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The intrinsic direct link of economic activities and Carpooling: The Administrative Court of the Region of Madrid vs Carpool peer-providers

by

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Table of Contents

Summary

This investigation focuses on the case law affecting carpool activities in Spain carried out by peer-providers in the collaborative economy, analysing the procedure and the ruling set by the Spanish administrative court affecting, in particular, the users of the carpool platform known as '*BlaBlaCar*'.

Preface

I would like to thank first my family for always being supportive although, even after explaining countless times, they still do not know what I do in Lund.

I want to thank as well: My friends from the ULPGC, specially Kabir and Tamer; My tutor Eleonor for her patience and her advice; My professors Cécile and Marta for their energy and passion; My classmates who were always helpful and kind.

Lastly, I want to thank my friend Edina, who made all my accomplishments in the last five years possible.

Abbreviation list

EU	European Union
CJEU	Court of Justice of the European Union
The Court	=/=
TFEU	Treaty on the Functioning of the EU
AG	Advocate General
VAT	Value Added Tax
VAT Directive	Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax
Sixth Directive	Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment
LOTT	Ley Ordenación del Transporte Terrestre (Law on terrestrial transport)
OTLE	Observatorio del Transporte y la Logistica en España (Transport and logistics Observatory in Spain)

1. Introduction

1.1 Background

The VAT Directive establishes in the point seven of its preamble that the "common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition"[1], so it is not a surprise that the rapidly growth of the sharing economy became an issue to be tackled by the different administrations: Some businesses and taxable persons would be obliged to comply with the normative while similar activities would scape taxation.

Thus, the first question that needs to be address in this research is: What is the mentioned "sharing economy"? According to the value added tax Committee of the Commission of the European Union, sharing economy is a "socio-economic phenomenon based on sharing of human and physical resources. It includes the shared production, distribution and consumption of goods and services by people and organisations"[2]

Also called "collaborative economy" in the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions'[3], the activities facilitated by collaborative platforms, being *BlaBlaCar*[4] in this research study, create opportunities for both taxable persons and individuals to access an open marketplace and offer and acquire services. "The collaborative economy involves three categories of actors: Service providers, users of these and intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them"[5].

1.2 Aim

The purpose of this research is to understand the reasons and outcome of the prosecution of carpool activities enforced by the Spanish administration and to prove whether the decisions of the Spanish national bodies are in line with the European and the national legal frameworks.

[1] Preamble (7), *VAT Directive,* Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

[2] VAT Committee, *VAT treatment of sharing economy,* Working paper No 878 of 22 September 2015, page 2

[3] 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.*

[4] Comuto SA, *BlaBlaCar,* <https://www.blablacar.com/> (Accessed 25th April)

[5] VAT Committee, *VAT treatment of sharing economy,* Working paper No 878 of 22 September 2015, page 3

Thus, the main objective is to analyse the decision of the Administrative Court of the Region of Madrid and answer the question: "*Does the Spanish case-law comply with the national and European legal frameworks in their administrative ruling against an individual participating as a peer-provider in the collaborative economy?*"

1.3 Method and material

The sources used in this research are primarily those which allow a purely legal analysis of the topic, using for this matter the EU law and Spanish national law, the decisions contained in the case law from the CJEU, working papers and communications of the VAT Committee as well as the decisions of the legal bodies on the cases started in Spain with carpool activities as their main issue.

Other sources used in order to give an in depth understanding of the topic are the different sources found in literature and academic articles; However, the special nature of the Spanish case[6] has made difficult to find relevant literature on the topic. Furthermore, press articles will offer the reader the context, both politically and socially, of the reality surrounding the cases discussed in this research.

Lastly, the *annexes*, which can be found at the end of this research, offer some vital information for the completion of this thesis: The ruling of the Administrative Court of the Region of Madrid (the names of the individuals have been removed to comply with the data protection rules in force) and an interview with the communications manager of *BlaBlaCar* in Spain and Portugal; This interview happened almost accidentally: It started as a simple request of information about the platform and after getting so much useful data from *BlaBlaCar's* responsible of communications, the author of this research decided to give it the proper form of an interview which hopefully will help the reader to understand the business model of the company, the limitations imposed to the peer-providers of the platform in order to preclude the latter from profiting in their carpool activities as well as offering some insights on the ruling and how this has affected their economic activity[7].

To conclude, it is worth remarking that this research follows a deductive method, presenting first the European regulations and case law surrounding the features of carpool activities, presenting the facts regarding the Spanish case and the law applicable and, finally, analysing the decision of the Administrative Court of Madrid and the implications of the ruling against the collaborative economy.

[6] See *Annex I*, question 8

[7] At this point it is recommended to read the *Annex I* found at the end of this research.

1.4 Delimitation

The focus of this investigation lies on the administration *versus* individuals' case-law in Spain; Therefore, this research does not analyse the neutrality issues brought before the competition law court in Spain: Although it is briefly mentioned in *Chapter 4*, this case affects two companies taking legal action against each other while the case of study is much more interesting from a legal perspective since it is the administration considering a peer-provider of the platform BlaBlaCar as a professional supplier of a services.

1.5 Outline

Consequently, to achieve the best understanding possible of the legal issues presented in this research, *Chapter 2* offers an overview on carpooling, *BlaBlaCar*, and briefly explains the legal treatment and tax advantages granted to individuals who carpool in other Member States; *Chapter 3* has its focus on the European legal framework and the key concepts of the study such as the 'taxable person', 'economic activity', and the 'direct link'; *Chapter 4* introduces the national legal framework of Spain, the applicable normative to the case studied as well as the case itself and conclusions regarding the application of the law in the case; Lastly, *Chapter 5* presents the conclusions of the research and approximates both legal frameworks studied and answering the research question.

2. Carpooling: Preliminary questions

2.1 Introduction

In this chapter, and before discussing all the relevant normative and case law both European and national, it is fundamental to answer some questions which present a more complete picture about the topic object of this research.

What is carpooling? This question is rather easy to answer: Most of people, if not everyone, has had the chance to share a car ride somewhere with a friend, a family member or a colleague; Carpooling, as the one studied in this research, implies the share of the costs incurred on those shared trips.

While the proper definition given by some of the most prestigious dictionaries[8] [9] will offer similar concepts as the 'sharing of a vehicle in order to get from one place to another', it is not strange that there is no mention to a consideration given in exchange for the ride or a consideration covering the costs shared: This should not be a surprise since those professionals writing definitions are not likely to care about the tax implications of carpool activities, particularly in the common market, as much as we do, plus those definitions were probably coined before a socio-economic reality when companies like *BlaBlaCar* existed and started capitalizing on the opportunities offered to creative entrepreneurs by the relatively new "sharing economy".

2.2. What is *BlaBlaCar*?

2.2.1 General

Now that a proper definition of carpooling is set, it is necessary to provide the reader with some facts regarding the economic activity performed by *BlaBlaCar* in the different markets. Thus, the following paragraphs go beyond the generic meaning into a more specific idea offering data regarding the business model and the exploitation of their online platform.

It is highly recommended, at this point, to read the totality of the interview with *BlaBlaCar's* communications manager of the company in Spain and Portugal found in the *Annex I* of this research which provides a greater degree of understanding to the business model and other questions surrounding the company.

[8]See, for instance, the definition given by Cambridge's dictionary https://dictionary.cambridge.org/dictionary/english/carpooling (Accessed 14th of March 2020)

[9]Also, see definition given by the Merriam-Webster dictionary https://www.merriam-webster.com/dictionary/carpool (Accessed 25th of April 2020)

2.2.2 *Blablacar:* Origins and development of the business

Founded in France in September 2006 by Nicolas Brusson and Frederic Mazzella[10], this revolutionary platform has expanded over the years to the astonishing number of 22 countries, operating in 12 EU members and counts with 90 million users all over the world[11].

Furthermore, the platform connects users, resulting in more than twenty-five million travellers per quarter[12] and more than one billion euros saved by the members of BlaBlaCar since its creation[13].

2.2.3 *BlaBlaCar* and its activity in the market

It must be clarified that *BlaBlaCar* offers their users an online tool which "does not provide any transport services. The site is a communications platform for members to transact with one another"[14], meaning that their economic activity is not that attributable to a provider of a service of professional transport but to connect peer-providers with users of those services.

Thus, and using the words of Giorgio Beretta, *BlaBlaCar* "acts as a broker that facilitate the match between supply and demand of individuals for goods and services. Eventually, platforms may complement this intermediation activity with ancillary services, such as the facilitation of payments and insurance coverage"[15]

Lastly, it is imperative to understand the goal of this research that the economic activity supplied by *BlaBlaCar* does not imply anything beyond the mere providing of a platform for their users where these can find either passengers or drivers to share their trip and the expenses originated from these trips; Therefore that is why the focus of this research is not on where does *BlaBlaCar* stand from an economic and taxable point of view but on the status of the users of their services.

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[10] BBC News, *The Inside Story of BlaBlaCar*, <https://www.bbc.com/news/av/business-38597506/the-inside-story-of-blablacar> (Accessed 25th April 2020)
[11] Comuto SA, *About us: BlaBlaCar Today*, https://blog.blablacar.com/about-us (Accessed 25th April 2020)
[12] Comuto SA, *About us: Our Key Numbers*, https://blog.blablacar.com/about-us (Accessed 25th April 2020)
[13] Ibid.
[14] Comuto SA, *"BlaBlaCar"*, 'Terms and Conditions: No Commercial Activity and Status of *BlaBlaCar*' <https://blog.blablacar.co.uk/about-us/terms-and-conditions> (Accessed 25th of April 2020)
[15] Beretta, Giorgio. VAT and the Sharing Economy, World Tax Journal, Volume 10 - Issue 3 (August 2018) p. 388

2.3 *Blablacar* and the relationship between peer-providers and the platform

It is important, in order to offer all the relevant information prior to the study of the case object of this research, to establish the legal relationship, if any, of the users of the BlaBlaCar platform, specially the relationship between the company and the peer-providers.

Thus, the platform establishes that it is to be used only to contact other people in order to share a trip in a non-commercial manner[16]. Furthermore, accepting the terms and conditions of *BlaBlaCar* implies approving that the company is not party in the agreements and does not "own, exploit, supply or manage" the vehicles nor it offers trips on the platform[17]. The company emphasizes on the independent character of the users of the platform by establishing that they do not "control the validity, truthfulness or legality of the adverts, seats and trips offered […] (and) do not provide any transport service and does not act in the capacity of carrier"[18]. Their role is limited to facilitate the access to the platform to their members that act under their own responsibility.

The legal relationship between members of *BlaBlaCar* and the company is non-existent, and this means that BlaBlaCar does not engage the activities of the platform as an intermediary for the suppliers of services and the peer-providers act on their own name and independently from the platform.

2.4 Private use of vehicles for carpooling in other jurisdictions

The main case of study of this research, which will be properly analysed in *Chapter 4*, was decided in 2018; However, the procedure started in 2016. Thus, it is convenient to compare the reality given then in other EU countries about carpooling.

For instance, in Belgium, contributions paid as peer-user are usually not taxed and allowances are displayed for that amount paid, being "exempt up to the price of a first class train ticket and up to a maximum of € 350 for the remaining journey"[19].

In the case of Netherlands, the advantages go even beyond and employers give tax free reimbursements for carpooling to their employees attending to

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[16] Comuto, SA, BlaBlaCar "*Terms and Conditions: Non-commercial and non-business purpose of the services of the platform*" < https://blog.blablacar.co.uk/about-us/terms-and-conditions> (Accessed 20th of May 2020)

[17] Comuto, SA, BlaBlaCar "*Terms and Conditions: Role of BlaBlaCar"* < https://blog.blablacar.co.uk/about-us/terms-and-conditions> (Accessed 20th of May 2020)

[18] Ibid.

[19] Corporate Vehicle Observatory, "*Mobility Taxation Guide 2016"*, <https://cms-static.arval.com/sites/default/files/cvo/media/cvo_mobility_taxation_guide_full.pdf> Page 4 of the document (Accessed 25th of May 2020)

circumstances of the activity such as whether the employee uses their private or company vehicle and whether the carpool is organised by the employer or the employee[20].

France had, by 2016, not many rules regarding carpool activities; The only requirement in carpooling between private people was that it should not lead to a remuneration of the driver and "car-poolers" could deduct costs commuting to the workplace[21]. More recently, in 2019, their Finance Bill introduces a "flat-rate car-pooling allowance" which allows a similar system to the one from Netherlands where employers could cover the costs of their employees as peer-users in carpool activities when commuting to the workplace[22].

Thus, since other member states of the EU such as the Netherlands, Belgium and France not only do not charge VAT on the amounts paid to drivers in carpooling, but also offer tax benefits to employers to reimburse their employees the amounts paid in carpool activities when commuting from and to the workplace; Thus, it is apparent to conclude that they are not considered economic activities under their national legislations.

As a final remark on this matter, it is worth mentioning that the Region of Andalucía became recently (January 2019) the first administration in the entire territory of Spain to encourage the car-sharing in an official, legislative text. This normative establishes in its article 36(7)(e) "the promotion of use of shared-vehicles" [23] in matters of transportation and mobility as an important measure in order to alleviate the climate change by reducing the carbon print of private use of vehicles in the Region.

[20] Ibid. page 7 and 8 of the document (Accessed 25th of May 2020)
[21] Ibid. page 16 of the document (Accessed 25th of May 2020)
[22] PwC, "*2019 Global Automotive Tax Guide*", <https://www.pwc.de/de/automobilindustrie/2019-global-automotive-tax-guide.pdf> (Accessed 25th of May 2020)

[23] Ley 8/2018, de 8 de octubre, de medidas frente al cambio climático y para la transición hacia un nuevo modelo energético en Andalucía.

3. The European Framework: The Taxable Person, the Economic Activity and the Direct Link

3.1 Introduction: The TFEU

The Treaty on the Functioning of the European Union is, with no doubts, the primary source of law in tax matters affecting the internal market of the European Union. Already in its preamble, the treaty envisages its economic nature by statements regarding the already mentioned internal market; For instance, the treaty expresses its intentions to "[...] ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe, […] removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition, […] strengthen the unity of their economies, […] contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade"[24]

The most relevant articles contained in the TFEU on regards of this research are, unquestionably, the articles which establish the capacity of the CJEU to offer preliminary rulings, the article that demands compliance of the institutions of the Union to adopt community regulations, directives, decisions, recommendations and opinions[25] and the article that envisages the state liability proceedings when member states fail to fulfil their obligations under the TFEU[26].

Thus, "the CJEU shall have jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union and national courts may or shall, according to whether there is a judicial remedy against the decision of the national court, bring the matter before the CJEU to give a ruling"[27]

The importance of the article mentioned is paramount for this study case since national authorities, in this case the national administrative court in Madrid, may and/or shall request the CJEU for a preliminary ruling where there are doubts about how to proceed in terms of EU policies such as indirect taxation, being this the cornerstone of the internal market of the European Union.

[24] Preamble of the *Consolidated version of the Treaty on the Functioning of the European Union*, signed on 13 December 2007, Official Journal C 326 , 26/10/2012 P. 0001 - 0390
[25] Article 288 of the Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01
[26] Ibid. article 260(1)(2)
[27] Ibid. article 267(b)

3.2 Relevant secondary law[28]

In order to analyse the issue at hand we need to attend to a couple of articles of the VAT Directive. Thus, the relevant articles contained in the Directive are those referencing the taxable person, deemed to be accountable for tax purposes, and the articles defining the concept of economic activity, being the latter inherently supplied by taxable persons in cases where VAT is collected.

Hence, for the issue object of this research, we find in the Directive that transactions subject to VAT are, for instance: "the supply of goods or services for consideration within the territory of a Member State by a taxable person acting as such"[29]. Furthermore, "taxable person shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity and/or the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity"[30].

3.3. The Taxable Person

3.3.1 Shaping the concept of 'taxable person': Case Law.

As an introduction to this sub-chapter of this research, it is necessary to borrow the words of *Aleksandra Bal* and her work on the concept of taxable person: "The subjective scope of the EU VAT system depends on the concept of 'taxable person' […]; Since it is a fundamental concept and has important financial consequences, the definition of taxable person should be clear and unambiguous. However, despite numerous judgments of CJEU on its interpretation, the concept of taxable person still appears to lack clarity"[31]

Thus, albeit it is envisaged under article 9(1) of the VAT Directive that "a taxable person is any person independently performing economic activities whatever its purpose or result to obtain income on a continuing basis in particular" it is true that from a practical point of view this definition has offered the ground for different interpretations of the Directive by national authorities, resulting in extensive case-law where the national courts would ask the CJEU for preliminary rulings on whether to consider individuals or legal persons as taxable persons.

[28] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax
[29] Ibid. Article 2(1)(a)(c)
[30] Ibid. Article 9(1)
[31] Bal, A. *"The Vague Concept of 'Taxable Person' in EU VAT Law",* International VAT monitor, September / October 2013, page 294

a) *Rompelman*

Mr. and Mrs. Rompelman acquired the future title of two properties in order to start an economic activity in which they would let that immovable property in exchange for a consideration[32]. Thus, the Rompelmans declared to the tax authorities their activity in order to deduct the costs incurred in the pursue of that economic activity[33] but their claim was rejected when the tax authorities considered that their activity had not commenced yet and therefore they shall not be given the option to deduct the input VAT incurred in their activity[34]. The case was presented to the CJEU to decide on the matter: Do the Rompelmans have the right to deduct as taxable persons although their economic activity has not started?

The Advocate General of the case, Sir Gordon Slynn, provided in his opinion what would become the line of thought followed by the Court three months after: "The purchase of immovable property for letting in my view is an activity of a person supplying services […] not to be interpreted as excluding preparatory to the actual supply of the services. That sentence includes 'all activities... of persons supplying services' and the purchase of immovable property for the purposes of letting is in my view such an activity."[35] Hence, the CJEU established that "such a preparatory act must be treated as part of the commercial activity since it is necessary in order to make that activity possible"[36].

Also, the CJEU added that "it is for the person applying to deduct VAT to show that the conditions for deduction are met and in particular that he is a taxable person. Therefore Article 4 does not preclude the revenue authorities from requiring the declared intention to be supported by objective evidence"[37]

"The common system of value-added tax therefore ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way"[38].

b) *Hutchison 3G*

In the early 2000, a number of telecommunication operators from United Kingdom entered a public auction in order to obtain the right to exploit radio

[32] Judgement of the Court of 14 February 1985, *Rompelman*, C-268/83, EU:C:1985:74, paragraph 3
[33] Ibid. paragraph 4
[34] Ibid. paragraph 6
[35] Opinion of the Advocate General of 15 November 1984, *Rompelman*, C-268/83, EU:C:1984:353, page 658
[36] Judgement of the Court of 14 February 1985, *Rompelman*, C-268/83, EU:C:1985:74, paragraph 11
[37] Judgement of the Court of 14 February 1985, *Rompelman*, C-268/83, EU:C:1985:74, paragraph 24
[38] Judgement of the Court of 14 February 1985, *Rompelman*, C-268/83, EU:C:1985:74, paragraph 19

frequencies in order to pursue their economic activities, such as providing wireless communications to their users[39].

During the auction process, no reference to VAT was made in regards of the acquisition of the licenses to exploit the frequencies offered by the governmental body. However, the different companies which obtained any of the licenses offered understood that VAT was charged on the transaction and proceeded to claim a deduction of the tax but the authorities declared that the transactions were not subject to VAT and therefore they were not entitled to receive the deduction sought[40].

The CJEU provided in its judgment several key arguments which are important for this research:

First, to the question on whether the auction was considered an economic activity, the Court established that "Directives give a very wide scope to VAT, only activities of an economic nature are covered"[41] and considers that the auction of licenses for frequencies exploitation of intangible property on a continuing basis[42] even if there was just a single payment from the telecommunications operators for the entire twenty years period, it is considered that there is a transfer of rights to dispose of the frequency but not the property, which remains with the State[43]. On the other hand, it is odd that attending to the same factors, both the Court and the AG got different answers to this question: While the AG considered that there is an economic activity[44] the Court decided that there is no economic activity[45]

However, this discrepancy between AG and the Court is irrelevant for the *Hutchison 3G* case since public bodies engage the market as taxable persons only under circumstances where their treatment as non-taxable person would lead to significant distortions of competition in order to protect the neutrality principle envisaged in the Directive and this principle is not applicable where the State has the monopoly to provide those frequencies.

c) *Van der Steen*

The importance of this case sits on the *criterion* of carrying out economic activities "independently" in order to be assessed as a taxable person under the rules contained in community law.

Mr. van der Steen constituted a private limited company from which he held all the shares and was the sole employee; However, the tax authority

[39] Judgment of 26 June 2007, *Hutchison 3G*, C-369/04, EU:C:2007:382, paragraphs 20-21

[40] Ibid. paragraphs 23 and 24
[41] Ibid. paragraph 33
[42] Ibid. paragraph 32
[43] Ibid. paragraphs 35 to 38
[44] Opinion of the Advocate General of 7 September 2006, *Hutchison 3G*, C-369/04, EU:C:2006:523, paragraph 73
[45] Judgment of 26 June 2007, *Hutchison 3G*, C-369/04, EU:C:2007:382, paragraphs 35 to 40

considered him and his company as constituting a single fiscal entity[46] and an action was brought against this decision, which deemed necessary the request of a preliminary ruling on the matter to the CJEU.

The CJEU uses the literal wording of the now article 10 of the VAT Directive by establishing that "the word 'independently' excludes employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties"[47]. Thus, a natural person, as in this case var der Steen, carrying out activities on behalf of their employer shall not be considered as carrying himself an economic activity. To this conclusion, it is valuable to add from the opinion of the AG on the same case that anyway there is a possibility "that a person who is sole shareholder, sole director and sole employee of a company may also be a taxable person in his own right in the context of other economic activities falling outside the scope of the contract of employment".[48]

d) *Ablessio*

The relevance of this case lies on the role of the authorities and whether they are entitled to decide the taxable person's status by establishing requirements to be fulfilled in order to obtain such capacity.

Ablessio is a Latvian construction company that applied to enrol the register of taxable persons subject to VAT, application that was refused by the authorities on the grounds that the company did not have the resources to carry out the declared economic activity and suspected that this was in order to evade tax[49]. After Ablessio brought the claim before the court of first instance and the decision of the court obliged the Latvian tax authorities to let Ablessio join the register of taxable persons, it was apparent that both authorities shared different views on the interpretation of the national rules applicable to the registration as a taxable person. Thus, they requested a preliminary ruling to the CJEU[50].

The CJEU disregarded the view of the Latvian tax authority and decided that "the tax authority of a Member State may not refuse to assign a VAT identification number to a company solely on the ground that, in the opinion of that authority, the company does not have at its disposal the material, technical and financial resources to carry out the economic activity declared"[51].

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[46] Judgment of the Court of 18 October 2007, *Van der Steen*, C-355/06, EU:C:2007:615, paragraph 13
[47] Ibid. paragraph 19
[48] Opinion of the Advocate General Sharpston of 14 June 2007, *Van der Steen*, C-355/06, EU:C:2007:352, paragraph 38
[49] Judgment of the Court of 14 March 2013, *Ablessio*, C-527/11, EU:C:2013:168, paragraph 9
[50] Ibid. paragraphs 11 and 13
[51] Ibid. paragraph 39

The bottom line here is that it is not up to tax authorities to define the taxable person status according to some subjective *criteria* as seen in this case but to attend to objective criteria in order to determine whether a person is in fact a taxable person liable of VAT.

3.3.2 Summary of the concept of taxable person provided by the case law of the CJEU

It can be established from the case-law, which provides with a better understanding of the concept of taxable person, the following statements:

First, that a taxable person can be considered as such even before their economic activity takes place as seen in *Rompelman*; Also, that workers hired by employers cannot be treated as taxable persons and only those carrying out activities independently can be subject to the rules inherently applicable to taxable persons, as seen in *Van der Steen*; And that to engage in the market as VAT liable, the criteria to be applied must be objective and not up for the authorities to decide on grounds of requirements established by them, principle from the *Ablessio* case.

The *Hutchinson 3G* case has a double lesson: The main topic of the procedure and whether to consider a public entity as a taxable person in their activities which has been already discussed and the more subtle take on the case and the possible consequences of considering someone as a taxable person after the activities have taken place with no VAT charged on the transactions (as it has happened, for instance, in the *Redlihs* case seen in the next chapter)*:* The implications of this fact for peer-providers in carpool activities are important since they are not VAT liable for their cost-sharing but if they got inspected by a tax authority and after an investigation the latter would assess the activities as an exploitation liable of tax, these peer-providers would have to pay all the tax due to the tax authorities plus, presumably, a fine. That is the importance of defining properly and clearly the figure of the taxable person[52].

3.4. The Economic Activity

3.4.1 Providing the most accurate definition of an 'economic activity' for VAT matters: Case Law.

In European VAT, the concepts of taxable person and economic activity have a really close relationship between them since they depend on one another: As a general rule, a taxable person is that whom performs an economic activity liable of tax, and performing an economic activity under the scope of VAT liable of tax grants the status as taxable person. This sub-chapter studies the case-law of the CJEU in order to provide this research with the most

[52] For a better insight on this issue of chargeability of VAT after the transactions have taken place, read Aleksandra Bal's conclusions on her article *"The Vague Concept of 'Taxable Person' in EU VAT Law",* International VAT monitor, September / October 2013, page 294

complete concept of what an economic activity is and where do carpool activities stand in regards of those.

3.4.2 The private and economic exploitation: *Enkler*

Mrs Enkler declared to the tax authorities that she was conducting a business hiring out motor caravans[53]. She used the motor caravan for both private and business purposes, declaring to the authorities, in the following years after its acquisition, deductions on the use of the vehicle for business purposes which accounted twice to third parties and several times to her own husband[54].

The tax authorities considered that Mrs. Enkler "did not act as a trader when she hired out her caravan"[55] and reclaimed the VAT wrongly charged as a trader. Thus, Mrs. Enkler appealed the decision of the authority and the case was brought before the CJEU to give a preliminary ruling on the matter.

The first question was whether to consider the hiring out of tangible property as a person supplying services or exploitation "for the purpose of obtaining income therefrom on a continuing basis"[56]. On this regard, both the opinion of the AG[57] and the CJEU consider that the hiring out of tangible property and its 'exploitation' constitutes an economic activity if it is done "for the purpose of obtaining income on a continuing basis"[58].

In order to determine whether Mrs. Enkler's activity falls under the scope of the Sixth Directive, the CJEU decided that "it is for the national court to evaluate the circumstances of the particular case"[59]

3.4.3 Cases with no economic activity: *Hong Kong Trade*

Established in Amsterdam, this organization offered, free of charge, information on trade with Hong Kong and between Hong Kong and other western European countries. They do not perform an economic activity as such, although they receive funding from the administration in Hong Kong to conduct their activities of commercial promotion. They tried to deduct input tax on their activities and the tax authorities denied this right. The case was then brought before the CJEU.

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[53] Judgment of the Court of 26 September 1996, *Enkler*, C-230/94, EU:C:1996:352, paragraph 6
[54] Ibid. paragraphs 8 to 11
[55] Ibid. paragraph 17
[56] Ibid. 18(1)
[57] Opinion of the Advocate General Cosmas of 28 March 1996, Enkler, C-230/94, EU:C:1996:145, ECR I – 4526
[58] Judgment of the Court of 26 September 1996, *Enkler*, C-230/94, EU:C:1996:352, paragraph 22
[59] Ibid. paragraph 30

The case resulted in two questions: Whether to consider Hong Kong Trade a taxable person and if they had the right to deduct tax. The opinion of the AG and the judgment of the Court shared a similar point of view on the first question, which affected the answer to the second question as not granting the right to the deduct to Hong Kong Trade: Thus, the opinion of the AG considers that the activity of Hong Kong Trade shall be regarded as granting the taxable person status only in cases where other undertakings would perform similar services against payment, since this would affect the fiscal neutrality envisaged in the VAT Directive[60], while the Court considers that Hong Kong Trade shall under no circumstances be considered a taxable person for deduction rights since all their services are provided free of charge, which puts them in a position in the chain of production resembling the figure of the final consumer, which do not have the right to deduct tax[61].

3.4.4 Economic activity without "continuing basis" criterion:

a) Single economic activity: *Welcome Trust*

This case is interesting due to the fact that there is a number of sales of shares which do not qualify as economic activity under the definition contained in the Sixth Directive; However, one of those sales, an international sale of shares which needed a more complex procedure in order to perform the mentioned sale, incurred in certain transactions liable of input VAT which the claimant wanted to deduct.

The Wellcome Trust is a charity that applied for refund of input VAT paid for shares sold outside the EU due to the complexity of operation of the second sale of shares contained in the case[62], which the charity considered to be an economic activity and thus, with the right to deduct the input tax[63]; Then, after protesting the decision of the tax authority on their interpretation of the Trust as taxable person and the existence of an economic activity granting the right to deduct, the national court requested the CJEU to give a preliminary ruling on the matter[64].

The interesting take on this case is the reference of the appellant to the "continuing basis" of the activity of the trust, although it would be only the international sale of shares (referred as "the second sale" throughout the judgement document), if this was prolonged in time, the regular sale of shares would be undeniably considered an economic activity[65]. The counter-

[60] Opinion of Avocate General Verloren Van Themaat of 2 March 1982, *Hong Kong Trade*, C-89/81, EU:C:1982:73, page 1295
[61] Judgment of the Court of 1April 1982, *Hong Kong Trade*, C-89/81, EU:C:1982:121, paragraph 10
[62] Judgment of the Court of 20 June 1996, *Wellcome Trust*, C-155/94, EU:C:1996:243, paragraph 2 and 10
[63] Ibid. paragraphs 14 and 15
[64] Ibid. paragraph 20: Questions 1 & 2.
[65] Ibid. paragraph 26

argument of the CJEU was that according to the Sixth Directive this view should be rejected because Wellcome Trust does not have "the status of professional dealer in securities"[66], and although this does not preclude the sale of shares of being treated as an economic activity under certain circumstances due to the wide scope of the VAT, the holding of shares is just "the mere exercise of the right of ownership by its holder"[67]. Furthermore, the Court compares the position of the Trust with the figure of a private investor due to its prohibition to engage in trading in investments which limits its ability to manage securities [68].

The Court followed the AG's opinion which determined that the application of the rules contained in the Sixth Directive are intended to be applied to persons 'economically active' only and "not to those whose activity is analogue to that of a private investor"[69]

b) Cases with occasional economic activities: *Kostov*

Mr Kostov is a self-employed bailiff registered for VAT purposes[70] who concluded a contract to perform as an agent making bids for land and transferring those acquisitions to the other part of the contract in exchange for a lump sum of money[71]. Thus, Kostov, after successfully acquiring the ownership of the properties, complying with his part of the contract, the problem arose when the tax authorities considered that the amount received under the contract as agent was a supply of service provided by Kostov, deeming the supply liable of VAT[72].

Kostov considers that since this activity is first of all of an occasional character plus the fact that the nature of the contract is not connected to his regular economic activity as self-employed bailiff, it should not be liable of VAT[73].

The Court held that the literal wording of the Directive, specifically the rule contained in article 9(1), establishes that taxable person (*ergo* subject to VAT) is that who "carries out independently in any place any economic activity, whatever the purpose or results of that activity" [74]. Thus, Kostov is liable to

[66] Ibid. paragraph 31
[67] Ibid. paragraph 32
[68] Ibid. paragraph 36
[69] Opinion of Advocate General Lenz of 7 December 1995, *Wellcome Trust*, C-155/94, EU:C:1995:426, paragraph 28
[70] Judgment of the Court of 13 June 2013, *Kostov*, C-62/12, EU:C:2013:391 paragraph 12
[71] Ibid. paragraph 13
[72] Ibid. paragraph 14-17
[73] Ibid. paragraph 20
[74] Article 9(1), *VAT Directive*, Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

pay VAT in all his economic activities, even if they are not connected to his regular economic activity[75].

As established by the Court, for instance, in the *Hutchison 3G* or *Wellcome Trust* cases, occasional activities performed by non-taxable persons are not considered economic activities under the scope of the Directives; However, the *Kostov* case involves a self-employed individual carrying out an occasional economic activity which deems him liable of VAT in all his economic activities.

Although this case is not so relevant for the case studied in this research, it is important in order to establish the most accurate definition of economic activity possible and *Kostov* provides the perfect example of occasional activities considered as economic ones.

c) *Force majeure* and the economic activity: *Redlihs*

In this case, the CJEU analyses whether to consider the supplies of timber from a non-taxable person as an economic activity; This can be approximated to the idea of cost-sharing in a way: A driver who needs to travel long distances might find other people to share their car trip and its costs in the same way Redlihs sold those supplies of timber to recover part of his loss after a storm.

Mr. Redlihs is not a taxable person; He owes some land in the forest and he does not use this forest for economic exploitation: After a storm, some of the trees from the forest fell and Mr. Redlihs decided to sell the timber to try and recover some of the value lost from his land; Those sales did not include any VAT since Mr. Redlihs is not a taxable person. However, the tax administration considered that the sales of timber are an economic activity and therefore, liable of VAT. The case was then brought to the CJEU[76].

The first question brought before the CJEU is the most important for this research since it enquires the Court whether to assess the activity as an economic exploitation of tangible property. Thus, the CJEU held that *force majeure* as seen in the case, aimed to "recover" the loss accidentally suffered by Redlihs is not relevant in order to assess the existence of an economic activity, establishing in their decision that "the occasional or continuous basis of the activity is of prime importance and mentioning as well that nonetheless, national courts must observe all the circumstances of every case in order to define whether the authorities are before an economic activity or not"[77]

[75] Judgment of the Court of 13 June 2013, *Kostov*, C-62/12, EU:C:2013:391 paragraph 31
[76] Judgment of 19 July 2012, *Rēdlihs*, C-263/11, ECLI:EU:C:2012:497 paragraph 13 to 15
[77] Ibid. paragraph 40

3.4.6 Summary of the concept of economic activity provided by the case law of the CJEU

The existence of an economic activity, as consistently held by the CJEU, must be assessed attending to objective criteria and specially to the continuing basis of the activities. Thus, in cases were there is an occasional exploitation it is for national courts to determine if they constitute an economic activity, as it follows from the *Enkler* case.

Hong Kong Trade is quite difficult to compare to the case studied in this research since carpooling is not performed free of charge; Nonetheless, both peer-providers in carpooling and Hong Kong Trade do not charge VAT on their transactions, precluding the assessment of deductible tax and their status as taxable persons.

In *Wellcome Trust* the Court follows the same principle envisaged in the *Enkler* case: A non-taxable person who performs one transaction that might be liable of tax shall not be regarded as an economic activity liable of VAT.

Carpooling, as the one seen in "*sub-chapter 2.4: Private use of vehicles for carpooling in other jurisdictions"*, covers the commuting between home and workplace which is presumably to be considered as an activity carried out on a continuing basis; As the AG established in their opinion on *Enkler*, "not every activity which is carried out independently and consists in the exploitation of tangible property […] is to be deemed an 'economic activity' […] but only such activity which is for the purpose of obtaining income therefrom on a continuing basis"[78]. Furthermore, payments would be in place in carpooling in the concept of cost-sharing, so considering carpool activities as genuine economic activities could be argued.

The principle extracted from *Redhils* might be the most important of the cases studied in this chapter since the decision of the Court establishing that in order to determine whether there is an economic activity, the national courts must observe the circumstances of the case[79] affects the case studied in this research and it can be argued whether the Spanish national court applied the principle envisaged in *Redhils* correctly.

[78] Opinion of the Advocate General Cosmas of 28 March 1996, Enkler, C-230/94, EU:C:1996:145, I – 4527
[79] See footnote 77

3.5. The direct link

3.5.1 The importance of the direct link: *Tolsma*

The direct link has been present in the decisions of the CJEU in indirect taxation matters since even the eighties; Thus, in the *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats* case, we find that "a provision of services is taxable, within the meaning of the Second Directive, when the service is provided against payment and the basis of assessment for such a service is everything which makes up the consideration for the service; there must therefore be a direct link between the service provided and the consideration received".[80]

However, attending to the similarities of the case study found in the next chapter of this research, the landmark decision that offers us a very close analysis of the direct link and carpool activities is the *Tolsma* case.

Tolsma is a street musician playing an instrument on the highway, obtaining a consideration from that activity; The authorities considered that *Tolsma* was indeed performing and economic activity as offering a service, in this case playing music, against a consideration.

Thus, the case found its way to the CJEU and the court decided that the definition of economic activity does "not include an activity consisting in playing music on the public highway, for which no remuneration is stipulated, even if the musician solicits money and receives sums whose amount is however neither quantified nor quantifiable"[81].

Furthermore, the CJEU established that "a provision of services is taxable only if there is a direct link between the service provided and the consideration received or if there is a reciprocal performance such as a legal relationship or an agreement"[82]

3.5.2 Is there a direct link attributable to carpooling?

In both Tolsma and carpooling, the continuing basis criterion is fulfilled, as consistently held by the CJEU in *Enkler*, *Wellcome Trust*, *Rompelman*, etc.; Even, the principle following the *Redlihs* case on which the mere alleviating of a loss does not preclude an activity from being categorized as an economic activity is fulfilled.

On the other hand, the existence of the required direct link, as held by the Court, can be argued to exist in the carpooling model studied in this research since agreements take place in the platform. Thus, the tax committee has expressed that "situations whereby goods or services are made available as

[80] Judgment of 5 February 1981, *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats*, C-154/80, ECLI:EU:C:1981:38, paragraph 12
[81] Judgment of 3 March 1994, *Tolsma*, C-16/93, EU:C:1994:80 paragraph 20
[82] Ibid. p. 13-20

part of an exchange, the existence of a direct link between the supply and the consideration in kind for it could be disputed and it would in any event have to be carefully assessed taking into account all the factual circumstances of the case at hand"[83]. If all the criteria established by the Court is fulfilled in the carpool model of *BlaBlaCar*, there is no reason for tax authorities of the Member States not to treat peer-providers of the platform as taxable persons and requesting their compliance to the tax laws.

However, the fact that the trips offered by non-taxable (in reference to the *Kostov* case) peer-providers shall happen regardless other users are found to share the costs of the trip, even when the continuing basis exists (see *Sub-chapter 2.4: Private use of vehicles for carpooling in other jurisdictions*), as well as the lack of records of other cases where the activity carried out by peer-providers in the platform has been prosecuted by the authorities in other Member States of the EU[84] should deem apparent that the carpool model used by *BlaBlaCar* does not fulfil the direct link *criterion* of the CJEU and accordingly it is not correct to consider the transactions between peer-providers and peer-consumers in carpooling as economic activities.

[83] VAT Committee, *VAT treatment of sharing economy,* Working Paper No 878, 22 of September 2015, page 10

[84] Question 7, *Annex I "Interview with Blablacar's Manager of communication Itziar Garcia"*

4. Spanish national legal framework and case analysis

4.1 Background of the case

The year 2016 was definitely not good a good year for the sharing and collaborative economy in the capital of Spain: *Uber* was allowed to pursue their economic activity after a ban set in 2014 was lifted[85], *BlaBlaCar* was brought before the courts of commercial law in Madrid for a matter of unfair competition against a confederation of bus enterprises that considered that *BlaBlaCar* offers a professional service of transport of passengers without the due licensing as an intermediary[86] and *BlaBlaCar* peer-providers started being investigated by the authorities[87].

Furthermore, Rodríguez Sardinero, Chief Executive of Transport in the Region of Madrid declared in 2016 that the authorities will continue inspecting drivers and warned to *BlaBlaCar* that "they must change their business model if they want to function in Spain" and added that "unless Spain changes the law, their way to work is illegal"[88].

While the Uber case is not the matter of study since it is not linked to the topic of this research, it shows however a clear picture of the environment in Madrid, being this an uncertain ground to the revolution brought by the sharing economy; Albeit *Uber* is a natural "antagonist"[89] to the taxi services of Madrid, the activity pursued by the users of *BlaBlaCar* is connected on the other hand to the bus sector and other inter-city transportation services.

Although that case was already decided and the Court ruled that there was no unfair competition[90] since there is no professional supply of transport of passengers, it is important to understand that the authorities in the Region of Madrid and other sectors of transportation have tried systematically to restrict

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[85] Serrato, F: *Uber returns to operate in Madrid with licensed drivers* <https://english.elpais.com/elpais/2016/03/30/inenglish/1459323814_036208.html> (Accessed 25th of April, 2020)
[86] Jones, J. *Spanish bus operators call for ban on BlaBlaCar*, <https://www.thelocal.es/20150812/blablacar> (Accessed 25th of April, 2020)
[87] AFP: *BlaBlaCar drivers threatened with fines in Spain* <https://www.thelocal.es/20161018/blablacar-drivers-threatened-with-fines-in-spain> (Accessed 25th of April, 2020)
[88] González Valero, S.: *BlaBlaCar recibe en Madrid su primera sanción en Europa* <https://www.elmundo.es/economia/2016/10/17/5804afd0e2704efe768b4620.html> (Accessed 25th of April 2020)
[89] Doncel, L: *Taxis vs Uber: A war between very similar enemies* <https://english.elpais.com/elpais/2019/01/29/inenglish/1548749144_862481.html> (Accessed 25th of April 2020)
[90] Comuto SA, Blablacar: *"The sentence of the Region of Madrid's Court favouring BlaBlaCar"* <https://blog.blablacar.es/newsroom/noticias/la-sentencia-de-la-audiencia-provincial-de-madrid-a-favor-de-blablacar-nos-llena-de-orgullo-y-alegria> (Accessed 25th of April)

the expansion of the sharing economy and in particular, the activities pursued by users of *BlaBlaCar's* carpool platform.

4.2 The Spanish legal system: Placement of the different sources of Law in the legal system

The foremost set of rules is contained in the Spanish Constitution. Already in its preamble, the rule makers established that it "consolidates a State that ensures the rule of law as an expression of the nation's will"[91]

Moreover, the Constitution establishes that "both citizens and Public Institutions are subject to the Constitution and the rest of legal system"[92] and the third paragraph of the same article envisages that "the Constitution guarantees the principle of legality, normative hierarchy, the publicity of legal statutes, the non-retroactivity of punitive provisions that are not favourable to or restrictive of individual rights, the certainty that the rule of law shall prevail, the accountability of public authorities, and the prohibition of arbitrary action of public authorities"[93].

Regarding the control of administrative operations, the Spanish Constitution contains that "The Public Administration shall serve the general interest in a spirit of objectivity and shall act in accordance with the principles of efficiency, hierarchy, decentralization, deconcentration and coordination, and in full subordination to the law"[94] and "the Courts shall check the power to issue regulations and ensure that the rule of law prevails in administrative action, and that the latter is subordinated to the ends which justify it"[95].

The Civil Code is right below the Constitution, hierarchically speaking, and envisages in its first article the sources of law in the Spanish legal system: "The sources of the Spanish legal system are statutes, customs and general legal principles"[96], in the next sub-article establishes the hierarchy of the legal system "any provisions which contradict another of higher rank shall be invalid"[97] and regarding customs, the Civil Code envisages that "shall only apply in the absence of applicable statutes, provided they are not contrary to morals or public policy, and that it is proven"[98]. To conclude with the relevant articles of the Spanish Civil Code it must be mentioned that "general principles shall apply in the absence of applicable statute or custom"[99].

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[91] Preambulo, Constitución Española. Boletín Oficial del Estado, 29 de diciembre de 1978, núm. 311, pp. 29313 a 29424 Cita en texto: (CE 1978)

[92] Ibid. Article 9(1)
[93] Ibid. Article 9(3)
[94] Ibid. Article 103(1)
[95] Ibid. Article 106(1)
[96] Article 1(1), Real Decreto de 24 de julio de 1889, por el que se publica el Código Civil
[97] Ibid. Article 1(2)
[98] Ibid. Article 1(3)
[99] Ibid. Article 1(5)

Besides the important articles quoted from the Constitution and the Civil Code, it is important to clarify that the case object of this research falls under the "administrative law" jurisdiction and, although "administrative precedent" (as in case-law) has a link to customs as long as the decisions of the administrative courts create customs by way of continuous repetition of those rulings; However this link is provided by the principle of legality and not by the use of customs *per se*. For instance, similar cases with similar circumstances shall result in the same rulings applying the normative in the same way (principle of legality and non-arbitrary rulings) otherwise some of the decisions of the courts would be undeniably a violation of the principles of the Spanish legal system. However, the case law might be observed when the regulations allow multiple interpretations.

The rules of administrative law that will be mentioned in the ruling analysed in the following sub-chapters are the following:

Article 140(2)[100] of the LOTT which establishes fines for those "contracting or profiting on own behalf of transport services without previously holding the necessary transport license" for amounts of 4001 to 6000 euros, according to the same normative[101].

However, there is no need of an authorization in order to perform private transportation[102] if it fulfils the following circumstances: The nature of the travel is of a personal or domestic need of the owner of the vehicle and the owner of the vehicle does not receive a monetary remuneration besides the mere sharing of costs[103]

4.3 The case object of the research

Following the now well-known events contained in the sub-chapter *4.1 "Facts surrounding the case: A not very welcoming climate for the sharing economy"*, the administrative authorities requested to *BlaBlaCar* all the data they had on the users of their online carpooling platform with the idea to prosecute the peer-providers on the grounds of being suppliers of a service of professional transportation of passengers and lacking the due license.

Thus, the 17th of October of 2016, the first peer-provider of carpool activities, referred as '*RMR*' case from now on, was fined with four thousand and one euros by the Directorate-General of Transportation in the concept of penalty for the activity pursued as driver of the carpooling platform. Luckily, this individual decided to argue against the decision of the administrative bodies,

[100] Ley 16/1987, de 30 de julio, de Ordenación de los Transportes Terrestres
[101] Ibid. Article 143(1)(i)
[102] Ibid. Article 103(2)(b)
[103] Ibid. Article 101(1)(a)

taking the issue before the ordinary justice, making possible this research, which finds its highlight in the following subchapters.

4.4 The argumentation of the parties in the case[104]

a) *RMR*'s attorney

The attorney of *RMR* required first to the court that the claims from the administrative authorities shall be considered invalid or that the sanction to be modified and be adapted to the legality with subsidiary character. Meaning that, in case the claims made by the administration were not to be dropped at least their decision should be made according to the law.

Furthermore, the attorney considers that the court should adopt the view of *RMR* not performing a professional service of transport of passengers as the services were part of a carpool activity sought through the platform provided by *BlaBlaCar*, where those trips had an strict personal nature (to visit his son in another region) and that did not report any kind of profit, being such one of the requirements to be considered as a supplier of services performing professional transport of passengers according to the national law.

To conclude, *RMR* claims that the process has infringed procedural guarantees, for instance, the presumption of innocence as well as the lack of motivation of the sanction which infringes the principle of legality.

b) The Administration

The court considers that the procedural guarantees are fulfilled, and no infringement has occurred, not causing a lack of defence on *RMR* since he was informed through all the stages of the process. Against the accusation of lacking motivation to their decisions, the court uses case law from the Spanish Supreme Court which establishes that the motivation to the decisions can be contained in the administrative act itself, not being necessary a "proper" motivation to their rulings as such; The court considers the decision is sufficiently explained by the description of the facts contained in the administrative file as well as the legal basis that motivate the decision.

Next, on the fifth point of the ruling, the court establishes that the question is, essentially, to decide whether *RMR* used the carpooling platform in order to obtain profit, qualifying the activity as a "public transport of passengers" which requires the proper administrative authorization when the services offered via *BlaBlaCar* go beyond what is considered as sharing a private vehicle and costs of the trips with other individuals and not obtaining any profit.

[104] All the information contained in this sub-chapter can be found in the Annex II

The court proceeds then to indicate that, from August 2015 to April 2016, *RMR* performed forty-eight trips using the carpooling platform and considers that *RMR* has received considerations that go beyond the mere sharing of costs.

To conclude with the arguments that are important for our research, the court considers that *RMR* uses *criteria* estimating the costs where includes tires, oil, repairs, insurance and fuel which, according to the court, it establishes the *criteria* of calculation of costs per kilometre for public transport; Nonetheless, the concept of collaborative economy must limit the sharing of costs to the trip which should include only the costs on fuel and tolls of the trip which are set to nineteen cents of euro per kilometre.

4.5 The outcome of the case and analysis

The Administrative Court of Madrid ruled that *RMR* was indeed performing professional transport of services through the platform provided by *BlaBlaCar* without the proper license, although as seen in articles 103(2)(b) and 101(1)(a) of the LOTT there is "no need of an authorization in order to perform private transportation" if "the nature of the travel is of a personal or domestic need and the owner of the vehicle does not receive a monetary remuneration besides the mere sharing of costs";

Furthermore, *RMR* charged no more than 0'15€/km[105], while the decision of the Court establishes that the limit is set on 0'19€/km for the calculation of costs on fuel and tolls for cost-sharing in carpooling, amount set by an annual report on costs of road transportation by private vehicles (See table 1) from the Transport and Logistics Observatory of Spain (OTLE), created by the Ministry of Development which has nothing but an informative value.

The sentence does not refer to the "continuing basis" criteria besides mentioning the number of trips performed in a nine months period. Thus, disregarding the principle of presumption of innocence when the administrative court has failed to prove, basically due to impossibility to provide evidences, that RMR did not drive those forty-eight times for personal and private reasons (which is the only criteria to follow according to Spanish national law), and furthermore, the national court assessed its ruling based on a yearly report with no legal value to determine that RMR was profiting from their activity even when the amounts received did not exceed the threshold established by this same report.

[105] Question 6, *Annex I "Interview with Blablacar's Manager of communication Itziar Garcia"*

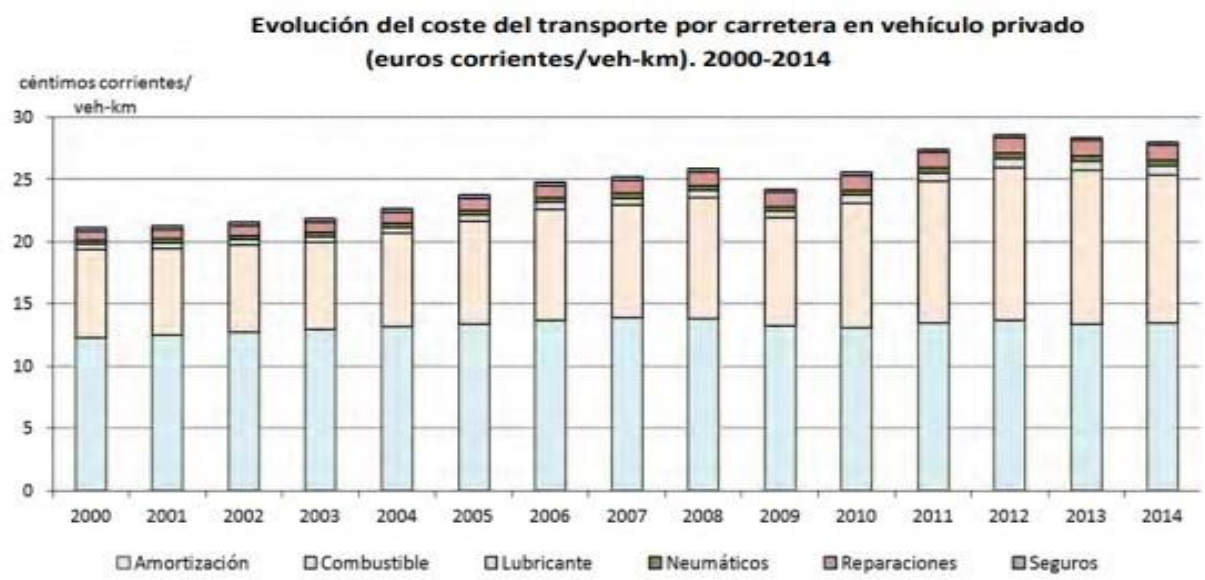

Table 1[106] *From left to right the bottom of the graph reads: "Amortization", "Fuel", "Oil", "Tires", "Repairs", "Insurance"

Hence, it is for anyone to assume that the problematic here is that RMR assessed the price calculating the costs per kilometre not only attending to fuel and tolls but also other *criteria* which are not supported by this yearly report that, interestingly enough, was created in 2012[107] and again, has just an informative purpose and no legal value.

The paramount fact to compare this case to all the case law explained in this research is that if no license provided by the administration was necessary in order to conduct an economic activity of transport of passengers, this ruling would consider RMR as a taxable person liable of VAT for those transactions carried out under the collaborative economy, matter which presumably could be brought before the CJEU.

[106] Observatory of Transport and Logistics in Spain, *Annual report 2015* <http://observatoriotransporte.fomento.es/NR/rdonlyres/0AE839CF-9E00-46F3-A27C-88B14AC37715/136237/INFORME_OTLE_2015.pdf >, February 2016, page 137 (Accessed 25th April 2020)

[107] Ministerio de Transportes, *"¿Qué es el OTLE?"* (What is the OTLE?) <https://observatoriotransporte.mitma.es/que-es-el-otle> (Accessed 20th of May)

5. Conclusions

"Does the Spanish case-law comply with the national and European legal frameworks in their administrative ruling against an individual participating as a peer-provider in the collaborative economy?"

The EU case law is clear: Even with a continuing basis, as follows from *Tolsma,* if there is no direct link or contractual relationship between the supply of service and the consideration, the tax authorities cannot treat that transaction as an economic activity. The existence of such link can be argued to exist in those cases where there are certain agreements taking place through an online platform; However, as mentioned several times in this research, the model implemented by *BlaBlaCar* has not been prosecuted in any other European country before; Furthermore, some Member States even offer tax benefits to carpooling related to the workplace, as seen in *Sub-chapter 2.4: Private use of vehicles for carpooling in other jurisdictions.*

Shall we assume then that every other region and authority of the EU is wrong on their interpretation about considering the peer-providers of *BlaBlaCar's* carpool model an economic activity when even the same administration in the region of Madrid, responsible of this ruling, has ceased to prosecute the users of the platform? This seems to be unlikely.

Thus, it is apparent to conclude that the ruling from the administrative court of the Region of Madrid goes against what has been established by the CJEU case law: The arguable presence of a direct link should at least had been discussed by the national court in order to assess its character of economic activity and request a preliminary ruling if such question presents doubts to the Administrative Court of the Region of Madrid; Moreover, the national court did not bring, in the different stages of the case, the matter before the CJEU, as the TFEU requires; Hence, it is apparent that the ruling goes against the principle of legality, the rule of law and the principle of prohibition of arbitrary action of public authorities.

The truth is, if the national court considers that there is in fact a direct link between peer-users and peer-providers in the carpool model created by *BlaBlaCar,* and certainly many users fulfil the 'continuing basis' criterion: Why there are no other cases of users being prosecuted in the last four years?

Therefore, a state liability proceeding should be imposed to Spain, at least to clarify the vision of the national court on their interpretation of carpooling as an economic activity; Furthermore, it would be interesting to know the opinion of the Court on the existence of a direct link, if any, in carpool activities where certain degree of agreement is present as shown in this research.

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- ANNEX I -

Interview with *Blablacar's* Manager of communication Itziar Garcia

“March 8, 2020

Dario Gomez(DG): Good Afternoon, Itziar* and thank you for answering my questions today. *BlaBlaCar* is a social media aimed to put in touch users willing to share their car and travel costs with other users. Regarding the study of “carpooling” and its tax treatment in the European legal framework, there are some questions around the business model of your company and their users.

Q1: First, I would like to know when *BlaBlaCar* changed the payment system, removing the payments in cash, to one completely electronic: Is this a measure aimed to discourage the inadequate use of the social media by some of the users or is it some sort of requirement imposed by any authority?

Itziar Garcia(IG): The system changed in 2014 and the main objective was to improve the trackability and avoid users “never showing up”. It was not a requirement imposed by any authority.

Q2 DG: Regarding the fees charged for your service, Is this VAT paid related exclusively to the e-service offered by *BlaBlaCar* as e-commerce platform or is it proportional to the consideration paid for the trip? Meaning: Is there any VAT paid on the trips agreed via your platform?

IG: In the sharing of costs there is no professional service, so there is no VAT. There is, however, VAT in the administrative fees over the price that *BlaBlaCar* Spain charges for the service.

Q3 DG: When was limited the freedom of the users to decide the price for the trip? Specially regarding the maximum price per kilometre.

IG: *BlaBlaCar* has always been a platform to share travel costs; There has always existed a limit to avoid the aiming for profit.

Q4 DG: What is the *criteria* to limit that price?

IG: The recommended price is currently of 0.05€/Km. On this consideration, there is a limit of 50% under and over the recommended amount. This price should cover fuel, tolls, etc. This amount is far from the 0.28€/km established by the “Transport and Logistics Observatory of Spain” (OTLE), under the Ministry of development, which has set the structure for costs within private transport.

Q5 DG: Is there any guidelines submitted by the administration with limits or advices to deal with those cases where a peer driver could be

accused of aiming for profit or on the contrary it has been *BlaBlaCar's* legal department designing those measures to avoid the eventual prosecution of users by the administration?

IG: The 'LOTT' envisages that there cannot be a profit motivation, but no law or guideline submitted by the administration defines exactly the costs. We (*BlaBlaCar*) have fixed a consideration which, as established before, is far from the parameters imposed by the OTLE, so there cannot be profit.

Q5 DG: Regarding the previous question, in the case initiated in 2016 where a *BlaBlaCar* user was accused of making profit through the social media (*RMR* case) in which the sentence ruled a fine for his activity: Did this user follow the recommended prices established by your platform?

IG: *BlaBlaCar* could prove that the user's activity complied with the rules of the platform and the normative in force. The considerations received never surpassed the travel costs which were around 0,14€/km, still far away from the 0,28€/km established by the OTLE.

Q7 DG: Has *BlaBlaCar* an opinion on this matter, which resulted in a fine of 4001€ for the activity conducted through your social media?

IG: We accept the administrative decisions. *BlaBlaCar* has always collaborated with the authorities and has followed the law in every country where they carry on its activities. *BlaBlaCar* is established in 22 countries, ten years in Spain, and it has never happened anything like that in any other region or country, which shows the exceptional character of this ruling in the region of Madrid.

Q8 DG: Did this case affect somehow the rest of users or the platform's activity?

IG: Actually, we have not noticed any changes in the activity by the users in the platform, which keeps growing consistently year after year in Spain.

DG: That's all, Itziar. Thank you very much for your time.

*Itziar Garcia, Communication Manager in Spain and Portugal"[108]

[108] Gomez, D.: Extracted from Annex I of the working paper "*Is carpooling an economic activity? Direct effect and the 'continuing basis in peer-providers"* Examination Paper, HARN59*,* Lund University, March 2020

- **ANNEX II -**

Ruling of the Administrative court of Madrid *Every name has been covered to comply with the data protection rules in force

Administración de Justicia

Juzgado de lo Contencioso-Administrativo nº 11 de Madrid
C/ Gran Vía, 19 , Planta 3 - 28013
45029710

NIG: 28.079.00.3-2018/0007832
Procedimiento Abreviado 168/2018
Demandante/s: D./Dña. R M R
PROCURADOR D./Dña. A C L
Demandado/s: CONSEJERIA DE TRANSPORTES E INFRAESTRUCTURAS
LETRADO DE COMUNIDAD AUTÓNOMA

SENTENCIA Nº 199/2018

En Madrid, a 28 de junio de 2018.

El Ilmo. Sr. D. J T M MAGISTRADO-JUEZ del Juzgado de lo Contencioso-administrativo número 11 de MADRID ha pronunciado la siguiente SENTENCIA en el recurso contencioso-administrativo registrado con el número 168/18 y seguido por el procedimiento abreviado, en el que se impugna la siguiente actuación administrativa: RESOLUCION DE LA CONSEJERIA DE TRANSPORTES, VIVIENDAS E INFRAESTRUCTURAS, POR LA QUE SE RESUELVE EL RECURSO DE ALZADA INTERPUESTO CONTRA LA RESOLUCION DE LA DIRECCION GENERAL DE TRANSPORTES, DE 17 DE OCTUBRE DE 2016, RECAIDA EN EL EXPEDIENTE SANCIONADOR BD-M2/129/002/2016.

Son partes en dicho recurso: como recurrente DON R M R representado por la Procuradora DOÑA A C L y dirigido por la Letrada DOÑA N O C y como demandada COMUNIDAD DE MADRID, representado y dirigido por el Letrado DON F M E.

ANTECEDENTES DE HECHO

PRIMERO.- Por el recurrente mencionado anteriormente se presentó escrito de demanda de Procedimiento Abreviado, contra la resolución administrativa mencionada, en el que tras exponer los Hechos y Fundamentos de derecho que estimó pertinentes en apoyo de su pretensión terminó suplicando al Juzgado dictase Sentencia estimatoria del recurso contencioso-administrativo interpuesto.

SEGUNDO.- Admitida a trámite por proveído, se acordó su sustanciación por los trámites del procedimiento abreviado, señalándose día y hora para la celebración de vista, con citación de las partes a las que se hicieron los apercibimientos legales, así como requiriendo a la Administración demandada la remisión del expediente . A dicho acto de la vista compareció la parte recurrente, afirmando y ratificándose la recurrente en su demanda.

TERCERO.- En este procedimiento se han observado las prescripciones legales en vigor.

Administración de Justicia

FUNDAMENTOS DE DERECHO

PRIMERO.- En el presente recurso contencioso-administrativo se impugna la resolución de la CONSEJERIA DE TRANSPORTES, VIVIENDAS E INFRAESTRUCTURAS, por la que se resuelve el recurso de alzada interpuesto contra la resolución de la DIRECCION GENERAL DE TRANSPORTES, de 17 de octubre de 2016, recaída en el expediente sancionador bd-m2/129/002/2016, por la que se impone sanción por importe de 4001 euros a la R Mi Ru de acuerdo con los arts. 143.1.1 i de la Ley 16/1987 y 201 R.D 1211/1990

La actuación administrativa impugnada tiene su origen en la denuncia formulada por la Inspección de Transportes, el día 20 de julio de 2016, según Acta I-31/16 nº 2 por:

"Realizar transporte público de viajeros careciendo de autorización de transporte. Servicios realizados con el vehículo matrícula 8353 –JJV en el periodo comprendido entre agosto de 2015 y abril de 2016 careciendo del preceptivo título habilitante, en la medida en que el importe total cobrado por los trayectos realizados, excede del importe resultante de compartir los gastos de trayecto entre los distintos viajeros"

SEGUNDO.- La parte recurrente ejercita pretensión de nulidad consistente en que se declare no ser ajustada a derecho la resolución impugnada y se proceda a su anulación. Que con carácter subsidiario se modifique la sanción adaptándose al mínimo legal.

Señala la parte recurrente, en síntesis, los siguientes hechos:

1.- Que nunca ha prestado ningún servicio de transporte de viajeros.

2.- Que es usuario de portal web https://www.blablablacar.es, habiendo contactado con otros usuarios para compartir gastos por los desplazamientos a Alicante y a Burgos que iba a realizar, en todo caso, por motivos estrictamente personales, siendo los viajes de naturaleza privada, que no suponen la prestación de ningún servicio de transporte público, por los que no percibió ningún beneficio.

Se articula la defensa en base a los siguientes motivos de impugnación:

Primero.- 1.- Vulneración de diversas garantías del procedimiento sancionador; - Vulneración del derecho a la presunción de inocencia. - .

Segundo.- Falta de motivación.

Tercero.- Infracción de los principios de tipicidad y legalidad.

Por su parte la defensa de la Administración demandada y de la codemandada interesa la desestimación del recurso, con condena en costas, al entender que la resolución impugnada es conforme a Derecho

TERCERO.- Los procedimientos sancionadores han de garantizar al presunto responsable los siguientes derechos: A ser notificados de los hechos que se le imputen, de las infracciones que tales hechos puedan constituir y de las sanciones que, en su caso, se les puedan imponer, así como de la entidad del instructor, de la autoridad competente para imponer la sanción y de la norma que atribuya la competencia, a formular alegaciones y utilizar los medios de defensa admitidos por el Ordenamiento Jurídico que resulten procedentes. Asimismo tienen derecho a formular alegaciones y utilizar los medios de

Madrid

Administración de Justicia

defensa admitidos por el Ordenamiento Jurídico que resulten procedentes y demás derechos reconocidos en los arts. 13 y 53 de la Ley 39/15

Ninguna vulneración cabe apreciar en la tramitación del procedimiento sancionar, donde a lo largo del expediente el interesado ha podido conocer la infracción que se le imputaban y formular alegaciones o recursos, sin que se aprecie indefensión alguna.

CUARTO.- Debe señalarse que conforme con un reiterado criterio jurisprudencial: *«La motivación de cualquier resolución administrativa constituye el cauce esencial para la expresión de la voluntad de la Administración que a su vez constituye garantía básica del administrado que así puede impugnar, en su caso, el acto administrativo con plenitud de posibilidades críticas del mismo, porque el papel representado por la motivación del acto es que no prive al interesado del conocimiento de los datos fácticos y jurídicos necesarios para articular su defensa. El déficit de motivación productor de la anulabilidad del acto, radica en definitiva en la producción de indefensión en el administrado»* (STS 29 septiembre 1.992). Tesis ésta que ha sido defendida igualmente por el Tribunal Constitucional, que ha dicho que *«...es claro que el interesado o parte ha de conocer las razones decisivas, el fundamento de las decisiones que le afecten, en tanto que instrumentos necesarios para su posible impugnación y utilización de los recursos»* (STC 232/1.992, de 14 diciembre).

La motivación de la actuación administrativa constituye el instrumento que permite discernir entre discrecionalidad y arbitrariedad, y así *«...la exigencia de motivación suficiente es, sobre todo, una garantía esencial del justiciable mediante la cual se puede comprobar que la resolución dada al caso es consecuencia de una exigencia racional del ordenamiento y no el fruto de la arbitrariedad (SSTC 75/1.988, 199/1.991, 34/1.992 y 49/1.992»* (STC 165/1.993, de 18 mayo).

Con relación a este extremo, el Tribunal Constitucional ha afirmado que "*...la facultad legalmente atribuida a un órgano (...) para que adopte con carácter discrecional una decisión en un sentido o en otro no constituye por sí misma justificación suficiente de la decisión firmemente adoptada, sino que, por el contrario, el ejercicio de dicha facultad viene condicionado estrechamente a la exigencia de que tal resolución esté motivada, pues sólo así puede procederse a un control posterior de la misma, en evitación de toda posible arbitrariedad que, por lo demás, vendría prohibida por el artículo 9.3 CE*".

Por último, la motivación es el medio que posibilita el control jurisdiccional de la actuación administrativa, pues, «*como quiera que los Jueces y Tribunales han de controlar la legalidad de la actuación administrativa, así como el sometimiento de ésta a los fines que la justifican -artículo 106.1º Constitución-, la Administración viene obligada a motivar las resoluciones que dicte en el ejercicio de sus facultades, con una base fáctica suficientemente acreditada y aplicando la normativa jurídica adecuada al caso cuestionado, sin presuponer, a través de unos juicios de valor sin base fáctica alguna, unas conclusiones no suficientemente fundadas en los oportunos informes que preceptivamente ha de obtener de los órganos competentes para emitirlos, los cuales, a su vez, para que sean jurídicamente válidos a los efectos que aquí importan, han de fundarse en razones de hecho y de derecho que los justifiquen*» (STS 25 enero 1.992).

«*La doctrina científica ha señalado que la motivación es el medio técnico de control de la causa del acto. No es un requisito meramente formal, sino de fondo. La jurisprudencia del Tribunal Supremo afirma que habrá de determinar la aplicación de un concepto a las circunstancias de hecho singulares de que se trate» -SS. 23 diciembre 1.969 (RJ 1969\6078) y 7 octubre 1.970 (RJ 1970\4251)-. El Tribunal Constitucional enseña que "la motivación no es sólo una elemental cortesía, sino un requisito del acto de sacrificio de derechos" -S. 17 julio 1.981 (RTC 1981\26)- y que "debe realizarse con la amplitud necesaria para el debido*

Madrid

Administración de Justicia

conocimiento de los interesados y su posterior defensa de derechos" -S. 16 junio 1.982 (RTC 1982\36)-. Ahora bien, tratándose de un acto discrecional,..., esta exigencia va insita en el mismo acto» (STS 18 mayo 1.991).

La motivación puede no venir contenida en el propio acto administrativo, sino en los informes o dictámenes que le preceden y sirven de sustento argumental, dado que «...la jurisprudencia, al examinar la motivación de los actos administrativos, no los ha aislado, sino que los ha puesto en interrelación con el conjunto que integra los expedientes, a los que ha atribuido la condición de unidad orgánica, sobre todo en los supuestos de aceptación de informes o dictámenes (motivación "in aliunde") (SS. 11 marzo 1.978 y 16 febrero 1.988)» (STS 2 julio 1.991 [RJ 1991\6328]). En definitiva, «*La motivación de los actos administrativos, supone tanto como exteriorización de las razones que llevaron a la Administración a dictar aquéllos. En el derecho positivo español la motivación puede recogerse en el propio acto, o puede encontrarse en los informes o dictámenes previos cuando el acto administrativo se produzca de conformidad con los mismos y queden incorporados a la resolución». (STS 23 mayo 1.991). La motivación por remisión ha sido asimismo aceptada por el Tribunal Constitucional en diversos pronunciamientos, como es el caso de las SSTC 174/1.987, 146/1.990, 27/1.992 y 150/1.993, de 3 mayo, y AATC 688/1.986 y 956/1.988.*

La resolución impugnada motiva de forma más que suficiente a través, tanto a través de la descripción de los hechos que se contiene en el expediente administrativo como de los fundamentos jurídicos que motivan la decisión.

QUINTO.- La cuestión a decidir consiste, en esencia, en si la parte recurrente ha utilizado la denominada plataforma virtual blablacar para un uso lucrativo, y por tanto si ha de tener la consideración de un transporte público discrecional de viajeros que requería de la correspondiente autorización administrativa, al exceder los servicios prestados, a través de la plataforma blablacar, de lo que puede considerarse compartir un viaje en vehículo privado con otros viajeros, repartiéndose los gastos del trayecto o recorrido y sin obtener beneficio alguno.

Al folio 1 y 2 del expediente administrativo consta el Acta de Inspección levantada en fecha 20 de julio de 2016 en la que se constata los servicios prestados por el recurrente, entre agosto de 2015 y el mes de abril de 2016, donde se señalan hasta 48 viajes, especificándose los viajes, nº de pasajeros, importe por pasajero e importe total cobrado, motivo por el cual se incoa el correspondiente procedimiento sancionador por considerar la administración que ha cobrado un importe total por los trayectos realizados que excede el importe resultante de compartir gastos de éstos entre los diferentes pasajeros.

Dispone el art. 33 de la Ley 16/1987, de 30 de julio, de Ordenación de Transportes Terrestres, que: *"1. El personal de los Servicios de Inspección del Transporte Terrestre tendrá, en el ejercicio de sus funciones, la consideración de autoridad. 2. Los hechos constatados por el personal referido en el apartado anterior tendrán valor probatorio cuando se formalice en documento público, observando los requisitos legales pertinentes, sin perjuicio de las pruebas que en defensa de sus respectivos derechos o intereses puedan señalar o aportar los propios administrados ya que la realidad de los mismos puede quedar desvirtuada mediante la adecuada prueba en contrario o aún por la ausencia de toda otra prueba".*

Madrid

El alcance del derecho fundamental del derecho a la presunción de inocencia, como declara reiteradamente la doctrina Jurisprudencial, tanto Constitucional como del Tribunal Supremo, es aplicable al ámbito del Derecho Administrativo Sancionador en el que nos movemos. En cuanto al alcance de dicho derecho, la sentencia del Tribunal Constitucional 45/1.997, de 11 de marzo , declara, siguiendo una corriente jurisprudencial plenamente consolidada, que "... hemos declarado en STC 120/1.994 que la presunción de inocencia sólo se destruye cuando un Tribunal independiente, imparcial y establecido por la Ley declara la culpabilidad de una persona tras un proceso celebrado con todas las garantías (art. 6.1 y 2 del Convenio Europeo de 1.950), al cual se aporte una suficiente prueba de cargo, de suerte que la presunción de inocencia es un principio esencial en materia de procedimiento que opera también en el ejercicio de la potestad administrativa sancionadora (STC 73/1.985 y 1/1-987), añadiéndose en la citada STC 120/1.994 que entre las múltiples facetas de ese concepto poliédrico en que consiste la presunción de inocencia hay una, procesal, que consiste en desplazar el *onus probandi* con otros efectos añadidos. La presunción de inocencia comporta en el orden estricto sensu determinadas exigencias. Una primordial consiste en la carga de probar los hechos constitutivos de cada infracción que corresponde ineludiblemente a la Administración Pública actuante, sin que sea exigible al inculpado "*una probatio diabólica de los hechos negativos*". En suma, pues, para que la presunción constitucional quede desvirtuada ser necesario la concurrencia de una prueba suficiente y razonablemente concluyente de la culpabilidad del imputado, habiéndose declarado por esa misma doctrina que la prueba de presunciones puede considerarse suficiente para desvirtuar la exigencia constitucional siempre que los hechos de que se extraiga la conclusión que la presunción comporta queden plenamente acreditados y la conclusión resulte razonable. Y en este mismo orden de cosas hemos de señalar que la eficacia probatoria de las actas y denuncias formuladas por los Agentes de la Autoridad en el ejercicio de sus funciones y su vinculación con la presunción constitucional antes examinada no comporta, en principio, violación del derecho fundamental.

Considera el recurrente que los viajes tenían un mero carácter privado y personal, efectuados como consecuencia de visitas a su hijo en Alicante y a su familia en Burgos, satisfaciendo por tanto una necesidad privada, limitándose a compartir los gastos de los viajeros entre los viajeros contactados. Incluso considera que ha soportado más costes que el total de los gastos sufragados por los restos de los acompañantes en todos los trayectos realizados. Sin embargo no ha logrado desvirtuar el acta de inspección que dio origen a la sanción impuesta.

Resulta determinante el informe que se contiene al folio 90 y ss. del expediente administrativo, no suficientemente desvirtuado por la parte recurrente, donde se señala que:

"1.- El interesado emplea una serie de parámetros para fijar los costes del transporte (parámetros obtenidos de los informes de los años 2014 y 2015 del Observatorio del Transporte y Logística en España) entre los que cita los neumáticos, lubricantes, reparaciones, seguros, combustibles y amortización del vehículo. Efectivamente, éstos constituyen los parámetros para fijar la estructura de costes- costes por kilómetro del transporte público. Sin embargo, el concepto de económica colaborativa o consumo colaborativo encuentra su base y justifican, ciertamente, en el hecho e "compartir gastos", en este caso, del trayecto, En ningún caso podemos hablar de costes del transporte. Por tanto, existe un evidente error de inicio a la hora de fijar los parámetros que se deben tener en cuenta para obtener el valor de referencia (precio/kilometro) que se ha de aplicar. Dentro de la categoría de gastos del trayecto a compartir, si cabría hablar de combustible y peaje propios del mismo. No se podría tener en cuenta, como hemos señalado, parámetros

Administración de Justicia

como los neumáticos, reparaciones, amortización del vehículo, etc... Todos ellos característicos de los costes de transporte público.
Por tanto, y partiendo de estas premisas, la administración del Estado establece, dentro del plan específico del control de las plataformas digitales de contratación de servicios de transporte de viajeros en vehículos de turismo particulares, como valor de referencia a aplicar el valor de indemnización por uso de vehículo particular por razón del servicio, fijándose en 0,19 euros por kilómetro recorrido.
Aplicado tal coeficiente, podemos concluir que el importe total cobrado por el interesado en los trayectos realizados excede del importe resultante de compartir gastos (combustibles y peje) entre los diferentes pasajeros, con el consiguiente beneficio económico asociado. Este benéfico es propio de una actividad profesional y por ende, considerado servicio público por la Ley de Ordenación de los Transportes Terrestres"

SEXTO.- La Ley 16/87, de 30 de julio, de Ordenación de los Transportes Terrestres, dispone en su art. 42, redactado por el apartado dieciocho del artículo primero de la Ley 9/2013, de 4 de julio, que : " ***1.*** *La realización de transporte público de viajeros y mercancías estará supeditada a la posesión de una autorización que habilite para ello, expedida por el órgano competente de la Administración General del Estado o, en su caso, por el de aquella Comunidad Autónoma en que se domicilie dicha autorización, cuando esta facultad le haya sido delegada por el Estado".*

El art. 140.1 considera como infracción muy grave "*La realización de transportes públicos careciendo del título habilitante que, en su caso, resulte preceptivo para su prestación de conformidad con lo dispuesto en esta ley y en las normas dictadas para su ejecución y desarrollo"*, correspondiéndole una sanción de multa, conforme al art. 143 j), de 4.001 a 6.000 euros .

Respecto al principio de proporcionalidad en la graduación de la sanción debemos comenzar recordando que el Tribunal Supremo viene manteniendo (STS 24/11/87; 23/10/89; 14/5/90 y 3/5/95) que el principio de proporcionalidad de las sanciones, consagrado en el Art. 131 de la Ley 30/92 de 26 de noviembre de Régimen Jurídico de las Administraciones Públicas y Procedimiento Administrativo Común, no puede sustraerse al control jurisdiccional, y que la discrecionalidad que se otorga a la Administración debe ser desarrollada ponderando, en todo caso, las circunstancias concurrentes al objeto de alcanzar la necesaria y debida proporcionalidad entre los hechos imputados y la responsabilidad exigida. Debidamente acreditada la infracción la sanción resulta claramente proporcionada en base a las circunstancias concurrentes derivadas de la falta de la preceptiva autorización administrativa.

SEPTIMO.- Procede imponer las costas causadas a la parte recurrente en base a lo dispuesto en el art. 139.1 de la Ley 29/1998, de 13 de julio de la Ley de la Jurisdicción Contenciosa Administrativa conforme a la redacción dada por la Ley de Agilización Procesal aprobada en fecha 22 de septiembre de 2011.

Si bien en uso de las facultades que nos otorga la ley fijamos el importe máximo de dichas costas por lo que se refiere a la minuta del Letrado de Administración demandada en 200 euros.

Por todo ello, en nombre de S.M. el Rey y en el ejercicio de la potestad jurisdiccional que, emanada del Pueblo Español, me concede la Constitución.

Madrid

Administración de Justicia

FALLO

CON **DESESTIMACIÓN** DEL PRESENTE RECURSO CONTENCIOSO-ADMINISTRATIVO Nº 168 DE 2018, INTERPUESTO POR **DON R M R** REPRESENTADO POR LA PROCURADORA DOÑA ADELA CANO LANTERO Y DIRIGIDO POR LA LETRADA DOÑA N OI C CONTRA LA RESOLUCION DE LA CONSEJERIA DE TRANSPORTES, VIVIENDAS E INFRAESTRUCTURAS, POR LA QUE SE RESUELVE EL RECURSO DE ALZADA INTERPUESTO CONTRA LA RESOLUCION DE LA DIRECCION GENERAL DE TRANSPORTES, DE 17 DE OCTUBRE DE 2016, RECAIDA EN EL EXPEDIENTE SANCIONADOR BD-M2/129/002/2016, DEBO ACORDAR Y ACUERDO:

PRIMERO.- DECLARAR QUE EL ACTO ADMINISTRATIVO RECURRIDO ES CONFORME A DERECHO, EN RELACIÓN CON LOS EXTREMOS OBJETO DE IMPUGNACIÓN, POR LO QUE DEBO CONFIRMARLO Y LO CONFIRMO.

SEGUNDO.- CON EXPRESA IMPOSICION DE LAS COSTAS CAUSADAS EN ESTA INSTANCIA A LA PARTE RECURRENTE EN LOS TERMINOS QUE SE CONTEMPLAN EN EL FUNDAMENTO SEPTIMO.

Esta resolución es firme y contra la misma no cabe recurso alguno.

Así lo acuerda, manda y firma el el/la Ilmo/a Sr/a. D./Dña. J T M Magistrado/a-Juez/a del Juzgado de lo Contencioso-Administrativo número 11 de los de Madrid.

PUBLICACIÓN.- Leída y publicada fue la anterior sentencia por el/la Iltmo./a Sr./Sra. Magistrado/a Juez/a que la firma. Doy fe.

NOTA: Siendo aplicable la Ley Orgánica 15/99 de 13 de diciembre, de Protección de Datos de Carácter Personal, y los artículos 236 bis y siguientes de la Ley Orgánica del Poder Judicial, los datos contenidos en esta comunicación y en la documentación adjunta son confidenciales, quedando prohibida su transmisión o comunicación pública por cualquier medio o procedimiento, debiendo ser tratados exclusivamente para los fines propios de la Administración de Justicia, sin perjuicio de las competencias del Consejo General del Poder Judicial previstas en el artículo 560.1.10 de la LOPJ

Madrid