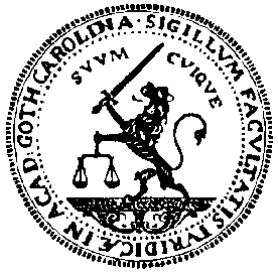

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Is sharing caring?

An analysis of the VAT treatment of certain sharing platforms

JURM02 Graduate Thesis

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Contents

Summary

The breakthrough of the sharing economy has resulted in great positive effects on the market, by creating new employment opportunities and increasing the competitiveness on the market. Meanwhile, it has been clear that traditional legislation does not completely cover this new business model and its actors. Revenues from the sharing economy is expected to annually amount to several billion euros, why it is of great interest for the Union that the issue is resolved. When consumers begin to provide services that were previously provided by business, the playing field is altered.

This thesis treats the question of how individuals, peers, that are providing services through sharing platforms, such as Uber and Airbnb, should be treated under the VAT Directive. The issue of whether these individuals fulfill the criteria for the concept of taxable person, taxable transaction as well as current and proposed deeming provision is the main focus. When applicable, these provisions result in the platforms being levied VAT, instead of the peers. Furthermore, the thesis also presents a discussion of whether the treatment could be considered in line with the principle of neutrality and VAT being a tax on consumption. According to the principle of neutrality, equal situations should be treated equally, and the legal character of VAT stipulates that VAT should be levied on private consumption.

The result of the thesis show that it is possible to apply the traditional legislation also to the untraditional business model that the sharing economy present. The result further shows that some of the peers that are providing services through the sharing platforms should be considered taxable persons while others should be viewed as employed by the platform. It further shows that while the sharing economy poses some threats to the application of the Directive, most of the treatment should be considered in line with both the principle of neutrality and VAT as a general tax on consumption.

Sammanfattning

Delningsekonomins framfart har inneburit stora positiva effekter på marknaden, genom att bl.a. skapa nya arbetstillfällen och öka konkurrenskraften på marknaden. Det har samtidigt blivit tydligt att traditionell lagstiftning inte helt täcker denna nya affärsmodell och dess aktörer. Intäkterna från delningsekonomin förväntas uppgå till flera miljarder euro årligen, varför det är av stort intresse för unionen att problemet hanteras. När det inte längre är företag, utan dess konsumenter som utför tjänster förändras spelplanen.

Uppsatsen behandlar frågan om hur privatpersoner som utför tjänster genom delningsplattformar såsom Uber och Airbnb bör behandlas enligt mervärdesskattedirektivet. Särskilt fokus ligger på huruvida dessa privatpersoner uppfyller kriterierna för konceptet beskattningsbar person, beskattningsbar transaktion samt nuvarande och föreslagna s.k. "deeming provisions". Då de är tillämpliga möjliggör dessa artiklar att plattformarna istället för privatpersonerna åläggs mervärdesskatt. Vidare diskuteras även hur väl denna behandling kan anses vara i linje med neutralitetsprincipen och det faktum att mervärdesskatten ska vara en skatt på konsumtion. Neutralitetsprincipen föreskriver att lika fall ska behandlas lika, och den legala karaktären av mervärdesskatten föreskriver att mervärdesskatt ska påläggas vid privat konsumtion.

Uppsatsens resultat visar att det är möjligt att tillämpa traditionell lagstiftning även på den icke-traditionella affärsmodell som delningsekonomin utgör. Vidare visar resultatet att vissa av de privatpersoner som utför tjänster genom delningsplattformarna bör anses utgöra beskattningsbara personer medan andra istället bör ses som anställda av plattformen. Framställningen visar att även om delningsekonomin utgör ett visst hot mot tillämpningen av direktivet, bör ändå merparten av behandlingen anses vara i linje med neutralitetsprincipen och mervärdesskatten som en skatt på konsumtion.

Preface

This thesis marks the end of my 4, 5 years in Lund. Little did I know then what fun I would have and how much I would learn.

There are a few people I want to express my gratitude towards. My supervisor Marta Papis-Almansa for providing me with valuable input and guidance when writing this thesis, and for introducing me to value added tax. My sister who has been there for me through thick and thin and supported me through ups and downs. My best friends Veronika and Felicia, for all the countless hours of studying, laughing and living life together.

Lastly, my mom. For proofreading every text, I have ever submitted, for pushing me and for always believing in me – thank you for your invaluable support, this one is for you.

Lund, January 2019

Sofie Lundgren

1 Introduction

1.1 Background

Sharing economy, gig economy, collaborative economy – the names used are many.[1] The term 'sharing economy' has entered the mainstream over the last few years, and the term has predominantly been associated with companies such as Uber and Airbnb. The rise of the sharing economy has received some criticism, one of which being that the sharing economy has nothing at all to do with sharing. This criticism e.g. claims that Airbnb is not a platform for sharing, but rather for short-term renting. Uber-doubters mean that it is not a platform for car sharing but rather an unregulated and exploitative system in which people work without important safety measures such as employee protection or social rights.[2]

Sharing economy platforms offer an array of benefits for both consumers and businesses. These platforms foster economic growth, create new employment opportunities and increase competitiveness on the market. Platforms such as these have also proven to provide a viable alternative business model, shifting the focus from 'ownership' to 'access'. This in turn allows for sustainable development and a rational use of resources.[3] Apart from the benefits that sharing economy platforms offer, there are also downsides with the system. One of the issues with the sharing economy platforms is how they are challenging the EU VAT system. Legislative frameworks have been adopted with the traditional business model in mind, resulting in several unanswered legal and tax questions in situations with the sharing economy platforms that use electronic communications networks as a main pillar.[4]

[1] Beretta, Giorgio, *VAT and the Sharing Economy*, World Tax Journal, 2018, Vol. 10, No. 3, pp. 381-425, p. 385.
[2] John, Nicholas A, *The Age of Sharing*, Polity, Cambridge, 2017, p. 69.
[3] Grlica, Ivo, H*ow the Sharing Economy is Challenging the EU VAT System*, International VAT Monitor, 2017, Vol. 28, No. 2 (accessed through IBFD), section 1.
[4] Grlica, Ivo, (n. 3), section 1.

According to an analytical paper, written on behalf of the European Commission, an average of 85 % of the value of transactions facilitated by sharing economy platforms is received by the provider (peer), rather than the platform.[5] It was estimated that the five largest sectors of the sharing economy generated revenues of nearly EUR 4 billion in 2015 and there is no indication that this will decrease.[6] Some experts estimate that the sharing economy could add EUR 160-572 billion to the EU economy going forward.[7] Meanwhile, the question of who should be subject to VAT remains. Statistics in countries such as the UK show that a great number of individuals within these platforms do have the consistent intention to obtain an income on continuing basis through their participation in trade and may be taxable persons for the VAT. This may lead to the rise of millions of micro-entrepreneurs, which could potentially present many challenges from an administrative and control perspective.[8] The sharing economy has turned us all into potential micro-entrepreneurs, whether we like it or not.

1.2 Aim and problem formulation

The purpose of this thesis is to evaluate the suitability of the current treatment of individual providers ('peers') providing services through sharing economy platforms under the VAT Directive.

In order to fulfil the aim of the thesis, the following questions will be answered:

- How are peers providing services through certain sharing economy platforms treated under the VAT Directive?
- Is this treatment in line with VAT being an indirect general tax on final consumption and the principle of neutrality?

[5] Vaughan, Robert & Daverio, Raphael, *Assessing the size and presence of the collaborative economy in Europe*, 2016, Ref. Ares(2016)2558461 – 02/06/2016, p. 6.
[6] Vaughan, Robert & Daverio, Raphael (n. 5), p. 6.
[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - a European agenda for the collaborative economy, COM(2016) 356 final (2 June 2016).
[8] Urrutia Aldama, Marta, *Shared economy, collaborative consumption and taxable persons for the VAT,* (2015-2016), Europese Fiscale Studies, p. 13.

When answering the question of how the peers are treated under the VAT Directive when providing services through platforms there are some sub-questions to answer. Since only taxable persons are subject to VAT, the question of whether the peers should be considered taxable persons must be answered. When looking at the services provided, the issue of the taxable transaction arises, why the question of whether the services provided is a taxable transaction must also be answered. In the context of the sharing economy, it is not always entirely clear who should be considered as the service provider. Therefore, the issue of whether there is one supply (a composite supply) or several supplies (by different actors or by the same actor) should also be answered.

1.3 Method and material

For the purpose of this thesis, the legal dogmatic method has been applied. The purpose of the legal dogmatic method is to interpret and determine the applicable law, *de lege lata*.[9] The selection of material follows that which the legal dogmatic method recognises, i.e. legislation, case law and legal doctrine.[10] As regards the material, the main source of information has been the VAT Directive. When applying the VAT Directive, guidance has been gathered from the case law of the CJEU, commentaries and legal doctrine in the form of articles, books and commentaries. Apart from legal doctrine and the case law, some guidance has also been gathered from the European Commission and the VAT Committee.

1.4 Delimitations

For the purpose of this thesis, questions of who and on what is levied VAT will be answered while questions such as where the tax should be levied for instance is excluded. This thesis was written under the assumption that the

[9] Sandberg, Claes, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation*, 2018, p. 49.
[10] Sandberg (n. 9), p. 44.

reader has prior knowledge of EU VAT why certain basic concepts and aspects of it such as exemptions, the taxable amount and deductions are not elaborated on further.[11]

The thesis further focuses on how the peers should be treated under the VAT Directive, why national legislation is only presented to exemplify certain aspects of the European perspective. It should further be noted that the conclusions drawn from this thesis are focused on two platforms in two of the sectors where sharing platforms operate. These conclusions may only be applied to other platforms and other sectors with discretion. Furthermore, there are other VAT-related issues to the treatment of the sharing platform than the ones presented in this thesis, for instance the issue of deducting input VAT which is only briefly touched upon in Chapter 4.2.3 or the qualification of services for the place of supply.

1.5 Research outlook

The issue of whether peers providing services through sharing economy platforms should fall within the scope of the VAT Directive has been discussed by the European Commission[12] and the VAT Committee.[13] Researchers such as Beretta[14] and Grlica[15] are some who have written articles regarding the issue of VAT and the sharing economy.

1.6 Disposition

The following chapter discusses the principle of neutrality and VAT as a general indirect tax on consumption. Chapter three contains a presentation of the sharing economy and two selected sharing platforms that will serve as a basis to the further discussion. The fourth chapter presents the criteria

[11] For an overview of EU VAT the author recommends Kristoffersson, Eleonor & Rendahl, Pernilla, *Textbook on EU VAT*, 2016, or Doesum, Ad van, Kesteren, Herman van & Norden, Gert-Jan van, *Fundamentals of EU vat law*, 2016.
[12] COM(2016) 356 final (2 June 2016), (n. 7)
[13] Value Added Tax Committee, Working Paper No. 878, taxud.c1(2015)4370160 – EN.
[14] Beretta, Giorgio, (n.1).
[15] Grlica, Ivo, (n. 3).

concerning the concept of a taxable person while chapter five contains a presentation of the concept of a taxable transaction and a presentation of some intermediaries in VAT. Chapter six examines how the peers, and the platforms, should be treated under the VAT Directive. The final chapter of the thesis answers the second question of the thesis, whether the concluded treatment is in line with the principle of neutrality and the character of VAT. In this chapter there is also a conclusion of the findings of the thesis.

2 Principles

This section will discuss VAT as a consumption tax, by dealing with the legal character and the purpose of VAT. It will also explain what the principle of neutrality is and what it entails. This will later lay as a basis for when the second main question of the thesis is answered in Chapter 7.

2.1 Consumption tax

Indirect taxes are defined by Schenk and Oldman as: "taxes that are levied upon commodities before they reach the consumer who ultimately pays the tax as part of the market price for the commodities".[16] In principle, EU VAT applies to all goods and services, but the aim is to tax consumption taking place within the EU.

A turnover tax is a tax paid on a good during or after its manufacture, rather than when it is sold (as a retail tax) and is usually calculated as a percentage of the value of the good. In short, the purpose of a turnover tax is to tax goods and services aimed for *personal consumption* – i.e. goods and services are to be taxed on their way to the consumer. Not all taxes which tax goods and services on their way to the consumer have the same legal character. Determining the legal character of a tax is however important as the legislative structure and interpretation of terminology should be guided by the legal character. One way of describing the legal character of a turnover tax is as a '*general tax on consumption*'. The goal of a tax on consumption is to tax expenditures made by private persons. The term 'private persons' in this context is wider than its colloquial use. Non-taxable legal persons, such as churches and government, are also taxed in most consumption taxes. According to Terra and Kajus, expenditures by legal entities should not be treated as consumptive expenditure.[17]

[16] Schenk, Alan & Oldman, Oliver, *Value Added Tax: a comparative approach*, 2007, p. 5.
[17] Terra, Ben & Kajus, Julie, *Introduction to European VAT (Recast)*, 2018, p. 126.

While the goal is to tax expenditures made by private persons, it is the businesses that act as tax collectors for the State.[18] The Court has clarified in *Hong Kong* that the burden of VAT must be borne by the final consumer.[19] The final consumer being the last person in the chain of transactions.

2.1.1 A general (indirect) tax on consumption

There are several ways in which a turnover tax may be levied, but it is the legal character – not the way in which the tax is levied – that determines if a tax is a turnover tax. What this means is that it is the inherent nature of the tax that should dictate the consequences of the tax and not the label or name of the tax. One way of determining the legal character is to look at the intention of the legislator. Article 1(2) VAT Directive provides that the legal character of VAT can be described as a general (indirect) tax on consumption.[20]

2.1.1.1 General

The purpose of a general tax on consumption is to tax all private expenditure. This means that there should be no discrimination between goods and services, which both represent consumption. This is logical since a good in many cases is a substitute for a service, the classical example being a consumer replacing parts of his car himself or hiring someone to repair them. If only the goods and not the services would be taxed there would be a discrimination against the purchase of goods and a large section of the tax base would not be taxed. Another reason for this is that the general character of VAT demands that what is equal should be treated equally and what is unequal should, in proportion, be treated unequally.[21]

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[18] Ecker, Thomas, *A VAT/GST Model Convention: tax treaties as solution for value added tax and goods and services tax double taxation*, 2013, p. 115; Judgment of 20 October 1993, Balocchi, C-10/92, EU:C:1993:846, para. 25; Judgment of 21 February, *Netto Supermarkt*, C-271/06, EU:C:2008:105, para. 21.
[19] Judgment of 1 April 1982, *Hong Kong*, Case 89/81, EU:C:1982:121, para. 7-9.
[20] Ecker, Thomas (n. 18), p. 96.
[21] Terra, Ben & Kajus, Julie, (n. 17), p. 127; Opinion of AG La Pergola, delivered on 27 February 1997, *Goldsmith*, C-330/95, EU:C:1997:94, para. 29.

2.1.1.2 Indirect

Taxes on consumption are generally levied indirectly.[22] Consumption taxes are designed on the assumption that the tax is fully shifted to the final consumer.[23] The shifting of the tax from the business onto the consumer, as part of the sales price of the goods or services is therefore an important aspect of the definition of an indirect tax. Although economists argue that indirect taxes, in practice, are not fully shifted forward, the legal character of 'indirect taxes' require the *possibility* of shifting the tax. The legislator has to see to it that the shifting is possible.[24]

A supplier's ability to shift the tax burden onto the consumers, in the form of setting a higher price on the good or service, depends on the supplier's market position and the price elasticity of demand. As a result, the value added tax in effect becomes a tax on production rather than on consumption in the case where the tax burden cannot be shifted from the supplier to the consumer.[25]

2.1.1.3 Consumption

It has been established that a turnover tax, and VAT in particular, is a tax on consumption. The concept of consumption, in this context, requires a brief discussion as the word may cause misunderstandings. The relevant criteria to consider when determining the consumption is the *expenditure* (not whether the consumption takes place right away or if it is a continuing process). The tax is due when the consumer makes the expenditure. A rule such as consumption = expenditure however, cannot be used. A general tax on consumption makes a distinction between consumptive and productive expenditure, as the tax intends to tax *private* consumption.[26]

[22] Terra, Ben & Kajus, Julie (n.17), p. 129.
[23] Lamensch, Marie, *European value added tax in the digital era: a critical analysis and proposals for reform*, 2015, p. 13.
[24] Terra, Ben & Kajus, Julie, (n. 17), p. 129.
[25] Lamensch, Marie, (n. 23), p. 13
[26] Terra, Ben & Kajus, Julie, (n. 17), p. 128.

2.1.2 Expenditure tax or transaction tax

Although VAT is a general tax on consumption and the purpose of VAT is to tax private consumption of goods and services, it is clear from Article 2 of the VAT Directive that it in fact are 'transactions' that are taxed, which means that VAT could also be characterised as a *transaction tax*. In reality, VAT is levied on the transactions carried out by taxable persons who serve as a proxy for the expenditures that arise during the purchase of the goods or services. These expenditures in turn serve as a proxy for the consumption of those goods and services. Furthermore, since VAT taxes the expenditure of consumers, not the actual consumption, it could also be defined as an expenditure tax.[27]

2.2 Neutrality

2.2.1 Fiscal neutrality

It should initially be emphasised that there is no completely neutral tax system. In many scenarios, the issue of neutrality in the tax system is ultimately a matter of fiscal or political considerations in deciding which discriminatory measures are most in line with the social and economic needs of the country.[28] The concept of neutrality is not mentioned in any of the provisions of the VAT Directive but is mentioned five times in the Preamble of the VAT Directive.[29]

In many of the Court's judgments[30], there is a reference to Article 2 of the First Directive (currently Article 1(2) of the VAT Directive) which explains the principle of fiscal neutrality in the following way:

[27] Doesum, Kesteren & Norden, (n.11) pp. 6-7.
[28] Urrutia Aldama, Marta, (n. 8), p. 16.
[29] In Recitals (5), (7), (13), (30) and (34); Papis, Marta, *The Principle of Neutrality in EU VAT*, 2014, 16.3.3 to 16.3.4, accessed through IBFD.
[30] See inter alia; Judgment of 6 July 2006, *Axel Kittel v Belgian State*, Joined cases C-439/04 and C-440/04, EU:C:2006:446, para. 49; Judgment of 8 June 2000, *Midland Bank*, C-98/98, EU:C:2000:300, para. 29; Judgment of 6 July 1995, *BP Soupergaz*, C-62/93, EU:C:1995:223, para. 16.

"The principle of the common system of VAT entails the application to goods and services of a *general tax on consumption* exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged."[31]

In *NCC Construction*[32], the Court admitted that the principle of fiscal neutrality was intended by Community legislature to reflect the general principle of equal treatment, in matters relating to VAT.[33] The principle of equal treatment however, has constitutional status – like other general principles of EU law – while the principle of fiscal neutrality requires legislation to be drafted and enacted, which requires a measure of secondary Community law.[34] The principle of equal treatment is a general principle of EU law which requires that persons in the same situation are treated in the same way. In other words, situations that are comparable should not be treated differently and non-comparable situations should not be treated the same, unless such treatment can be justified objectively.[35]

Terra and Kajus derive from the Court's judgment in *NCC Construction* that the principle of fiscal neutrality cannot be regarded as an independent principle of EU law.[36] CJEU elaborated on this matter in *Zimmermann*[37], where it settled that this finding meant that the principle of neutrality was not a primary law against which it is possible to test the validity of the provisions of the Directive, but only a principle of interpretation.[38] Amand argues that,

[31] Emphasis added.
[32] Judgment of 29 October 2009, *NCC*, C-174/08, EU:C:2009:669.
[33] The Court has concluded this in several of its cases, see inter alia; Judgment of 6 November 2003, *Dornier*, C-45/01, EU:C:2003:595, para. 69; Judgment of 26 May 2005, *Kingscrest Associates and Montecello*,C-498/03, EU:C2005:322 , para. 52; Judgment of 27 April 2006, *Solleveld and van den Hout-van Eijnsbergen*, Joined cases C-443/04 and C-444/04, EU:C:2006:257, para. 36.
[34] *NCC* (n. 32), para. 41; See also Judgment of 10 April 2008, *Marks & Spencer*, C-309/06, EU:C:2008:211, para. 49.
[35] Amand, Christian, *VAT Neutrality: a principle of EU law or a principle of the VAT System?*, World Journal of VAT/GST Law, 2013, 2:3, pp. 163-181, p. 165.
[36] Terra, Ben & Kajus, Julie, (n. 17), p. 43.
[37] Judgment of 15 November 2012, *Zimmermann*, C-174/11, EU:C:2012:716.
[38] *Zimmernmann* (n. 37), para. 50; Papis, Marta, (n. 29), 16.6.3 to 16.6.4.

based on contextual and historical analysis, one may conclude that VAT neutrality is the principle of the VAT system which reflects the EU principles of non-discrimination and equal treatment, principles which takes precedence before the provisions of the VAT Directive.[39] Apart from the neutrality in terms of equal treatment there is also the matter of neutrality for taxable persons regarding the possibility of deducting input VAT. Taxable persons are allowed to deduct input VAT, which is important in the neutrality aspect. If taxable persons are not allowed to deduct input VAT, then the burden of VAT will not be shifted onto the consumer.

To maintain a fruitful discussion about the principle of neutrality, one ought to make a distinction between internal and external neutrality. When discussing internal neutrality, Terra and Kajus divide the principle into three aspects (legal, competition and economic neutrality) whereas van Doesum, van Kesteren and van Norden divide the principle into two (legal and economic).[40] These aspects of the principle of neutrality will be presented briefly below.

2.2.1.1 Internal neutrality

Internal neutrality deals with national aspects.

2.2.1.1.1 Legal neutrality

The main pillar for the legal neutrality is that the equal is treated equally. The legal character of VAT assumes that comparable services, under comparable conditions that are provided by comparable persons are treated equally, no matter the legal personality of the provider, i.e. by an individual or a business.[41] This aspect of neutrality has a close connection to the legal character of VAT, which was discussed in Chapter 2.1. The legal neutrality is also manifested in the second guideline[42] of OECD's VAT/GST Guidelines.[43]

[39] Amand, Christian, (n. 35), p. 181.
[40] Terra, Ben & Kajus, Julie (n. 17), p. 131; Doesum, Kesteren & Norden, (n. 11) p. 36.
[41] Urrutia Aldama, Marta, (n. 8), p. 15.
[42] Guideline 2.2 – Businesses in similar situations carrying out similar transactions should be subject to similar levels of taxation.
[43] OECD, *International VAT/GST Guidelines*, 2017.

Whether two transactions are similar is determined based on the characteristics of the goods or services supplied. The similarity of business is established by viewing to which extent the businesses' input is used to support taxable activities.[44] CJEU has emphasised that similar goods and similar services are goods and services which are in competition with each other.[45] CJEU has further held that it is not relevant whether or not the distortion of competition is substantial.[46] It is the perspective of the consumer which is decisive in determining whether goods or services are in competition with each other.[47]

2.2.1.1.2 Economic neutrality

As regards economic neutrality, a turnover tax is considered neutral when the tax does not interfere with the optimal allocation of the means of production. Examples of this type of interference is different tax rates.[48]

2.2.1.1.3 Competition neutrality

Competition neutrality is closely linked to the legal neutrality, in the sense that when a turnover tax is legally neutral, the competition will not be distorted, leaving the tax competition neutral.[49] Competition neutrality does not only relate to economics – there is also a legal aspect to it. As was mentioned in Chapter 2.1, an indirect general tax on consumption will be paid by the businesses but subsequently borne by the consumers, by shifting the tax as part of the price of the supply. When identical products carry a different tax burden, the business with the higher tax burden cannot fully shift the burden onto the consumer if the business wishes to remain competitive.

[44] Merkx, Madeleine, *Establishments in European VAT*, 2013, p. 33.
[45] Judgment of 3 May 2001, *Commission v France*, C-481/98 , EU:C:2001:237, para. 22; Judgment of 29 March 2001, *Commission v France*, C-404/99, EU:C:2001:192, para. 45-47.
[46] Judgment of 28 June 2007, *JP Morgan Fleming Claverhouse Investment*, C-363/05, EU:C:2007:391, para. 47.
[47] Merkx, Madeleine (n. 44), p. 33; Judgment of 10 November 2011, *The Rank Group*, Joined cases C-259/10 and C-260/10, EU:2011:179, paras. 36, 43-44.
[48] Terra, Ben & Kajus, Julie (n. 17), p. 131.
[49] Terra, Ben & Kajus, Julie (n. 17), p. 131.

Instead, the business itself will have to carry part of this burden itself, which goes against the legal intentions of the legislator.[50]

2.2.1.2 External neutrality

Contrary to internal neutrality, external neutrality relates to international aspects. As has been mentioned previously[51], VAT is meant to tax national expenditure of individual consumers. If goods or services are not consumed in the country where the product or service is acquired, and VAT is levied on these products or services then that tax is unfairly levied.[52] External neutrality is related to legal and economic neutrality. External neutrality should ensure that VAT is passed onto the consumers, so it does not become a tax on business, which would risk the creation of a situation where VAT affects the business decisions. It should further contribute to the goal that consumption of similar goods and services is taxed equally.[53]

In order to obtain external neutrality, goods and services that are supplied to a customer in another country should be freed of the burden of VAT in the supplier's country. External neutrality ensures that goods and services acquired locally, or cross-border carry the same burden of VAT which relates to the neutrality of competition.[54] That this is preferred has been confirmed by the CJEU.[55]

2.2.2 Neutrality in a consumption tax

The principle of neutrality as regards consumption taxes has been inscribed in the Treaty provisions since 1957. Consumption taxes, such as VAT, impacts prices directly and consequently also the free movement of goods, persons, services and capital. At this point in time, most consumption taxes

[50] Terra, Ben & Kajus, Julie (n. 17), p. 131.
[51] Chapter 2.1.
[52] Terra, Ben & Kajus, Julie, (n. 17), p. 132.
[53] Doesum, Kesteren & Norden, (n. 11), p. 38.
[54] Doesum, Kesteren & Norden, (n. 11), p. 38.
[55] Judgment of 3 October 2006, *Banco popolare di Cremona Soc.coop. arl v Agenzia Entrate Ufficio Cremona*, C-475/03, EU:C:2006:629, para. 23, Judgment of 10 July 2008, *Koninklijke Ahold*, C-484/06, EU:C:2008:394, para. 28.

were cumulative multistage taxes meaning that they are levied on each stage of the production and distribution stage, without any offset for tax paid at an earlier stage which made it impossible to ascertain the proportion of tax included in the price of a product. Multistage consumption taxes such as VAT are levied at each stage of the production and distribution, why neutrality must be considered in the entire production process.[56]

[56] Amand, Christian, (n. 35), p. 170f.

3 What is the sharing economy?

This section will present a definition of the sharing economy and explain how the two selected platforms and their peers engage, so that the treatment of these platforms and peers can be examined in the following chapters.

3.1 Defining the sharing economy

In its Agenda for Collaborative Economy[57], the European Commission defines the collaborative economy[58] as:

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 individuals.[59]

According to the European Commission, there are three categories of actors in the sharing economy:

1. Service providers who share assets, resources, time and/or skills,
2. Users
3. Intermediaries that connect providers and users, via an online platform, and facilitate transactions between them (*'sharing platforms'*).

The service providers are divided into two subcategories; private individuals offering services on an occasional basis (*'peers'*) and service providers acting in their professional capacity (*'professional service providers'*).[60]

[57] COM(2016) 356 final, (n. 7).
[58] The terms 'collaborative economy' and 'sharing economy' are often used interchangeably. The term 'sharing economy' will be used throughout this thesis.
[59] COM(2016) 356 final, (n. 7), p. 3.
[60] COM(2016) 356 final, (n. 7), p. 3.

These actors operate on a similar model, namely that the business creates an online marketplace where users and providers are brought together, and the platform takes a commission in exchange for providing the matching platform.[61] One of the particular features of the sharing economy is that the service providers oftentimes are individuals who offer assets or services on an occasional, peer-to-peer basis.

3.2 Who are the relevant actors?

The aim of the thesis is to investigate how 'peers' in the sharing economy platforms should be treated under the VAT Directive. Given that the revenues and transaction values from peer-to-peer accommodation and peer-to-peer transportation facilitated by sharing economy platforms amount to over 70 %[62], the focus on this thesis will be on the accommodation and transportation sectors. To exemplify the treatment, one major platform from each of these two sectors, where the level of impact from the platforms on the peers differs, have been selected. The level of impact for instance affects the composite supply problematic and the possible application of existing (and proposed) deeming provisions. There are many different sharing platforms providing goods and services, each of them different from the other. It is therefore difficult to draw general conclusions without looking into each and every one of them. As regards services, Uber and Airbnb are both representative of other platforms, but not all.

3.2.1 Uber

Uber[63] is a peer to peer ride-sharing platform, founded in 2009, with its headquarters in San Francisco, California. Today, Uber is active in over 850 cities around the world, in 84 countries.[64] For a person receiving the service, or a 'rider' using Uber's own terms, to use the service one must sign up on

[61] Brandon Elliot, Carrie, *Taxation of the sharing economy: Recurring issues*, Bulletin for International Taxation, Vol. 72, No. 4a, 2018, accessed through IBFD.
[62] Vaughan, Robert & Daverio, Raphael (n. 5), p. 7.
[63] *Move the way you want*, <https://www.uber.com/se/en/>.
[64] *Sök stad* <https://www.uber.com/sv-SE/cities/>; *Uber Cities* <https://uberestimator.com/cities>.

the platform and download the mobile application. Once you have downloaded the app and are looking for a ride, you enter your destination in a 'Where to?'-box on the screen and select a ride option to see wait time, car size and an estimated price of the ride (calculated with a price model set up by Uber) before confirming your pickup location. A driver nearby can then choose to accept the rider's trip request. When the driver has accepted the ride and is close, the rider receives a notification that the driver's vehicle is nearby.

When the ride is complete, the fare is charged to the bank card which was deposited by the rider before confirming a ride and a receipt is sent to the rider from Uber, but in the name of the driver. Uber then retracts its share of the fare, which is approximately 20 % of the fee paid by the rider, and the remainder of the fare is paid to the driver on a weekly basis.[65]

3.2.2 Airbnb

Airbnb[66] is an American company, officially launched in 2008, providing accommodation rentals, mainly short-term. The company has over 5 million listings worldwide, in roughly 81 000 cities, in 191 countries and has hosted 400 million guests.[67] The platform brings people who want to rent apartments, rooms or houses together with people who have a spare room and wish to earn some extra money. When a person wants to rent out their room, apartment or house they can sign up to Airbnb and list their housing free of charge. The host is the one who sets up the price, requirements for guests and availability.[68] When the listing is up, qualified guests can connect with the host and the parties can communicate questions before the stay.

[65] *When am I paid each week*?, < https://help.uber.com/partners/article/when-am-i-paid-each-week---?nodeId=42973e65-45a8-4aaf-90d5-d3e97ab61267>.
[66] *Planera din nästa resa*, < https://www.airbnb.se/>.
[67] *Fast Facts*, <https://press.airbnb.com/fast-facts/>.
[68] *Tjäna pengar som en värd på Airbnb*, <https://www.airbnb.se/host/homes>.

Airbnb charges a fee of 3 percent per booking for the hosts, and between 0-20 percent of the booking's partial sum.[69] Payment is done either through a direct deposit to a bank-card or other available payment methods depending on the jurisdiction of the host and guest. VAT is calculated according to the local VAT rate in the guest's country and Airbnb charges VAT on its service fees for users in the EU. VAT is charged upon payment and is calculated based on the total reservation fee and is deducted from the host's payment.[70]

[69] *What is the Airbnb service fee?*, <https://www.airbnb.se/help/article/1857/what-is-the-airbnb-service-fee>.
[70] *What is VAT and how does it apply to me?* <https://www.airbnb.se/help/article/436/what-is-vat-and-how-does-it-apply-to-me>.

4 Taxable person

This section will explain the concept of the taxable person, divided into a few aspects of the concept. The special scheme for small and medium-sized enterprises will also be discussed briefly as that could be of relevance in answering the questions of the thesis.

4.1 General

Article 2 of the VAT Directive stipulates that the supply of goods and services by a *taxable person* acting as such are subject to VAT. This means that the supply of goods and services within a country are only taxable if they are supplied by, or in certain situations acquired by, a taxable person. 'Taxable person' is one of the basic concepts in EU VAT and the definition can be found in Article 9(1) of the VAT Directive:

"Any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity."

There are two concepts that may be excerpted from Article 9(1) of the VAT Directive which require some further explanation and will be elaborated on further below: economic activity and independently.

4.2 Economic activity

Economic activity will be divided into a few sections: economic, continuity and acting as such.

4.2.1 Economic

In Article 9 (1) of the VAT Directive, an economy activity is specified as comprising any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of

obtaining income therefrom on a continuing basis shall, in particular, be regarded as an economic activity.

The term 'economic activity' is very wide and must be interpreted in a broad manner.[71] The case law by the CJEU further shows that the term is objective in character, in the sense that the activity is considered as such and not with regard to its purpose or result.[72] If the term would be interpreted too restrictively, there is a risk that transactions which ultimately lead to consumption would escape taxation. This would not be in line with the purpose of VAT, which is to tax all supplies of goods or services.[73] This broad interpretation does however not mean that all activities should be considered 'economic activities'.[74]

An activity does not necessarily need to be profitable in order to be determined as an 'economic activity'. Article 9(1) of the VAT Directive stipulates that persons who, independently carry out economic activities must be regarded as taxable persons whatever the purpose or result of that activity. It is apparent from the case law from the CJEU that the activity must be of economic nature in order to qualify as an economic activity (despite the phrase "whatever the purpose or result"). The CJEU found in *Hong Kong*[75] that a person who habitually provides services for traders, in all cases free of charge cannot be regarded as a taxable person. Where a person's activity consists exclusively in providing services for no direct consideration, these services are not subject to VAT, since the application of VAT presupposes the stipulation of a price or consideration.[76]

The question of when an economic activity begins has also been discussed by the CJEU. In *Rompelman*[77] the CJEU established that the exploitation of

[71] Judgment of 26 March 1987, *Commission v Netherlands*, Case 235/85, EU:C:1987:161, para 14; Beretta, Giorgio, (n. 1), p. 402.
[72] Judgment of 20 June 2013, *Fuchs*, C-219/12, EU:C:2013:413, para. 17.
[73] Chapter 2.1.
[74] Beretta, Giorgio, (n. 1), p. 402.
[75] *Hong Kong*, (n. 19).
[76] *Hong Kong*, (n. 19), paras. 9-11; Beretta, Giorgio, (n. 1), p. 402.
[77] Judgment of 14 February 1985, *Rompelman*, Case 268/83, EU:C:1985:74.

property begins with the first preparatory act, meaning that a person can qualify as a 'taxable person' before the first taxable transaction is carried out.[78]

4.2.2 Continuity

Another relevant component of the 'economic activity' is that supplies must be made on a regular basis (continuity). There is a general acceptance that an activity can only be an economic activity if it is performed on a continuing basis. This explains the existence of Article 12 of the VAT Directive, which provides Member States with a possibility to regard anyone who carries out transactions relating to activities in the second subparagraph of Article 9 (1), on an occasional basis as taxable persons. This provision would be redundant if incidental supplies were to be regarded as economic activities by default.[79] It cannot be found in the VAT Directive that there is a requirement regarding regularity of supplies, but this may, according to van Doesum, van Kesteren and van Norden, be interpreted from a reverse reasoning.[80]

Continuity needs to be related to the nature of the activity, which may consist in the exploitation of property.[81] The third paragraph of Article 9(1) of the VAT Directive stipulates that the exploitation of tangible or intangible property for purposes of obtaining income therefrom on a continuing basis, must be regarded as an economic activity. CJEU has discussed the concept of 'exploitation' in numerous cases. In *van Tiem*[82], CJEU confirmed that the income from exploitation must be obtained on a continuing basis.[83] CJEU ruled that the granting of building rights where the grantee is authorised to use the property for a specified period in return for a consideration, constituted an economic activity.[84] CJEU also ruled that the term

[78] *Rompelman* (n. 77), para. 13.
[79] Beretta, Giorgio, (n. 1), p. 406; Doesum, Kesteren & Norden, (n. 11), p. 60.
[80] Doesum, Kesteren & Norden, (n. 11), pp. 60-61.
[81] Beretta, Giorgio, (n. 1), p. 406.
[82] Judgment of 4 December 1990, *van Tiem*, C-186/89, EU:C:1990:429.
[83] *van Tiem* (n. 82), para. 18.
[84] *van Tiem* (n. 82), para. 20.

'exploitation' refers to all transactions, whatever their legal form, by which it is sought to obtain income from the goods in question on a continuing basis.[85] CJEU further specified in *Enkler*[86], that the length of the period for which a property is hired, the number of customers and the amount of earnings are factors which may be considered when determining whether an activity is carried on for the purpose of obtaining income on a continuing basis.[87]

CJEU emphasised in *Slaby and others*[88] that, the simple acquisition and the mere sale of an asset cannot amount to exploitation of an asset intended to produce income on a continuing basis. This since the only consideration for those transactions consists of a possible profit on the sale of that asset according to settled case law.[89] The purpose for which an activity is conducted appears to be irrelevant for the assessment. In *Rēdlihs*[90], CJEU ruled that an economic activity can exist even when the activity consists of alleviating the consequence of a case of force majeure.[91] According to Beretta, the decisive factor is whether the person takes active steps to market property by mobilising resources similar to those deployed by a producer, a trader or a person supplying services within the meaning of the second subparagraph of Article 9(1) of the VAT Directive.[92]

In *Kostov*[93], CJEU held that a person who is already a taxable person for VAT purposes in respect of his activities must be regarded as a taxable person in respect of any other economic activity carried out occasionally, provided that that activity constitutes an activity in the meaning of the second subparagraph of Article 9(1) of the VAT Directive.[94]

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[85] *van Tiem*, (n. 82), para. 18.
[86] Judgment of 26 September 1996, *Enkler*, C-230/94, EU:C:1996:352.
[87] *Enkler* (n. 86), para. 29.
[88] Judgment of 15 September 2011, *Slaby and Others*, Joined cases C-180/10 and C-181/10, EU:C:2011:589.
[89] *Slaby and others*, (n. 88), para. 45.
[90] Judgment of 19 July 2012, *Rēdlihs*, C-263/11, EU:C:2012:497.
[91] *Rēdlihs* (n. 90), para. 37.
[92] Beretta, Giorgio, (n. 1), p. 407; Slaby and others, (n. 88) para. 39; *Rēdlihs* (n. 88) para. 36.
[93] Judgment of 13 June 2013, *Kostov*, C-62/12, EU:C:2013:391.
[94] *Kostov* (n. 93), para. 31.

4.2.3 Acting as such

Only supplies that are carried out by a taxable person 'acting as such' are subject to EU VAT. This means that it does not suffice to establish whether a person has a taxable person status, but that it must also be established whether this person acts as such. This may be exemplified by a one-man business supplying a used car. In this situation it must be established whether he acts in his private capacity – in the situations where he bought and uses the car for private purposes only – or in his capacity as a taxable person – in situations where the car was bought and used for business purposes only).[95]

Only supplies made by taxable persons 'acting as such', fall within the scope of VAT. Henceforth, it is necessary to make a distinction between supplies that a taxable person makes in order to further his business and supplies relating to his non-business activities.

The circumstances in *Enkler*[96] are quite similar to that of those in the sharing economy: a business arrangement where a tax payer rents out his or her asset (car, home etc.) a couple of times a year.[97] Mrs. Enkler was employed in her husband's tax consultancy firm when she notified local authorities that she was carrying on the business of hiring motor caravans.[98] According to the national court, the permanent activity required to be a trader presupposed an intention to obtain income. Such an intention had to be established by reference to 'objectively verifiable criteria'. When determining whether or not those requirements were fulfilled, the national court found that Mrs. Enkler did not carry on a business of hiring out motor caravans as a trader because, inter alia, she had bought just one car, which by its nature was intended for leisure use and had used it mainly for private purposes, her main activity was not hire, she did not have an office for keeping and maintaining

[95] Doesum, Kesteren & Norden, (n. 11), p. 58.
[96] *Enkler* (n. 86).
[97] Cannas, Francesco, *Sharing economy: Everyone can be an entrepreneur for two days … but what about a VAT taxable person*?, World Journal of VAT/GST Law, 2017, Vol. 6, Issue 2, p. 82-99, p. 90.
[98] *Enkler*, (n. 86), para. 7.

the vehicle.[99] The Court concluded in *Enkler* that the hiring out of tangible property should equate to 'exploitation' as referred to in Article 9 of the VAT Directive, but left it up to the national court to determine whether this hiring out of property was carried on with the view to obtain income on a continuing basis.[100] The issue of whether Mrs. Enkler should be considered as acting as such was not answered by the Court.

One way of ascertaining whether an activity is carried out for the purpose of obtaining income on a continuing basis is to compare the circumstances in which the person concerned actually uses the property with the circumstances in which the corresponding economic activity is usually carried out.[101] Where a property is only suitable for economic exploitation that will normally be sufficient to find that its owner is exploiting it for the purposes of obtaining income on a continuing basis. Where a property is capable of being used for both economic and private purposes, all circumstances in which it is used must be examined in order to determine whether it is actually being used for the purpose of obtaining income on a continuing basis.[102]

In a situation where a taxable person's asset is used both for economic and personal purposes, an apportionment rule must, according to Beretta, be followed.[103] The method for this is usually left to the national courts to decide, but some guidance can be gathered from *Armbrecht*[104] where the Court held that the distribution between the part allocated to the taxable person's business activities and the part used for private purposes must be based on the proportions of private and business use in the year of acquisition and not on a geographical division.[105] The apportionment rule that Beretta is referencing refers to the possibility of a taxable person to deduct input VAT

[99] Opinion of Advocate General Cosmas, delivered on 28 March 1996, *Enkler*, C-230/94, EU:C:1996:145, para 7.
[100] *Enkler*, (n. 86), paras. 21-22.
[101] *Fuchs* (n. 72), para 21; *Enkler* (n. 86), para 28; *Rēdlihs* (n. 90) para. 35.
[102] *Fuchs* (n. 72), para 20, *Enkler* (n. 86), para 27, *Rēdlihs* (n. 90), para. 34.
[103] Beretta, Giorgio, (n. 1), p. 409.
[104] Judgment of 4 October 1995, *Armbrecht*, C-291/92, EU:C:1995:304.
[105] *Armbrecht* (n. 104) para. 21.

that has been levied on the purchase of an asset used for business purposes. The right of deduction ensures that a taxable person only pays VAT on the balance between the VAT on his output transactions and the VAT incurred on his purchases. Consequently, VAT is in effect only levied on the value added.[106] In situations such as those that often arise in the sharing economy, where the asset is used both for personal and business purposes, the taxable person in question is only allowed to deduct the costs that can be attributed to the business.[107] The right to deduction is found in Title X, Articles 167-192 of the VAT Directive.[108]

From *Fuchs*[109], it can be deduced that an individual does not have to take too many steps to become a taxable person. In the case at hand, Mr. Fuchs was operating a photovoltaic installation which, in light of that judgment, must be regarded as falling within the concept of 'economic activities', if it is carried out for the purpose of obtaining income on a continuing basis. The question of whether an activity is designed to obtain income on a continuing basis is according to the CJEU an issue of fact which must be assessed having regard to all the circumstances of the case, including the nature of the property concerned.[110] Where a property is only suitable for economic exploitation, this will normally be enough to find that its owner is exploiting it for the purposes of obtaining income on a continuing basis. Where a property is capable of being used for both economic and private purposes, all circumstances in which it is used must be examined in order to determine whether it is actually being used for the purpose of obtaining income on a continuing basis.[111] One way of ascertaining whether the activity is carried out for the purpose of obtaining income on a continuing basis is to compare

[106] Doesum, Kesteren & Norden, (n. 11), p. 348.
[107] *Armbrecht* (n. 104) para. 27; Judgment of 11 July 1991, *Lennartz*, C-97/90, EU:C:1991:315, para. 29.
[108] Note that since 2011 immediate deduction of input VAT in relation to immovable property is not possible anymore, since the introduction of Article 168a of the VAT Directive. This may be relevant for some Airbnb hosts if they are renting out immovable property.
[109] *Fuchs* (n. 72).
[110] *Fuchs* (n. 72) para 19; *Rēdlihs* (n. 90) para. 33.
[111] *Fuchs* (n. 72) para. 20; *Enkler* (n. 86) para. 27; *Rēdlihs* (n. 90) para. 34.

the circumstances in which the person concerned actually uses the property with the circumstances in which the corresponding economic activity is usually carried out.[112]

The property in question in the case was by its very nature capable of being used for both economic and private purposes. In *Fuchs*, CJEU discusses the purpose of obtaining income separately from on a continuing basis. In this context, the concept of income must according to CJEU be understood as meaning remuneration received as consideration for the activity carried out. It is not relevant whether the exploitation is intended to make a profit for achieving the purpose of obtaining income.[113] Regarding 'on a continuing basis', the Court makes a reference to a contract which was concluded for 'an indefinite duration'.[114]

Despite the fact that all the electricity produced was supplied to the electricity network and that no remuneration was provided as consideration for that supply, the CJEU still ruled that it was an economic activity subject to VAT.[115] The amount of electricity produced was always lower than the amount consumed by the individual which makes the judgment even more remarkable. Previous case law would, according to Beretta, indicate that an activity that is carried out merely to sustain personal consumption could not be considered an economic activity.[116]

4.3 Independently

It is not enough that a person carries out an economic activity to be considered a taxable person, Article 9(1) of the VAT Directive further stipulates that this activity needs to be carried out independently. The condition 'independently' excludes persons who are bound to an employer by a contract of employment

[112] *Fuchs* (n. 72) para. 21; *Enkler* (n. 86) para. 28; *Rēdlihs* (n. 90) para. 35.
[113] *Fuchs* (n. 72) para. 25.
[114] *Fuchs* (n. 72) para. 27.
[115] *Fuchs* (n. 72) para. 22.
[116] Beretta, Giorgio (n. 1), p. 409.

(employees) or by any other legal ties creating the relationship of employer and employee, as regards working conditions, remuneration and the employer's liability, from VAT.[117]

CJEU has discussed the component 'independently' in numerous cases. Two of the early cases where CJEU ruled on the matter, were cases concerning professions governed by public law (notaries and bailiffs in *Commission v Netherlands*[118] and tax collectors in *Recaudadores de Zona*[119]).

In *Commission v Netherlands*[120], CJEU ruled that given that the notaries and bailiffs carried out their activities on their own account and on their own responsibility and were free to arrange how they should perform their work, subject to certain limits imposed by the statute, and received emoluments making up their income, they were indeed acting independently.[121] The existence of a disciplinary control by the public authorities and the fact that the bailiffs' remuneration was determined by their statutes was not enough for CJEU to find that the bailiffs were not acting independently.[122]

The tax collectors in *Recaudadores de Zonas*[123] did not receive a salary and were not bound to the Commune (local authority in Sevilla) by a contract of employment. CJEU considered that there was no relationship of employer and employee since the tax collectors themselves procured and organised the staff, equipment and materials necessary for them to carry out their activities independently. Though the local authority could give the tax collectors instructions and they were subject to disciplinary control by the same authority, this was not considered decisive for the purpose of defining the legal relationship between the Commune for the purposes of the Directive.

[117] Article 10 of the VAT Directive.
[118] *Commission v Netherlands* (n. 71).
[119] Judgment of 25 July 1991, *Recaudadores de Zonas*, C-202/90, EU:C:1991:332.
[120] Commission v Netherlands (n. 71).
[121] *Commission v Netherlands* (n. 71), para. 6.
[122] *Commission v Netherlands* (n. 71), para. 14
[123] *Recaudadores de Zonas* (n. 119).

Neither was the fact that the Commune could be held liable for the tax collectors' conduct when acting in their capacity sufficient to establish a relationship of employer and employee. According to the CJEU, the decisive criterion for this purpose is what liability that arises for the Commune in a situation where the tax collectors enter into contractual agreement with a third party, not acting as representatives of the public authority.[124]

The question referred to by the Netherlands in v*an der Steen*[125] was whether a natural person, carrying out all work in the name and on behalf of a company that is a taxable person, who through a contract of employment is bound to that company, a company in which he is the sole shareholder, manager and member of staff, is himself a taxable person within the meaning of the Directive.[126] There were three (main) reasons why the CJEU found that the company and Mr. van der Steen had a relationship of employer and employee, the determining factor for independence being whether Mr. van der Steen, as the sole shareholder and manager, bore the economic risk. CJEU held that Mr. van der Steen did not bear any economic business risk when performing his work and reiterated the principle laid down in *Recaudadores de Zona*[127], that regarding remuneration there is no relationship of employee and employer where the persons concerned bear the economic risk entailed in their activity.

When acting as the manager and performing the work set up by the company's dealings with third parties, Mr. van der Steen did not bear any economic risk. Furthermore, Mr. van der Steen did not act in his own name, on his behalf or under his own responsibility but on behalf and under the responsibility of the company when providing the services in his role as employee of the company. Lastly, Mr. van der Steen was the only one carrying out the company's services. The contracts entered into with third parties were however entered

[124] Recaudadores de Zonas (n. 119).
[125] Judgment of 18 October 2007, *van der Steen*, C-355/06 , EU:C:2007:615.
[126] *van der Steen* (n. 125) paras. 27-30.
[127] *Recaudadores de Zonas* (n. 119), para 13.

into by the company, and the company paid Mr. van der Steen a fixed monthly salary. The company also deducted income tax and compulsory social insurance premiums from Mr. van der Steen's salary. Mr. van der Steen was considered to be dependent on the company to determine his remuneration.[128] When acting within the framework of his employment contract, Mr. van der Steen was not considered to be acting independently.

From *van der Steen*, it appears clear that a natural person who carries out all work in the name and on behalf of a company that is a taxable person pursuant to a contract binding him to that company of which he is also the sole shareholder, the sole manager and the sole member of staff, is not himself a taxable person.[129]

The judgments in *Asscher*[130] and *Heerma*[131] could according to the Court not lead to a different interpretation. Having found in *Heerma*[132] that the letting of property by a person to the partnership of which he is a member and for which he receives rent constitutes a supply for consideration, the Court held that a partner who lets immovable property to the partnership of which he is a member and which itself is a taxable person acts independently. The Court further explained that regarding the activity in question, there is no relationship of employer and employee similar to that mentioned in Article 10 of the VAT Directive between the partnership and the partner, but rather the opposite. When letting tangible property to the partnership, the partner acts in his own name, on his own behalf and under his own responsibility, even if he is the manager of the lessee partnership. While Mr. Van der Steen was the sole shareholder and director of the company, his situation is not the same as the one described in *Heerma* – since Mr. van der Steen performed his

[128] *van der Steen* (n. 125), paras. 22-24.
[129] *van der Steen* (n. 125).
[130] Judgment of 27 June 1996, *Asscher*, C-107/94, EU:C:1996:251.
[131] Judgment of 27 January 2000, *Heerma*, C-23/98 , EU:C:2000:46.
[132] *Heerma* (n. 131).

work under a contract of employment.[133] In *Asscher*[134], the Court reasoned that a director of a company of which he is the sole shareholder does not carry out his activity in the context of a *relationship of subordination*, resulting in the person pursuing an activity as a self-employed person within the meaning of Article 49 TFEU and not as a worker (Article 45 TFEU). This reasoning could not be applied in *van der Steen*[135] as that case related to the definition of taxable person in respect of VAT and not to the freedom of movement for persons.[136]

While it may be easy to conclude that some persons are not acting independently, such as employed persons, it is not as easy to determine whether someone is in fact acting independently. One of the factors that the CJEU considers when establishing whether a person is acting independently is if the person in question bears the *economic risk* entailed in their activities.[137]

CJEU emphasised that the term 'any person who' in Article 9 (1) gives the notion of 'taxable person' a broad definition, with focus on the independence of an economic activity.[138] This was also emphasised by the Advocate General in his Opinion in *Gmina Wroclaw*[139] – all persons (even entities who lack legal personality) which in an objective manner satisfy the criteria set out in Article 9 (1) are to be regarded as taxable persons for the purposes of VAT.[140] Bodies governed by public law are however excluded from the capacity as taxable person insofar as their activities or economic transactions are made as public authority. The budgetary entities in question did not bear liability for damage or the economic risk associated with carrying out those

[133] *Heerma* (n. 131); van der Steen (n 125).
[134] *Asscher* (n. 130).
[135] *van der Steen* (n. 125).
[136] *Asscher* (n. 130), para 26.
[137] See inter alia *Recaudadores de Zonas* (n. 119), para 13; Doesum, Kesteren & Norden, (n. 11) pp. 80-81.
[138] Judgment of 29 September 2015, *Gmina Wroclaw*, C-276/14, EU:C:2015:635, para. 28.
[139] *Gmina Wroclaw*, (n. 138).
[140] Opinion of Advocate General Jääskinen, delivered on 30 June 2015, *Gmina Wroclaw*, C-276/14, EU:C:2015:431, paras. 28-29.

activities since they did not own their own property, generate their own earnings or bear the costs of the activities. Therefore, the budget entity was considered to be the same taxable person as the municipality, within the meaning of Article 9 (1) of the Directive.

Terra and Kajus list three situations where an activity has an independent character, namely when the activity is performed by a person who is not organically integrated into an undertaking or an administration, when the person in question has freedom to organise the human and material resources needed to perform said activity, and the economic risk of the activity is carried by that person.[141] The fact that the concept of independence is still unclear can be further supported by the fact that there is a case regarding the concept pending before the Court.[142]

4.4 Special scheme for small enterprises

The special scheme for small enterprises is embodied in Articles 281-292 of the VAT Directive. Member States which encounter difficulties in applying the normal VAT arrangements to small enterprises due to the enterprises' activities or structure may, according to Article 281 of the VAT Directive, apply simplified procedures for charging and collecting VAT. This scheme allows small entrepreneurs with lower turnover to make supplies without applying VAT, thereby avoiding that administrative (and cost) burden. If the special scheme is applied there is no right to deduct input VAT.[143] The annual turnover required to fall within the scope of the special scheme is dependent on when the Member State entered into the EU.[144] For Member States who acceded after 1 January 1987 there are country specific thresholds that apply.[145] Notably, taxable persons whose annual turnover is below the thresholds provided in Articles 284-287 'may' be exempted, meaning that it is up to the Member States to decide whether the exemption is applicable and

[141] Terra, Ben & Kajus, Julie (n. 17), p. 191f.
[142] Pending case C-420/18 IO.
[143] Article 289 of the VAT Directive.
[144] Articles 284-285 of the VAT Directive.
[145] Article 287 of the VAT Directive.

what the specific threshold is, so long as it is not higher than the one stipulated for their specific situation in the Directive. It should also be noted that this scheme does not apply to transactions carried out on an occasional basis, as referred to in Article 12 of the VAT Directive as this may have consequences for the actors in the sharing economy, where they perform such transactions.[146] From the perspective of the tax authorities, this scheme reduces the need to control a large number of small entrepreneurs with low revenue.

In this section, it may also be mentioned that there are different thresholds regarding registration for VAT in the different Member States. In Denmark and Sweden for instance, the threshold is DK 50 000[147] and SEK 30 000[148], while the threshold in the UK is GBP 85.000[149].[150] This is a significant difference. According to some practitioners, this could explain why the debate whether Uber drivers are employees or independent contractors is so important, particularly in the UK.[151] In the situation where Uber drivers are considered taxable persons, those who do not reach the threshold could provide the service free of VAT. According to the same practitioners, few of the Uber drivers will reach the UK threshold of GBP 85.000.[152]

It should be noted that in January 2018, the Commission presented a proposal to amend the special scheme for small enterprises.[153] The proposal will now go through the legislative procedure and it is for the future to hold whether this proposal will be accepted. In the proposal presented by the Commission, a definition of 'small enterprise' is presented, in proposed Article 280a of the

[146] Article 283(1)(a) of the VAT Directive.
[147] Roughly the equivalent of EUR 5100.
[148] Roughly the equivalent of EUR 3000.
[149] Roughly the equivalent of EUR 11 300.
[150] Momslovens §§ 48 and 49; Mervärdesskattelag 9d kap. §1.; *VAT registration thresholds* <https://www.gov.uk/vat-registration-thresholds>.
[151] Loftager Jørgensen, Lars & Svane Jensen, Thomas, *Deleøkonomi - hvilke udfordringer står momssystemet overfor?*, 2017, p. 191.
[152] Loftager Jørgensen, Lars & Svane Jensen, Thomas, (n. 151), p. 191.
[153] Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards the special scheme for small enterprises, COM (2018) 21 final (18 January 2018).

VAT Directive, as meaning any taxable person established within the Community with a Union turnover no higher than EUR 2 000 000 or the equivalent in national currency.[154] Meanwhile, Article 284 is replaced and Articles 285-287 of the VAT Directive that presents thresholds are deleted. Article 283(1)(a) will also be deleted, which could have a consequence for the sharing economy.[155]

[154] COM (2018) 21 final (n. 153), p.13.
[155] COM (2018) 21 final, (n. 153), p. 14f.

5 Taxable transaction

This section will discuss the concept of the taxable transaction, the problem with composite supplies and intermediaries in VAT. A presentation and discussion regarding a proposed provision from the e-commerce package will also be provided here.

5.1 General

Supply of services is defined negatively in Article 24 (1) VAT Directive as any transaction which does not constitute a supply of goods. Article 14 of the VAT Directive defines supply of goods as meaning the transfer of the right to dispose of tangible property as owner. The transfer of goods through a commissionaire should also be regarded as supply of goods.[156] In Article 25 VAT Directive there is a list of transactions that may constitute a supply of service. The concept 'supply of services' should, according to Henkow, be interpreted widely – in accordance with the nature of VAT. Any transaction that provides an advantage or benefit for someone must typically be defined as a service.[157] The VAT Directive gives VAT a wide scope, as it is meant to be a general tax on consumption.[158] The Court has emphasised the general principle that VAT is to be levied on all services supplied for consideration by a taxable person in several cases.[159]

5.2 Composite supplies

The VAT Directive is not clear regarding the question of single or multiple supplies. However, some guidance may be found in the case law of the CJEU. The question does not lack importance. In a situation where a transaction cannot be qualified as a single supply of goods or services, a situation may

[156] Article 14(2)(c) of the VAT Directive.
[157] Henkow, Oskar, *Mervärdesskatt i teori och tillämpning*, 2013, p. 50.
[158] Doesum, Kesteren & Norden, (n. 11), p. 123.
[159] See inter alia; Judgment of 12 November 1998, *Institute of the Motor Industry*, C-149/97, EU:C:1998:536, para 17; Judgment of 14 September 2000, *D*, C-384/98, EU:2000:444, para 15; Judgment of 20 June 2002, *Commission v Germany*, C-287/00, EU:C:2002:388, para 43.

occur where the different supplies carry different liabilities as regards e.g. place of supply, applicable rates, exemptions or even the liability for payment of tax. According to Terra and Kajus, it is preferred that the secondary elements of a transaction with several elements which taken individually might have their own VAT liability, are subsumed into the principal element, at least in a situation where these elements can be distinguished.[160] Advocate General Cosmas recommended this course in his opinion in *Faaborg-Gelting Linien*.[161] According to AG Cosmas, it is necessary to identify the primary and secondary components of an activity in order to distinguish between the concepts of the 'supply of goods' and the 'supply of services'. One of the issues at hand in *Faaborg-Gelting Linien*, and the relevant issue for the purpose of this thesis, was whether the supply of meals for consumption on board ferries between Denmark and Germany were to be considered supplies of goods or supplies of services. When making the distinction, AG Cosmas emphasises the supplementary services designed to enable the food and drinks to be consumed comfortably onboard the ferry, which he means constitute the essential characteristics of the activity. Even if the activity constitutes the supply of food and drink, the price paid in this case is consideration for the supplementary services – meaning that a supply of services is involved.[162]

CPP[163] is the leading case regarding the qualification of a transaction as a single or multiple supply and according to Doesum, Kesteren and Norden, the case can be characterised as a milestone in CJEU's development of a doctrine on composite supplies.[164] Card Protection Plan (CPP) offered a service by which a customer whose credit cards were lost or stolen could be compensated with up to 750 GBP per claim in the event of fraudulent use of the card. CPP involved an insurance broker to arrange an appropriate insurance policy. CPP did not pay VAT on the payments they received from the customers for the insurance service. The plan in question included

[160] Terra, Ben & Kajus, Julie (n. 17), p. 253.
[161] Opinion of Advocate General Cosmas, delivered on 1 February 1996, *Faaborg-Gelting Linien*, C-231/94, EU:C:1996:25.
[162] AG Opinion in *Faaborg-Gelting Linien*, (n. 161), para. 14.
[163] Judgment of 25 February 1999, *CPP*, C-349/96, EU:C:1999:93.
[164] Terra, Ben & Kajus, Julie (n. 17), p. 253; Doesum, Kesteren & Norden (n. 11) p. 135.

services that, if judged on their individual merits would be categorised as insurance transactions, which were exempt, and card registration services, which were taxed. One of the questions raised by the House of Lords was defined by the CJEU as what the appropriate criteria are when deciding, for VAT purposes, whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately?[165]

For VAT purposes, the question of the extent of a transaction is important, when identifying the place where the services are provided and for applying the rate of tax. However, CJEU emphasised that it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases, this due to the diversity of commercial operations. In *CPP*, CJEU reiterates the principle it laid down in *Faaborg-Gelting Linien* that in a situation where the transaction consists of several features and acts, all the circumstances in which the transaction takes place must first be taken into account.[166]

It follows from Article 2(1)(a) and (c) of the VAT Directive, according to the Court, that every supply must normally be considered as distinct and independent and that a supply which contains a single service from an economic point of view should not be artificially split. The reason for this is to not distort the functioning of the VAT system. Furthermore, the important aspects of the transaction must be established in order to determine whether the taxable person is supplying the customer with a single service or several distinct principal services.[167] According to the CJEU, there is a single supply in particular in cases where one or more elements should be considered as constituting the principal service, while one or more elements should be considered as ancillary services which share tax treatment of the principal service. If a service does not constitute an aim in itself for customers, but a means of better enjoying the principal service supplied it must be regarded as

[165] *CPP* (n. 163), para. 26.
[166] Judgment of 2 May 1996, *Faaborg-Gelting Linien*, C-231/94, EU:C:1996:184, para 12-14; *CPP* (n. 163), para 28.
[167] *CPP* (n. 163), para 29.

ancillary to a principal service. In such situations, it is not decisive that a single price is charged. Yes, if the service that is provided to customers consists of several elements for a single price, this might indicate that there is a single service. If it was the case that the customers intended to purchase two distinct services, an insurance supply and a card registration services, then it would be necessary to identify the part of the single price related to which services, as for instance the possibility to make exemptions may differ between the two.[168]

The case law on the matter of composite supplies show that the issue is not always easy to solve in practice.

5.3 Supply of services for consideration

Article 24(1) VAT Directive must be read together with Article 2(1) VAT Directive. In Article 24(1), the definition of a supply of service is defined whereas Article 2(1) states that the supply of such a service for consideration within the territory of a Member State, by a taxable person acting as such, is subject to VAT. Hence, a supply of service is only taxable if it is made for consideration.[169] In *Hong Kong*, CJEU ruled that a person who habitually provides services free of charge is not taxable person at all. Instead, he must be assimilated to a final consumer.[170]

There is no definition of what 'consideration' means in the VAT Directive but CJEU has clarified that it is an independent concept of EU law.[171] CJEU also ruled that there must be a direct link between the service provided and the consideration received, in order for the service to be subject to VAT.[172]

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[168] *CPP* (n. 163), para. 31.
[169] Judgment of 3 March 1994, *Tolsma*, C-16/93, EU:C:1994:80, para 14; Judgment of 14 July 1998, *First National Bank*, C-172/96, EU:C:1998:354, para 26; Judgment of 27 April 1999, *Kuwait Petroleum*, C-48/97, EU:C:1999:203, para. 26; Judgment of 21 March 2002, *Kennemer Golf*, C-174/00, EU:C:2002:200, para 39.
[170] *Hong Kong* (n. 19) para 10.
[171] Judgment of 5 February 1981, *Coöperatieve Aardappelenbewaarplaats*, Case 154/80, EU:C:1981:38, para. 9.
[172] *Coöperatieve Aardappelenbewaarplaats* (n. 171), paras. 12-13; See also *Tolsma* (n. 169) para. 14; *First National Bank* (n. 169) para. 26; *Kuwait Petroleum* (n. 169) para. 26; *Kennemer Golf* (n. 169) para. 39.

This direct link is not explained by the VAT Directive either. Doesum, Kesteren and Norden find that this 'direct link'-criteria is a fundamental aspect of the VAT system since the ultimate goal with VAT is to tax consumption. The legislator has chosen to tax the supplies by taxable persons rather than to directly tax the consumption for efficiency reasons. A direct link between the supplies by the taxable persons and the payments by the customer is necessary to measure the spending of the customers' consumption.[173] It is also essential that the consideration is capable of being expressed in monetary value, even where the remuneration is a supply of a good or service, and that it is a subjective value. This since the basis of assessment is the consideration that is received, not an estimated value based on objective criteria.[174]

The concept of 'for consideration' was further developed in *Tolsma*[175] where the CJEU held that a supply of services is effected for consideration only when there is a legal relationship between the provider of the service and the recipient pursuant to which there is a reciprocal performance, where the remuneration for the services constitutes the value actually given in return for the service supplied to the recipient.[176] Even if a person solicits money and receives non-quantified and non-quantifiable sums, there is no supply of service for consideration where no remuneration is stipulated.[177]

5.4 Intermediaries in VAT

According to Article 28 VAT Directive, where a taxable person acting in his own name but on behalf of another person takes part in a supply of services,

[173] Doesum, Kesteren & Norden (n. 11) p. 128.
[174] *Coöperatieve Aardappelenbewaarplaat*s (n. 171) paras. 12-13.; See also Judgment of 23 November 1988, *Naturally Yours*, Case 230/87, EU:C:1988:508, para. 16; Judgment of 27 March 1990, *Boots Company*, Case C-126/88, EU:C:1990:136, para. 19; Judgment of 24 October 1996, *Elida Gibbs*, C-317/94, EU:C:1996:400, para. 27;
Judgment of 20 January 2005, *Hotel Scandic Gåsabäck AB*, C-412/03, EU:C:2005:47, para. 21.
[175] *Tolsma* (n. 175).
[176] *Tolsma* (n. 175) para 14.
[177] Doeesum, Kesteren & Norden (n. 11) p. 130.

he should be deemed to have received and supplied those services himself. A similar provision regarding the supply of goods can be found in Article 14(2)(c) VAT Directive, which stipulates that the transfer of goods pursuant to a contract under which commission is payable on purchase or sale should be regarded as a supply of goods. Since the purpose of Article 28 VAT Directive is similar to that of Article 14(2)(c) VAT Directive, discussions regarding both provisions can be viewed.[178]

5.4.1 Disclosed agent

A disclosed agent is an intermediary who is involved in a supply in the name and on behalf of someone else; the principal or the consumer.[179] In a situation with a disclosed agent, the consumer is aware that he or she is dealing with an agent of the principal. There will be two supplies in this situation: the supply of goods or services between the principal and the consumer and the supply of intermediation between the disclosed agent and the principal/or the consumer. The VAT treatment of disclosed agents is not as complex as the one that applies for undisclosed agent, since there are no deemed supplies for VAT purposes. The principal is the one responsible for calculating and collecting VAT on his supply to the consumer while the intermediary is responsible for its supply of the intermediation service to the principal.

5.4.2 Undisclosed agent

A commissionaire, or an undisclosed agent, acts in his own name, on behalf of another person (often referred to as the 'principal').[180] The key aspect of the concept of the commissionaire is that the customer does not know that the commissionaire acts for the account and risk of someone else, i.e. that the commissionaire does not tell the customer who the principal is. When a commissionaire sells goods or provides services to a customer, on behalf of his principal, it is really the principal who makes the supply of goods or services to the customer. If no particular arrangements are made, the invoice

[178] Doesum, Kesteren & Norden (n. 11) p. 125.
[179] Amand, Christian, *EU Value Added Tax: The Directive on Vouchers in the Light of the General Value Added Tax Rules* (2017) 45 Intertax, Issue 2, pp. 150–168, p. 156.
[180] Doesum, Kestern & Norden (n. 11), p. 112.

that the customer receives will be from the supply by the commissionaire, while the supply is in fact from the principal. Since the customer does not receive a correct invoice from the supplier it is not possible for the customer to deduct any VAT in relation to the supply. The only way for this to be solved would be if the commissionaire discloses the principal, but that would go against the concept of a commissionaire contract.[181]

The situation may be solved with the help of Article 14(2)(c) and Article 28 of the VAT Directive. These provisions create a legal fiction of two identical supplies provided consecutively. Under that fiction, the operator, who takes part in the supply of services and who constitutes the commission agent, is considered to have i) firstly, received the services in question from the operator on behalf of whom it acts, who constitutes the principal, before providing, ii) secondly, those services to the client himself. It follows that, as regards the legal relationship between the principal and the commission agent, their respective roles of service provider and payer are notionally inversed for the purposes of VAT.[182] This means that it is the principal who is regarded as having made the supply of goods or services to the consumer while the commissionaire is regarded as having made a subsequent supply of goods to the customer.[183]

The Court has discussed the scope of Article 14(2)(c) and Article 28 of the VAT Directive in some cases, a few of which will be discussed below.

The Court emphasised in *Fast Bunkering Klaipeda*[184], that a contract under which commission is payable constitutes, in principle, an agreement by which an intermediary undertakes to carry out in his own name one or more legal transactions on behalf of a third party.[185] A supply of goods to an intermediary

[181] Doesum, Kesteren & Norden (n. 11) p. 112.
[182] Judgment of 14 July 2011, *Henfling and Others*, C-464/10, EU:C:2011:489, para. 35; Terra, Ben & Kajus, Julie (n. 17) p. 267.
[183] Doesum, Kesteren & Norden (n. 11), p. 113.
[184] Judgment of 3 September 2015, *Fast Bunkering Klaipėda,* C-526/13, EU:C:2015:563.
[185] *Fast Bunkering Klaipėda* (n. 184) para. 33.

acting in his own name is not made at the last stage of the commercial chain for those goods, since it is intended that the intermediary will acquire the goods not to use them, but to sell them to a third party.[186] In the case, CJEU seems to accept that there are situations in a chain transaction where the middleman is 'skipped', so that the supply is considered to have been made directly between the principal and the final consumer. CJEU ruled that goods which were delivered via an intermediary acting in his own name (B) were supplied directly to the operator (C) because the intermediary (B) was neither in law nor in fact empowered to dispose of the fuel as if he were owner.[187] According to van Doesum, van Kesteren and van Norden this raises the following question: under which circumstances does a supply need to be seen as having been made to and by that intermediary person (which is the case in most chain transactions), and under which circumstances, and on the basis of what criteria, must a supply be treated as one made directly by the first person in the chain to the last person?[188]

A central reason for the CJEU to skip the middleman (the intermediary) in *Fast Bunkering Klaipėda* was that the right to dispose of the property as owner was already with the customer at the time when the intermediary could transfer his rights.[189] The main practical impact of *Fast Bunkering Klaipéda* is, according to Doesum, Kesteren and Norden, that the original supplier of tangible goods involved in chain transactions must conclude whether they are making their supply to their contract party (the intermediary) or directly to the final consumer with whom they have no contractual agreements.[190] The default situation following the case continues to be that one is considered to make taxable supplies to the contracting party (the intermediary) rather than to parties that the supplier does not have a contractual agreement with, although caution is advised.[191]

[186] *Fast Bunkering Klaipėda* (n. 184) para. 34.
[187] *Fast Bunkering Klaipėda* (n. 184) para 51.
[188] Doesum, Kesteren & Norden (n. 11) p. 113.
[189] *Fast Bunkering Klaipėda* (n. 184) paras. 48-53.
[190] Doesum, Kesteren & Norden (n. 11) p. 114.
[191] Doesum, Kesteren & Norden (n. 11) p. 114.

In *Auto Lease Holland*[192], CJEU emphasised that it is clear that 'supply of goods' does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were the owner of the property. The purpose of the VAT Directive might be jeopardised if the preconditions for a supply of goods — which is one of the three taxable transactions — varied from one Member State to another, as do the conditions governing the transfer of ownership under civil law.[193] The relevant question to answer is therefore to whom the oil companies transferred the right to actually dispose of the fuel as owner – to the lessee or the lessor? According to the Court, it is to the lessee. The lessee had a free choice of quality and quantity of the fuel, and monthly payments to Auto Lease were an advance.[194]

In both these cases, the middleman was skipped. The ruling in *Auto Lease Holland* was believed to be a specific solution in an extraordinary case at the time of the ruling. Following *Fast Bunkering Klaipéda*, Doesum, Kesteren and Norden argue that it does not seem to be as extraordinary to skip the middleman, although they do not believe such a treatment to be the default VAT treatment of chain transactions.[195] In both of these cases, the intermediary did not have other options than to transfer the legal ownership to the person who had already been brought, by the original supplier, in the position to dispose of the goods as if he were the owner.[196] The argumentation Doesum, Kesteren and Norden put forward here is supported by the VAT Committee's unanimous decision that *Fast Bunkering Klaipéda* should be seen as predicated on the specific facts of the case in question and must therefore be construed narrowly.[197]

[192] Judgment of 6 February 2003, *Auto Lease Holland*, C-185/01, EU:C:2003:73.
[193] *Auto Lease Holland* (n. 192), para. 32.
[194] *Auto Lease Holland* (n. 192) paras. 35-37.
[195] Doesum, Kesteren & Norden (n. 11), p. 113.
[196] Doesum, Kesteren & Norden (n. 11), p. 113f.
[197] VAT Committee Guidelines resulting from the 107th meeting 8 July 2016, Document B – taxud.c.1(2016)7297391 – 911.

5.4.3 The relationship between Article 28 of the VAT Directive and Article 9(a) of the Implementing Regulation

As a means of explaining how Article 28 of the VAT Directive should be interpreted, Article 9a of the Implementing Regulation has been introduced. This Article contains a presumption that where a taxable person takes part in the supply of electronically supplied services through a telecommunications network, an interface or a portal such as a marketplace for applications, he should be presumed to be acting in his own name but on behalf of the provider of those services.[198] This presumption can only be rebutted if the provider is explicitly indicated as the supplier by that taxable person and that is reflected in the contractual arrangements between the parties.[199]

In *Henfling and Others*, the Court stated that Article 28 of the VAT Directive has been couched in general terms and does not contain restrictions as to its scope or its extent.[200] According to Henkow, this ought to mean that the presumptions laid down in Article 9a of the Implementing regulation should apply to services other than the two listed in that provision (electronically supplied services and telephone services). Henkow further claims that it would be strange if Article 9a lacked relevance in explaining Article 28 VAT Directive in the context of other services.[201]

What constitutes electronically supplied services is defined in Article 7(1) of the Implementing Regulation 282/2011. To be classified as electronically supplied services, the services should be delivered over the Internet or an electronic network, the nature of the service should render the supply essentially automated, minimal human intervention should be involved and

[198] Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, Article 9a.
[199] Article 9a (n. 198).
[200] *Henfling and Others* (n. 182) para. 36.
[201] Henkow, Oscar, *Acting in One's Own Name on Someone Else's Behalf: A Changing Concept*, 2017, p. 249.

the service should be impossible to ensure in the absence of information technology.[202] While services provided by the peers could not constitute electronically supplied services, services provided by the platforms could potentially as the criteria in Article 7(1) fit well with the platforms' business model. In this matter, no general conclusion can be drawn, but each sharing platform must be assessed individually. This is discussed further in Chapter 6.2.3.2 regarding the issue of composite supplies.

The view that Henkow holds, namely that it would be strange if Article 9a lacked relevance in explaining Article 28 of the VAT Directive in the context of other services than electronically supplied services and telephone services, is supported by the principle of fiscal neutrality, which is explained in Chapter 2.2. From the perspective of neutrality, equal cases should be treated equally where competition exists. Article 9a should therefore be applicable to all services provided, as Article 28 of the VAT Directive does not contain restrictions as to its scope or extent, which was held by the Court.[203]

Regarding the question of whether the 'buralistes' in *Henfling and others*[204] were acting in their own name on someone else's behalf, the Court noted that the condition that the taxable person must act in his own name but on behalf of another must be interpreted on the basis of the contractual relationship at issue. The national court is still required to check specifically whether the 'buralistes' were acting in their own name when conducting the activity.[205] The Court lists some facts that need to be taken into account, namely; whether the betting slips issued mention the organiser's name, that the customers agreed, according to the wording of the betting slips, to be subject to the regulations of the organiser, whether the business carried out by the 'buralistes' carried the organiser's sign and whether or not the 'buralistes' acted as agents.[206]

[202] Article 7(1) (n. 198).
[203] See *Henfling and Others* (n. 182), para. 36.
[204] *Henfling and Others* (n. 182).
[205] *Henfling and Others* (n. 182) para. 42.
[206] *Henfling and Others* (n. 182) para 43.

Henkow discusses whether there is a difference between Article 28 of the VAT Directive and Article 9a and whether Article 9a goes beyond Article 28.[207] In *Henfling and Others*, the Court only instructed the national court on how to assess whether the 'buralistes' were acting as undisclosed agents or not, but did not provide a presumption or a rule.[208] Henkow argues that Article 9a goes beyond the clarifications made by the Court regarding the interpretation of Article 28 of the VAT Directive since it introduced irrebuttable presumptions. By introducing these, Henkow argues that Article 9a provides a partly new definition of the scope of Article 28 VAT Directive.[209] According to Article 9a, it is not necessary for the platform to be bound but only necessary that it sets terms or accept payments.[210]

There was a proposal to amend Article 28 of the VAT Directive, by inserting the following phrase; 'including cases where a telecommunications network, an interface or a portal is used for that purpose', as from 2018.[211] As of today, this is not included in the provision and it was not part of the Directive or the Implementing Regulation that were adopted as the VAT e-commerce package on 5 December 2017.[212] It was also proposed that the same phrase was to be inserted in Article 14(2)(c) VAT Directive as from 2021. This was not part of the changes to the Directive which were adopted as the VAT e-commerce package either.[213] The proposals meant that it had been found necessary to insert a reference to the platforms in Article 9a Implementing regulation into the Directive. This is noteworthy since the Implementing regulation is

[207] Henkow, Oscar (n. 201) p. 250.
[208] *Henfling and Others* (n. 182) para. 43.
[209] Henkow, Oscar (n. 201), p. 251.
[210] Henkow, Oscar, (n. 201), p. 253.
[211] Proposal for a Council Directive amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, COM(2016) 757 final (1 December 2016).
[212] Council Directive (EU) 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods; Council Implementing Regulation (EU) 2017/2459 amending Implementing Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax.
[213] (n. 211).

designed to implement the VAT Directive, but not expand the scope of the VAT Directive or go beyond its scope.[214] A directive and an implementing regulation do not follow the same legislative procedure. As a result, the Implementing regulation clarifies the content of the VAT Directive, but it does, and should, not amend it.

If the proposal that was brought forward by the Commission had been accepted, that would have meant that it would have been necessary to include a reference to the platforms in Article 9a to the Directive. Since the proposal was never accepted, that could indicate that the legislator also holds the opinion that Article 9a goes beyond the scope of Article 28 of the VAT Directive.

According to Article 9a, it is enough that the platform sets terms or accepts payments for a platform to fall within the scope of the Article. By that definition, Uber would fall within the scope of the Article as it both accepts payments and sets terms. It would not be as clear whether Airbnb would fall within the scope as it is mainly up to the host to set up price and house rules for the guest, but the platform does handle the payment. This interpretation should however be held redundant since Article 9a goes further than it is allowed, as it broadens the scope of the Directive, instead of explaining it.

5.4.4 Introducing a deeming provision making platforms liable for paying VAT

While the proposals presented in Chapter 5.4.3 were not adopted, the e-commerce package has introduced other provisions that have been. One such important aspect of the e-commerce VAT package that was not part of the original proposal put forward by the Commission[215] is the introduction of a new Article, 14a of the VAT Directive:

[214] Henkow, Oscar (n. 201), p. 248.
[215] COM (2016) 757 final (n. 211).

"1. Where a taxable person facilitates, through the use of an electronic interface such as a marketplace, *platform*, portal or *similar means*, distance sales of goods imported from third territories or third countries in consignments of an intrinsic value not exceeding EUR 150, that taxable person shall be deemed to have received and supplied those goods himself.
2. Where a taxable person facilitates, through the use of an electronic interface such as a marketplace, *platform*, portal *or similar means*, the supply of goods within the Community by a taxable person not established within the Community to a non-taxable person, the taxable person who facilitates the supply shall be deemed to have received and supplied those goods himself."[216]

Platforms that 'facilitate' intra-EU distance sales of goods made by a non-EU taxable person will, under this article, be deemed to receive the goods from the seller and then deemed to supply the goods onward to the final consumer.[217] This deeming provision will only apply in the cases where the platforms facilitate sale of goods made by non-EU suppliers. It will however apply both in intra-EU and domestic sales.[218] Furthermore, the establishment of the platform will not be relevant as the deeming provision will apply both in situations where the platform is registered in EU and when it is not.

According to Lamensch[219] this provision is most likely inspired by the European Parliament legislative resolution of 30 November 2017 where the following paragraph was proposed to be added:

'3a. Where a taxable person, acting in its own name but on behalf of another person, participates in a distance sale of goods imported from third countries or territories in a consignment having an intrinsic value of less than EUR 150, or the equivalent in national currency, and has an annual turnover exceeding EUR 1 000 000, or the equivalent in national currency, in the current calendar year, and including cases where a telecommunications network, an interface or a portal is used for the purpose of the distance sale, that taxable person shall be deemed to have received and supplied those goods itself.'[220]

[216] (n. 212); Emphasis added.
[217] Lamensch, Marie, *Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One*, EC Tax Review, 2018, Vol. 27, Issue 4, pp. 186-195, p. 191.
[218] Lamensch, Marie (n. 217), p. 191.
[219] Lamensch, Marie (n. 217), p. 191.
[220] European Parliament legislative resolution of 30 Nov. 2017 on the proposal for a Council directive amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods

This proposal was introduced as a way for online platforms to be liable for VAT due on imports where there is a risk that the VAT is not paid by suppliers based in third countries. The threshold of EUR 1 000 000 was introduced as a way to not impose the liability burden on SMEs or startups.[221]

Lamensch raises a few questions that remain unanswered, much due to the fact that practical issues were not discussed by the Member States as the provision was adopted so rapidly.[222] One of the questions raised is that of who, or which platforms, will fall within the scope of the deeming provision. The Commission and the Member States appear to be willing to go for a broad scope of application, while Lamensch argues that common sense would suggest that for a platform to fall within the scope of the provision it must handle the payment and be able to withhold VAT.[223] A technical question regarding the creation of a fiction with two subsequent supplies with transport also arises. In a chain transaction, there can only be one transport for VAT purposes. Should the transport be linked to the deemed business to consumer supply then the platform would incur VAT in the country where the transport of the goods start which could raise difficulties regarding the question of a refund.[224] This provision, along with Article 242a of the VAT Directive[225], as amended, will require platforms to keep detailed records of all supplies they facilitate to enable the Member States' tax authorities to make controls. The records will have to be kept for a period of ten years after the end of the year during which the transaction was carried out, and the records must be made available electronically on request.[226]

When discussing this provision in the context of this thesis, it must be noted that the provision is only applicable on the *supply of goods*, and not the supply

(COM(2016)0757 – C8-0004/2017 – 2016/0370(CNS)) (Special legislative procedure – consultation).
[221] COM(2016)0757 (n. 220).
[222] Lamensch, Marie (n. 217), p. 191.
[223] Lamensch, Marie (n. 217), p. 191.
[224] Lamensch, Marie (n. 217), p. 191.
[225] (n. 212).
[226] Lamensch, Marie (n. 217), p. 192.

of services. This means that the deeming provision would have no bearing on the matter of sharing platforms such as Uber and Airbnb, where the platform or the peers with the intermediation of the platform is providing a service, while it could potentially have bearing on other sharing platforms that provide goods.

6 Applying the concepts

In this section, the first main question of the thesis, namely how Airbnb and Uber should be treated under the VAT Directive will be answered. There are two levels of this analysis; the intermediary service provided by the platforms and the services provided to the users by the peers. These different types of transactions are considered separately for VAT purposes. From a VAT point of view, the assessment of services provided by the platform does not influence the assessment of the services provided by individuals through the platform and vice versa.[227] The author does not agree with the Commission's view here. In situations where the deeming provision Article 28 of the VAT Directive is applicable, the VAT is redefined in terms of the transaction and who is considered to have supplied it. Therefore, the assessment of services provided by the platform does in fact very much influence the assessment of the services provided by individuals through the platform and vice versa. Although the deeming provision might not always be applicable, the very idea that it might should be enough to support such a statement. The VAT assessment of the intermediary service provided by the platforms to providers raises less controversy than the one regarding the transactions between providers and users.[228] The question that poses some difficulties, for Uber and Airbnb, when determining the applicability of the concept of a taxable person does not arise in the situation where the internet platforms connects the peers with the users, but rather the providing of housing and transportation by the peers.

6.1 Platform

It is clear that the services that the internet platforms are providing are indeed economic activities that fall within the scope of Article 9(1) of the VAT Directive and that they are acting independently. Where a service is supplied

[227] Working Paper No. 878 (n. 13), p. 3.
[228] Working Paper No. 878 (n. 13), p. 3.

for consideration by the sharing platform to the platform's user, it is recognized by the VAT Committee that such a service is subject to VAT.[229] The matter of applicability of VAT is uncontroversial but the question of which service that the platform is providing still remains. Is the platform simply providing a service of intermediation or is it providing the underlying supply of service as well (the passenger transportation or the accommodation rental)? In order to answer this question, it must first be determined whether it is the peer that is providing the service. Therefore, the answer to this question will be discussed and answered in Chapter 6.2.

From the case law cited in Chapter 4, it is clear that the service platform acts in the course of its business. In the unlikely event that such a situation should arise where activities are carried out for personal purposes, it may be concluded from *Kostov*[230] that those activities will be subsumed into the activities as taxable person.[231]

In situations where a transaction is made between a sharing economy platform and its users free of charge, this falls outside the scope of VAT as was noted from the CJEU's stance in *Hong Kong.*[232] Although this is not the case in the examined sharing platforms Uber and Airbnb, it is in other platforms why it does not lack relevance to bring it up.

6.2 Peers

It is not expressly regulated in the EU legislation at what point a peer becomes a professional service provider in the sharing economy. As mentioned above, the more difficult question arises when determining the applicability of the concept of a taxable person of the peers, the ones' providing the housing and transportation (or other services) to the users. The most controversial part of this assessment is whether the peers providing the services through the

[229] Working Paper No. 878 (n. 13), p. 10.
[230] *Kostov* (n. 93).
[231] Beretta, Giorgio (n.1) , p. 409.
[232] See Chapter 2.2.1.

sharing platforms qualify as taxable persons as defined in Article 9(1) of the VAT Directive. Subsequently, a discussion of whether these peers qualify as taxable persons within the meaning of Article 9(1) VAT Directive and whether they can be considered as acting as such is held below.

As was established in Chapter 4.1, a taxable person is any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. The discussion will therefore first discuss whether the peers are carrying out an economic activity, and if so, if they are doing so independently.

6.2.1 Economic activity

To further the discussion of whether the peers are carrying out an economic activity, the discussion will be divided into some aspects of the concept, namely; 'economic', 'acting as such' and 'continuity'.

6.2.1.1 Economic

It was emphasised in Chapter 4.2.1 that an economic activity means any activity where persons are supplying services and that the term should be interpreted in a broad manner. When peers are providing passenger transportation or accommodation rental through Uber and Airbnb, they are indeed fulfilling the criteria of 'economic', particularly as they are provided for consideration.[233] As regards the sharing economy, the issue of when an economic activity begins may be of relevance for the possibility for the potential taxable person to make use of the deduction mechanism of VAT.[234] Since this is not in the scope of this thesis, the issue will however not be discussed further.

6.2.1.2 Acting as such

While the assessment regarding whether the sharing platform is acting as such was fairly easy to make, it is more difficult to determine whether the peer acts as a taxable person or not. In a situation where an activity is carried out for

[233] See Chapter 4.2.1 and *Hong Kong* (n. 19) read contrario.
[234] See Chapter 4.2.1 regarding preparatory acts.

consideration, which is the case for both the Uber rider and the Airbnb host, it must be determined whether the asset, the car or the apartment/room, can be used only for business purposes.

A car or an apartment/room cannot be used only for business purposes, rather these assets can generally be used for both personal and business purposes (while mostly for personal purposes). When looking at the objectively verifiable criteria that the national court referred to in *Enkler*, the situation could be similar for some Uber riders and some Airbnb hosts. It is up to the peers to provide the car and the accommodation. Some riders will buy a car (or own the car before subscribing to the platform) with the intent of using it for leisure use. They will likely not have an office for keeping and maintaining the vehicle and the main activity is not always to provide passenger transportation. Uber riders that buy the car for the purpose of using it for passenger transportation as the main activity can still use it for leisure use and will likely not have an office for keeping and maintaining the vehicle. For an Airbnb host, the main activity is not always to rent out the apartment or room and the apartments are oftentimes bought for the purpose of leisure use (prior to renting it through Airbnb). A situation where an apartment is bought mainly for business purpose could occur and, in those situations, the host should be considered as acting as such.

Taking the approach that riders purchase the car, or own it prior to providing the service, and the Court's judgment in *Enkler*, neither the Uber driver nor the Airbnb host should be considered acting as such. It can however be deduced from *Fuchs* that an individual does not have to take many steps to become a taxable person (and thereafter act as such). In situations where the car or the apartment is purchased with the intent to use it solely, or mainly, for the providing of the service, the situation differs from that in *Enkler* and it is more likely that the business purpose will take over and the peers should be deemed as acting as such (provided that the rest of the criteria for a taxable person is fulfilled). In both these situations, all circumstances in which the car or the apartment is used must be examined to determine whether they are used for the purpose of obtaining an income on a continuing basis.

While a car and an apartment can generally be used for both private and business purposes, it ought to be the case that a rider or a host would be considered as 'acting as such' when providing the service of passenger transportation and accommodation rental, provided that the remaining criteria for a taxable person are fulfilled.

6.2.1.3 Continuity

In his Opinion in *Wellcome Trust*, Advocate General Lenz emphasises that the requirement of continuity does not mean that a person must enter into a series of transactions in order to qualify as a taxable person. Even an activity that is completed in a single day can be regarded as an economic activity.[235] According to Cannas, one could legitimately ask how it is possible to reconcile the stability-requirement with the fact that a single transaction may potentially mean that a seller falls within the concept of the taxable person. Even if a transaction is completed in a single day that does not rule out that the activity is limited to that day, but rather that it can last a long time.[236] Bal notes that the requirement of continuity should not be understood as meaning that a person must enter into a series of transactions to qualify as a taxable person.[237]

As for the question of 'stability', this may cause some problems for the sharing economy as it is largely built upon the occasional hiring out of assets. As a line in discussing this question, the distinction of when the host or rider is using his assets for personal or business use should be discussed again. Cannas sums this up well by asking the question; is the host or rider carrying out an economic activity or is he exercising his right of ownership?[238] Is a person renting out his or her apartment once a year, several years in a row doing so on a continuing basis? Is a person who occasionally provides

[235] Opinion of Advocate General Lenz, delivered on 7 December 1995, *Wellcome Trust*, C-155/94 EU:C:1995:246, para. 32
[236] Cannas, Francesco (n. 97), p. 93.
[237] Bal, Alexandra, *The Vague Concept of "Taxable person" in EU VAT Law*, International VAT Monitor, 2013, Vol. 24, No. 5 pp. 294-298, p. 295.
[238] Cannas, Franceso (n. 97), p. 93.

passenger transportation, when he needs some extra money doing so on a continuing basis? It would in the author's opinion be too far-fetched to take the approach of the Commission and state that the simple subscription to the platform would mean that continuity is fulfilled.[239] When subscribing to the platform, a person might do so simply to see what it would be like to provide such a service or to gain further information. In the author's opinion, the mere subscription to a platform should not be enough to fulfill the 'continuity' criteria. The actual providing of a service must be a minimum, not the mere subscription.

While Bal argues that a person does not have to enter into a series of transactions in order to qualify as a taxable person, it is the author's opinion that continuity implies more than one transaction. As a minimum, the host or the rider should provide their service more than once to qualify as a taxable person. In *Enkler*, the Court noted that factors to consider when determining continuity are the length of the period for which property is hired, the number of customers and the amount of earnings. Comparing this with the Court's judgment in *Wellcome Trust* where the Advocate General held that a series of transactions is not needed to be considered performing the service on a continuing basis the case law regarding when continuity begins is unclear.[240] Continuity does not require a series of transactions, but is one transaction sufficient? By providing the service more than once, it may in the author's opinion be presumed that the service is provided on a continuing basis. This opinion is based on the somewhat contradictory case law presented and the description of 'continuation' in the dictionary.[241] Such a presumption should naturally be able to rebut, but that would be up to the peer to prove.

It should further be noted here that continuity also relates to a person who is already a taxable person, but for another business than the passenger transportation or the accommodation rental. He will be regarded as a taxable

[239] Working Paper No. 878 (n. 13), p. 8.
[240] AG Opinion (n. 235), para 32.
[241] *Continuation* <https://www.merriam-webster.com/dictionary/continuation>.

person in respect of other activities that are carried out occasionally if these constitute economic activities.[242] Consequently, a person who has his own business and is not an employee will be deemed a taxable person while an employee providing a service not related to his employment might not be, depending on the factors presented in this chapter.

6.2.2 Independently

The condition that the economic activity must be conducted *independently* in Article 10 of the VAT Directive, is as mentioned in Chapter 4.3, aimed at excluding employed and other persons in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability. Research conducted by the VAT Committee suggests that there is typically no such relationship of employer and employee binding the peers and the sharing platform.[243]

According to Airbnb's terms, Airbnb is not a party to any agreements entered into by the hosts and guests and has no control over the conduct of neither the hosts, guests or other users of the site.[244] Uber on the other hand refers to their riders as 'independent contractors'. Even in situations where the sharing platform claims that there is no situation which resembles that of an employment, the economic reality must however always be considered.[245] Should the actual situation between the sharing platform and an individual who provides goods or services resemble that of an employer and employee, then the situation must be treated as such, and the question of whether the individual is acting independently carefully analysed. Whether the VAT Committee took the economic reality in account when determining that the

[242] See Chapter 4.2.2.
[243] Working Paper No. 878 (n. 13), p. 7.
[244] *Terms of Service for European Users*, <https://www.airbnb.se/terms>.
[245] Terra, Ben & Kajus, Julie (n. 17) p. 224; *Auto Lease Holland* (n. 192) paras. 31-37; *Fast Bunkering Klaipéda* (n. 184) para. 51; Judgment of 28 June 2007, *Planzer*, C-73/06, EU:C:2007:397, paras. 42-50; Judgment of 20 February 1997, *DFDS*, C-260/95, EU:C:1997:77, para. 23.

research suggested that there is typically no relationship of employer and employee is not entirely clear.

In the case of Uber, it was reported in 2015 that several government bodies in the United States had ruled that Uber drivers are employees, while others ruled that Uber drivers are in fact independent contractors.[246] This highlights the difficulty of determining whether the rider should be seen as acting independently, and therefore carry out an economic activity.

The economic reality is that Uber controls where the riders go and how much money they make from each ride. Furthermore, all communication, complaints and payment go through the platform. The riders do not bear the economic risk. This can be exemplified by the situation when a passenger's credit card bounces. In such a situation, the rider is still paid.[247] The fact that Ubers riders are paid on a weekly-basis, and not upon the service provided such as for Airbnb, further speaks in favor of riders not acting independently as provided for in Article 10 of the VAT Directive. Although it can be argued both ways, there are more circumstances in favor of riders acting as an employee of Uber rather than as independent contractors as the company claims. The name that Uber uses for its riders is not decisive in establishing independence, rather it is the *economic reality* and the reality appears to be that riders are not acting independently.

As regards Airbnb, the hosts who provide the services are acting in their own name, on their own behalf and bear the economic risk of the activity. Unlike the case in Uber, Airbnb does not have much influence on the hosts and how they are providing their services. The hosts set their own prices, can communicate with the guests and payment is done immediately after the service is provided (unlike the case in Uber). Airbnb merely serves as an intermediary connecting people, in a much greater sense than Uber.

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[246] *Uber dealt another blow over driver status* <https://www.bbc.com/news/technology-34207838>.
[247] *Uber policy for credit/debit card non-payment*, <https://uberpeople.net/threads/uber-policy-for-credit-debit-card-non-payment.204355/>.

6.2.3 Taxable transaction

The concept of taxable transaction also has some different aspects to it and will be divided into a discussion of supply of services for consideration and a discussion of the problem of the composite supply.

6.2.3.1 Supply of services for consideration

As mentioned in Chapter 5, supply of services means any transaction that is not a supply of goods. It is thus clear that the transactions provided by the sharing platforms, Uber and Airbnb, to the peers and the consumers respectively constitute a supply of services. CJEU has further emphasised in its case law that VAT is to be levied on all services for consideration by a taxable person.[248] In the case of Airbnb it is clear that there is a supply of services for consideration between both the sharing platform and the host and the sharing platform and the guest since Airbnb takes a fee from both of these parties. It is also clear that there is a supply of services for consideration between the peer and the guest. Furthermore, there is a direct link between the service provided and the consideration received, which is a requirement the Court has emphasised in its case law.[249] Consideration is received upon the actual renting of the accommodation (from the guest to the host, via Airbnb). Airbnb connects the host and the guest, and it is for this intermediation that part of the consideration is received. This is also the case with Uber. The user pays for the service provided (the ride). The matter of whether a supply of service has been made for consideration may be more difficult to assess in the case of other sharing platforms, for instance sharing platforms where property is given to a pool or where barter transactions takes place, but this will not be discussed further here.

6.2.3.2 One or more supply?

As for the case with Airbnb, the guest pays a fee to Airbnb for providing the connection with the host. This means that it is clear for persons acquiring a service through Airbnb that they are paying for two supplies of services, the intermediation on the one hand and the actual accommodation on the other.

[248] See Chapter 5.1.
[249] See Chapter 5.3.

In the situation where Uber is considered to supply the services, and not the individual (where the independency-criteria is not fulfilled), a discussion regarding whether Uber should be considered as having provided two different services (the intermediation service and providing the transportation service) or if it is a composite supply should be held. Since Member States are provided with a possibility to introduce a reduced rate for transport of passengers it is of importance to discuss this distinction.[250] In the case of Uber, one would assume that it is the service of passenger transportation of getting from A to B that is the principal service which the user is after. The intermediation service of connecting the user with the rider and handling the payment could then be seen as an ancillary service, which is necessary, at least according to Uber's business model, to provide the transportation service. It could be argued that this intermediation indeed is a mean of better enjoying the principal service, namely the transportation service. Where this is the case, the transportation service should according to the case law discussed in Chapter 5.2, be treated as the principal service and the supplies should not be artificially split.

One exception from the general lack of clear rules and guidance regarding the sharing economy models is the Court's judgment in *Uber Systems Spain*.[251] While this case does not deal with matters of VAT per se, it is of relevance for the furtherance of the discussion regarding how to qualify the services provided by the platform and in part also the criteria of 'independence'.

What the referring court wanted to be determined was whether the services provided by Uber were to be regarded as transport services, information society services or a combination of both.[252] The Court began by noting that an intermediation service consisting of connecting a non-professional driver

[250] Article 98(2) + Annex III (5) of the VAT Directive.
[251] Judgment of 20 December 2017, *Uber Systems Spain*, 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 reiterates its standing in the aforementioned case.
[252] *Uber Systems Spain* (n. 251), para. 18.

using his or her own vehicle with a person who wishes to make an urban journey is, in principle, a separate service from a transport service consisting of the physical act of moving persons or goods from one place to another by means of a vehicle.[253] Accordingly, an intermediation service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver who will carry out the transportation using his or her own vehicle, meets, in principle, the criteria for classification as an 'information society service' […].[254]

Despite this conclusion, the Court decides in a different way and finds that a service such as the one Uber is providing is more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey.[255] In that regard, it follows from the information before the Court that the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises *decisive influence* over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.[256] That intermediation service must thus be regarded as forming an integral part of an overall service whose main

[253] *Uber Systems Spain* (n. 251), para. 34
[254] *Uber Systems Spain* (n. 251), para. 35.
[255] *Uber Systems Spain* (n. 251), para. 37.
[256] *Uber Systems Spain* (n. 251), para. 39.

component is a transport service and, accordingly, must be classified […], as 'a service in the field of transport'.[257]

The Court's reasoning in *Uber Systems Spain*[258] supports the conclusion above, namely that the passenger transportation should be treated as a principal service and the intermediation as an ancillary service. According to Álvarez Suso, there are two crucial influences of the Uber cases on the application of VAT. The first is that they provide directions on deciding who the service supplier of the passenger transport is, or rather whether Uber was considered the deemed provider of such services (undisclosed agent in Article 28 VAT Directive) and as a consequence also the taxpayer in that supply.[259] When making such a decision, it is important to pay attention to certain circumstances of the contractual relationships, liabilities etc. assumed by the three parties: the rider, the platform and the user.[260] This issue was not covered by the Court, but Álvarez Suso argues that due to the extensive influence the platform has in the providing of and conditions for the supply of services[261] one tends to think that Uber should be considered the deemed supplier of the transport services, and that the passenger expects that Uber is at least partially responsible for damages caused where a failure to provide the service would occur.[262] This could also be supported by the colloquial use of 'catching an Uber', in the same way as someone is 'catching a taxi'.[263]

The second influence stems from the debate as to whether the platforms are providing electronically supplied services or if they are providing the underlying service, i.e. the transport of passenger? Álvarez Suso argues that the services provided by Uber should be qualified as urban transport of

[257] *Uber Systems Spain* (n. 251), para. 40.
[258] *Uber Systems Spain* (n. 251).
[259] Álvarez Suso, Marcos, *Comments on CJEU Case Law on Taxable Transactions 2017: the anti-abuse doctrine (Cussens) and the sharing economy (UBER)*, 2018, p. 246.
[260] Álvarez Suso, Marcos (n. 259), p. 246.
[261] *Uber Systems Spain* (n. 251), para. 39.
[262] Álvarez Suso, Marcos (n. 259), p. 246.
[263] *Cape Point Nature Reserve Questions and Answers* <https://www.tripadvisor.com/FAQ_Answers-g312659-d5978740-t4758672-Can_I_catch_an_Uber_back_from_cape_point.html>.

passengers, subject to the grant of a license, and not as electronically supplied services. [264] This is the author's opinion as well.[265]

6.2.4 Special scheme for small enterprises

The special scheme for small enterprises implicates that persons with an annual turnover lower than the threshold are exempt from VAT. The application of a threshold may affect the situation regarding for instance the principle of neutrality, as equal cases are not necessarily treated equally. Since the scheme existed prior to the difficulties that have arisen concerning the sharing economy had arouse, this should instead be seen as a discriminatory measure which is in line with the economic and social needs of the Union.[266] In the situation with the sharing economy, applying the special scheme for small enterprises on the peers providing services may be regarded as a decent transitionary measure, but it should not be a long-term solution. However, many a little makes a mickle, and as was mentioned Chapter 1.1, the sharing economy amounted to EUR 4 billion in 2015 and is only expected to increase. When almost anyone can become a micro-entrepreneur with the evolution of the sharing economy, there is a great risk of much revenue being lost if the special scheme is applied and the competition between traditional business such as the taxi-business or hotel sector risk being in an unfavorable position should the amount of peers increase rapidly since they, if the special scheme is applicable, are exempt from VAT.

Article 12 of the VAT Directive gives Member States a possibility to regard as taxable persons even those who only carry out economic activities on an occasional basis. If the Member States were to do this, then the special scheme for small enterprises is not applicable. It is not hard to imagine that individuals providing services through sharing platforms do this on an occasional basis, such as a person renting out his apartment a week during his summer holiday

[264] Álvarez Suso, Marcos (n. 259), p. 247.
[265] See Chapter 6.2.2.
[266] See Chapter 2.2.1.

through Airbnb. If the Member States were to deem also the exploitation of property by a person that is performed on an occasional basis, as a taxable person then the special scheme for small enterprises would not be applicable for that person. This is arguably one way of ascertaining that more activities fall within the scope of VAT. With the new provisions in the special scheme for small enterprises, Article 283(1)(a) of the VAT Directive which precludes transactions referred to in Article 12 from the special scheme, is removed. This would mean that even transactions carried out on an occasional basis as referred to in Article 12 of the VAT Directive could fall within the scope of the special scheme and henceforth not be levied VAT.

6.2.5 Conclusion

As regards the perspective of 'economic' in economic activity, it is clear that both the peers and the platforms fulfill this partial criterion of the concept of economic activity. In what proportion of business or personal use a peer is using his property can be relevant when determining whether a peer is acting as such but where the property can be used for both personal and private purposes, the peer should be considered as acting as such when all other criteria for the taxable person is fulfilled. When the peer is a taxable person prior to providing the service with the intermediation of the platform, this rubs off on the peer's taxable person status and he will be considered a taxable person even for occasional activities.

A peer can be said to provide the services on a continuing basis, even when this does not occur in a series of transactions, but the case law is not entirely clear on where continuity begins. In the case of Uber, the taxable person status of the peer is largely dependent on the concept of 'independence'. While Airbnb's hosts should be considered as acting independently, it is the author's opinion that Uber riders should not. This conclusion is largely drawn due to the large impact that Uber has on its riders, when setting the price, the riders' not bearing any economic risk and communication goes through the platform. The transactions that the peers and the platforms are providing are provided for consideration and the question of whether there is one or several supplies

arises for both Uber and Airbnb. For Airbnb there are two supplies taking place, one from the platform and one from the host. For Uber on the other hand, the conclusion is drawn that there is one supply made; the passenger transportation, and that this is provided by the platform. The intermediation is considered ancillary to the principal service.

The special scheme for small and medium-sized enterprises can be applied to Airbnb hosts with a low annual turnover, but not to Uber riders since the conclusion that it is the platform that is providing the service was drawn.

7 The treatment and the principles

This chapter will answer the second main question presented in the first chapter of the thesis, namely whether the VAT treatment concluded in Chapter 6 is in line with the principle of neutrality and the fact that VAT is a tax on consumption. The chapter will also discuss whether the presented deeming provision (Article 14a of the VAT Directive) is in line with the principle of neutrality and VAT as a tax on consumption. Before a conclusion is presented, a short discussion regarding the issue of the deeming provision and the sharing platforms will also be held.

7.1 The treatment and the principle of neutrality

The answer to the question of whether the VAT treatment of peers and the platforms is in line with the principle of neutrality is manifold. When looking at this question, it is of importance to evaluate the matter from a number of aspects; is the treatment neutral between the peers, between peers and other businesses and between the platforms and other businesses.

7.1.1 Neutrality of the VAT treatment between peers

It was mentioned in Chapter 4.2.2 that a peer who has his own business and is therefore a taxable person, will be deemed a taxable person when he is performing economic activities, even when these activities fall outside the scope of his business. This principle was gathered from the Court's judgment in *Kostov*[267]. To be able to discuss whether this would be in line with the principle of neutrality, one must look at which situations are equal, to determine whether these situations are in fact treated equally. In a situation where there are two peers performing the same service (providing passenger

[267] *Kostov* (n. 93).

transport if he is a rider, or providing accommodation if he is a host) on an occasional basis, but one of the peers is an employee and the other self-employed; and all peers are providing the service as a way to make ends meet or to simply try out the service, then the two situations are similar. The treatment of the two however, is not. In this scenario, the self-employed person's taxable person-status rubs off on his taxable person-status when providing another service. Two situations that are equal, are not treated equally which is what the legal neutrality entails. This means that such a treatment cannot, in the author's opinion, be deemed neutral.

In another situation, where both peers are taxable persons prior to providing the service as a peer or both peers are employees (or at least not taxable persons prior to providing the service), they should be considered to be in a similar situation when they are providing this service. The VAT treatment between these two types of peers should in the author's opinion indeed be considered neutral as they are treated equally. Two peers that are taxable persons prior to providing the service of passenger transportation or accommodation rental will both be deemed taxable persons according to the principle laid down by the Court in *Kostov*.[268] Two peers that are non-taxable persons prior to providing the service as a peer will be judged equally, while the treatment may differ – depending on whether they fulfill the criteria to qualify as a taxable person. Even if the treatment between the two may vary, this should still be considered neutral since the treatment will largely depend on the continuity of the provision of service. Where the treatment of the peers varies depending on the continuity in which the peer is providing the service, the treatment should be considered neutral even when it varies since only activities carried out on a continuing basis should be levied VAT. When comparing two situations, and one of the peers are not providing the service on a continuing basis in this comparison, such situations are not entirely comparable why it would not go against the principle of neutrality to treat the two differently.

[268] Chapter 4.2.2.

7.1.2 Neutrality of the VAT treatment between peers and other businesses

When viewing the treatment of the Airbnb hosts, compared to other businesses, this treatment should be considered neutral. It was concluded in Chapter 6 that Airbnb hosts should be considered taxable persons, assuming that they provide services on a continuing basis. The same would be the case with any other business. When providing the service of accommodation rentals, the hosts are doing so with the platform serving as an intermediary connecting the host and the user, but the peer performs the service like any other business and should also be treated as such. The VAT treatment of Airbnb hosts should therefore be considered neutral, when compared to how other businesses are treated.

The treatment of Uber riders differs from that of the Airbnb hosts, mainly due to the large impact Uber as a platform has on its riders, or its 'independent contractors'. The Uber riders should be not be considered as taxable persons as they are not acting independently. Uber riders should be treated as employees providing a service for their employer which should be considered neutral since they are in a similar situation as other employees and someone else (the platform) still carries the VAT burden.[269]

In this section the special scheme for small enterprises should also be mentioned. While not all businesses fall within the applicability of the provisions, it should still be considered neutral that some peers do while some businesses may not. This since the peers are covered by the provision due to their low annual turnover, not due to the fact that they are peers. The treatment is not in line with competition neutrality, but since the special scheme has been considered justified by the legislator and therefore a discriminatory measure in line with the social and economic needs of the Union[270], this

[269] See Chapter 7.1.3.
[270] See Chapter 2.2.1; European Commission, *Green Paper on the future of VAT, Towards a simpler, more robust and efficient VAT system,* Brussels, 1 December 2010, COM(2010) 695 final, p. 17.

treatment should all the while still be considered justified, although not neutral.

7.1.3 Neutrality of the VAT treatment between the sharing platforms and other businesses

The answer to the question of how sharing platforms should be treated under the VAT Directive can be difficult to answer, at least in situations where the matter of the intermediation performed by the platform may fall within the scope of current and proposed deeming provisions. This is the case in one of the platforms examined for the purpose of this thesis. It was concluded in Chapter 6.2.2 and Chapter 6.2.3.2 that as regards Uber, the platform should be deemed as having provided both the service of passenger transportation and the intermediation service. Consequently, it is the platform that carries the VAT burden of the passenger transportation, not the rider. Since there is someone who is carrying the VAT burden, and this someone is a taxable person, such a treatment should also be considered neutral when comparing with other businesses.

The treatment of Airbnb on the other hand is that the services provided by the platform is limited to the intermediation. As a result, Airbnb is responsible for paying VAT on the services provided to the hosts and the users. Since the hosts are responsible for paying VAT on the revenue collected for the services provided this should also be considered neutral in terms of the treatment between the sharing platform and other business, since equal situations are treated equally.

7.1.4 Neutrality of the deeming provision

While there is no completely neutral tax system, it should still be discussed whether the proposed deeming provision is in line with the principle of neutrality. The Court has emphasised in its case law that similar goods and similar services are goods and services that are in competition with each other and that it is the consumer's perspective that is decisive when determining

this.[271] From the general character of VAT, in which the principle of neutrality is embedded, it can be deduced that there should be no discrimination between goods or services when they both represent consumption. One could therefore argue that the providing of goods or services by two separate taxable persons or individuals can be comparable situations. The question that remains is therefore whether Article 14a would be *more* in line with the principle of neutrality if it was to be expanded to include services as well, since it is currently not as it discriminates between goods and services.

If the deeming provision was to be extended to include services provided by a taxable person established within the Union, it could potentially result in a situation where Airbnb would be the deemed provider of the service of accommodation rental. From the perspective of neutrality, this would not result in any big changes. It would still be considered neutral. The main difference with such a provision would be that Airbnb would carry the burden of VAT which could potentially result in a more equal level playing field with other businesses in the sector. However, since the provision is only applicable to goods it is somewhat of a lost chance, particularly for the sharing economy.[272]

7.2 The treatment and VAT as a general indirect tax on consumption

7.2.1 Treatment in line with a tax on consumption?

It was established in Chapter 2.1 that the goal with a turnover tax is to tax goods and services aimed for personal consumption. VAT is described as a general indirect tax on consumption, but the aim is to tax all private expenditure. The relevant criteria when discussing consumption in this

[271] See Chapter 2.2.1.1.1.
[272] See Chapter 7.3.

context is the expenditure, not when the consumption takes place (e.g. if it is a continuing process or if the consumption takes place right away). Consumption occurs when the expenditure is made, meaning that the consumption occurs when the user catches an Uber or rents a room through Airbnb. This since VAT is levied on transactions carried out by taxable persons serving as a proxy for the expenditures that arise when the user purchases the service.

Consequently, to be in line with VAT being a general (indirect) tax on consumption, VAT should be levied when consumers catches an Uber or rents a room through Airbnb as this is categorised as private consumption. It does however not reveal onto whom the VAT should be levied – i.e. VAT can be levied on the platform or on the peers, and still be in line with the character of VAT as a tax on consumption, the important factor being that it is in fact levied where there is private expenditure. The treatment discussed in Chapter 6 should therefore be considered in line with VAT being a general indirect tax on consumption. A treatment where VAT is levied onto the peer would be equally in line with VAT as a tax on consumption as a treatment where VAT were to be levied onto the platform. As the crucial element for this assessment is that the consumption (the private expenditure) is taxed, the discussion below in 7.2.2 regarding the special scheme for small enterprises should also be noted.

7.2.2 Special scheme for small enterprises and VAT as a tax on consumption

When riders and hosts have a turnover lower than the threshold provided for in the peers' own Member State their transactions can be exempt from VAT if the peers are considered taxable persons.[273] From the discussion in Chapter 6, it is the author's opinion that Airbnb hosts should be considered taxable persons, while Uber riders should not. The examples given in Chapter 4.4 provides thresholds between EUR 3000 and 11 300, and depending on the

[273] If the peers are not considered taxable persons, VAT is not levied on their transactions, why there would be no need for it to be exempted.

amount that the host receives for the accommodation rental and the number of times the host rents out his or her room or apartment, he or she could fall within this threshold and therefore the transactions he or she would make would be exempt from VAT.

When viewing the special scheme for small enterprises generally it is questionable whether this is in line with the purpose of VAT, namely to tax private expenditure. The special scheme indeed exempts some of the private consumption which takes place, which goes against the character of VAT being a general (indirect) tax on consumption. The special scheme has existed for some time now, and from the perspective of the tax authorities it reduces the need to control a large number of small entrepreneurs with low revenue, which is how it has been justified.[274] To simply include some of the peers in the sharing economy with lower turnover would therefore, in the author's opinion not be in line with VAT being a tax on consumption but it would be in line with the usage of the special scheme and ought therefore still be justified. With the proposed new provisions in the special scheme for small enterprises, the threshold is raised which could mean that the scheme could be applicable to more peers. This would not be in line with VAT being a tax on consumption either, but still justified.

7.2.3 The deeming provision and VAT as a tax on consumption

The purpose of VAT as general tax on consumption is, as mentioned, to tax private consumption, or rather private expenditure. There should be no discrimination between goods and services as they both represent consumption. However, when introducing a provision such as Article 14a of the VAT Directive, the legislator discriminates between goods and services, since there is no introduction of a similar provision regarding the supply of services. The issue of when a taxable person facilitates a supply of service through a platform exists in the same manner as it does when a taxable person

[274] COM(2010) 695 final, (n. 270), p. 17.

facilitates a supply of goods, why the author questions why the legislator has not introduced a similar provision for services. Article 14(2)(c) and Article 28 of the VAT Directive for example both present a legal fiction in which the middleman is skipped, and the service is deemed to have been provided by the principal directly to the consumer. These deeming provisions go well in line with VAT as a tax on consumption as the deeming provision tackles all private consumption – both through the supply of services and through the supply of goods. Why the legislator has chosen to only introduce a deeming provision for the supply of goods facilitated by a platform and not the supply of services remains unanswered as it is not explained in the proposal.

7.3 The deeming provision and the sharing economy

The scope of the deeming provision Article 14a of the VAT Directive that will enter into force in 2021 is not entirely clear, at least not regarding who or which platforms will fall within the scope. No matter if the scope would be as broad as the suggestion by the Commission and the Member States or limited to only platforms handling payment and with ability to withhold VAT[275], neither would be an issue for sharing platforms such as Uber and Airbnb, if the provision was to be extended to include the supply of services as well as the supply of goods since both platforms handle payment and would be able to withhold VAT. Other issues would however arise.

It should be noted that Article 14a targets the supply of goods imported from third territories and the supply of goods within the Community by a taxable person that is not established within the Community.[276] In the situation of Uber or Airbnb, this would mean that the platform, if it facilitated the supply of a service would be deemed to have provided the service itself only in the situation where the peer is not established within the Community. Even if a deeming provision such as Article 14a would be introduced and target services, it would be of importance that such a provision targeted both taxable

[275] See Chapter 5.4.4.
[276] See Chapter 5.4.4.

persons not established within the Community and taxable persons established within the Community for it to have a better reach. Providing accommodation rental through Airbnb for instance requires that the host has an apartment or room to rent. A person does not have to rent his or her private home, but it could for instance be a summer house or an overnight apartment, which can of course be located in another Member State than where the host is established. In those situations, a deeming provision such as Article 14a but for services could potentially suffice. It would however not in a situation where the host is renting out his or her private home in the same Member State where he or she is established.

From the discussion held in Chapter 6.2.2, the passenger transportation provided by riders through Uber would not fall within the scope of such a deeming provision as the riders should not be considered taxable persons. With the conclusion drawn in Chapter 6.2.2 and Chapter 6.2.3.2, the deeming provision Article 28 of the VAT Directive would suffice for the platform to be deemed the provider of the passenger transportation to the user.

7.4 Conclusion

The general conclusion that may be drawn from the discussion held in Chapter 7 is that the treatment of peers providing services should, in most scenarios, be considered as in line with the purpose of VAT being a tax on private consumption. As long as VAT is levied on a transaction, no matter onto whom it is levied, the purpose of VAT should be considered as being fulfilled. It is the author's opinion that the special scheme for small and medium-sized enterprise is not in line with the principle of neutrality, as equal situations are not treated equally. This does however not mean that the author does not understand the reason behind the scheme or does not support it. Rather, the author considers such a treatment justified since what is relevant for the applicability of the special scheme is turnover, not whether the provider of the service is a business or a peer. Therefore, the answer to the question of whether the treatment is in line with VAT being a tax on consumption should be affirmative.

Just as the general conclusion was affirmative regarding whether the treatment of peers was in line with VAT being a tax on consumption, the same applies for the question of whether this treatment is in line with the principle of neutrality. There are however a few scenarios where this question should not be answered in the affirmative. This is the case when comparing peers; where one of the peers is a taxable person prior to providing the service as a peer. In a situation where such a peer provides a service, he or she will be deemed a taxable person even when performing these services on an occasional basis. Similar situations are not treated equally in this scenario, why such a treatment should not be considered in line with the principle of neutrality. The author concludes that the treatment compared in the other situations should be answered in the affirmative and be considered in line with the principle of neutrality.

Article 14a of the VAT Directive will likely solve some of the issues that was intended with it, but it is the author's opinion that it could have had a larger impact if it had included services as well. Since the revenue from the peer-to-peer accommodation and peer-to-peer transportation sector amount to over 70 %[277], and services are common in these sectors, much of this revenue could have been targeted with a deeming provision including services where the taxable person is established within the Union. Even though Airbnb hosts should be considered taxable persons, it is not unlikely that many of them will either not provide the service on a continuing basis, or fall within the scope of the special scheme and therefore be exempt from VAT. In those situations, a deeming provision including services where the taxable person is established within the Union would result in the platform being the deemed provider and likely, in many scenarios, be levied VAT. Where this would be the case, the (large) platform would be responsible for paying VAT and not the peer.

[277] Vaughan, Robert & Daverio, Raphael (n. 5), p. 7.

To conclude, while the sharing economy poses a threat to the traditional legal structure, some legislation can be applied without considerable difficulties on some of the sharing platforms. Article 14a of the VAT Directive and Article 9 of Implementing Regulation 282/2011 show that the legislator intends to deal further with the issue but since the legislative procedure tends to be lengthy, we may have to wait long for a legislation that covers all sharing platforms and services provided thereunder.

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