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Types of Intermediation for VAT Purposes

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Summary

This thesis provides a comprehensive analysis of the VAT regulation concerning intermediaries. It mainly focuses on the questions of the establishment of intermediaries and the distinction between their two types: undisclosed and disclosed agents.

Firstly, the thesis analyzes the conceptual framework of the VAT regulation of the transactions involving undisclosed and disclosed agents and systematises *lex specialis* provided by the VAT Directive. Further, it examines the identifying criteria for undisclosed and disclosed agents as well as platforms falling within Article 14a of the VAT Directive coming into force on July 1, 2021. Namely, such criteria are “acting on behalf of the principal”, “acting in its own name” or “acting in the name of the principal”, “taking part” in a supply, and “facilitating” a supply. The analysis is conducted in light of the relevant provisions of the VAT Directive, case law and legal literature.

Preface

This thesis is written as a concluding part of my master's programme in International and European Tax Law at School of Economics and Management, Department of Business law at Lund University.

I would like to express my gratitude to my supervisor Dr. Marta Papis-Almansa for her engrossing teaching at the courses in indirect taxation as well as support during my thesis writing process. I would also like to extend sincere thanks to Professor Cécile Brokelind and all guest professors who, by sharing their experience and knowledge, provided excellent guidance through the world of taxation.

Abbreviation list

AG	Advocate General
CJEU	Court of Justice of the European Union
EU	European Union
Implementing Regulation	Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax
VAT	Value Added Tax
VAT Directive	Council Directive 2006/112/EC on the common system of value added tax of 28 November 2006

1 Introduction

1.1 Background

For suppliers and buyers, involving a third party in the supply of goods or services is a common commercial practice. Such a person, an intermediary, would act in the interest of the supplier helping it perform its obligation to render a service or good to its end user; or a customer, helping it purchase a service or good.

Depending on whether the represented party (the principal) reveals itself, an intermediary may act as an undisclosed or a disclosed agent. When the principal prefers to be unidentified, an intermediary acts in its own name. Accordingly, the information on the actual supplier or customer is not disclosed to third parties an intermediary interacts with. Such an intermediary obtains the status of an undisclosed agent. In opposite cases, an intermediary acts as a disclosed agent meaning that third parties are aware of the fact that they interact with not their counterparty to the contract but a person representing it.¹ As Terra B. & Kajus J. notice, the general value added tax (VAT) rules would establish obstacles for the undisclosed agents: they would not be able to deduct the input VAT.²

Moreover, intermediaries not only act on different conditions, but conduct activities in a wide range of industries. Such industries may have a special nature and consequently, alter the way intermediaries provide their services. For instance, it is relevant for the tourism industry where intermediaries traditionally buy services in their own name from third parties before providing them to their customers. As a result, travel services are usually purchased, provided, and used in different places.³ Application of the general VAT rules to such intermediaries would lead to an excessive administrative burden and the unfair allocation of revenues between the European Union (EU) Member States.⁴

In order to ensure an effective and fair calculation and collection of VAT in different practical situations, the VAT Directive⁵ provides a special regulation for undisclosed and disclosed agents and *lex specialis* (in particular, regarding travel agents). Furthermore, as commercial realities change, such a special regulation is constantly developing. For instance, the VAT liability of

¹ Terra B., Kajus J. (2020). “Commentary on European VAT”, *Global Topics IBFD*, p. 88.

² Ibid. This will be elaborated on in subsection 2.2.2 of this thesis.

³ Tarhova E., Yoncheva E. (2020). “The EU Special Scheme for Travel Agents: Complex Present but Desired Future – Options for Reform”, *International VAT Monitor*, 31 (4), p. 205. The regulation of the activities of travel agents and tour operators will be analyzed in subsection 2.3.1.1 of this thesis.

⁴ Ibid., Evaluation of the special VAT scheme for travel agents, *European Commission*, URL: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11883-VAT-scheme-for-travel-agents-evaluation-en> [16.05.2021].

⁵ Council Directive 2006/112/EC on the common system of value added tax of 28 November 2006.

platforms facilitating certain supplies of goods has been introduced in response to an economic trend on the digitalization of the economy.^{6;7}

Therefore, the regulation related to intermediation is intended to tackle the challenges caused by evolving commercial practice and ensure the efficiency of VAT. Effective implementation of such rules requires clarity in identifying a person as an intermediary and, further, as an undisclosed or a disclosed agent or a platform facilitating a supply.

1.2 Research questions and aim

For the correct application of the VAT rules concerning the activity of intermediaries, it is necessary to firstly establish whether there is an intermediary, and secondly distinguish whether it is acting as a disclosed or an undisclosed agent or facilitating a supply of goods or services⁸. This may be challenging due to the variety of forms of commercial relationships alongside the lack of guidance on the interpretation and implementation of the relevant VAT rules and rapidly changing case law.

This thesis aims to perform a comprehensive analysis of the issues of the establishment of intermediaries and the differentiation between their types. The questions to be examined are (1) what types of intermediaries exist, (2) what conditions and requirements an intermediary must meet to be subject to one or another special rule and (3) what system of the VAT provisions governing the transactions with the involvement of intermediaries is.

1.3 Method and material

This thesis applies the legal dogmatic method.⁹ The analysis is based on the interpretation of the relevant sources of law of the EU (with a special emphasis on the VAT Directive), the jurisprudence of the Court of Justice of the European Union (CJEU) and legal doctrine.

Examination of the VAT Directive involves not only the general rules regulating the activities of disclosed and undisclosed agents, but also *lex specialis* governing supplies of certain services and goods by undisclosed and disclosed agents and providing a special regulation for certain cases of intermediation. The VAT Directive is analyzed in light of the CJEU's case law with particular focus on the most recent cases¹⁰ bringing new developments in interpreting and applying the concept of an intermediary. Regarding the literature, the thesis refers to the works by Terra B. & Kajus J., Henkow O., Jespersen C., Rendahl P., and others.

⁶ Council Directive (EU) 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, Article 2 (2).

⁷ Comes into force on July 1, 2021.

⁸ If a platform is being examined as falling within Article 14a of the VAT Directive.

⁹ Douma S. (2014). "Legal Research in International and EU Tax Law", *Wolters Kluwer*, p. 17-20.

¹⁰ The CJEU's judgements delivered between January 2017 and April 2021.

1.4 Delimitation

This thesis focuses on the analysis of disclosed and undisclosed agents from the perspective of the qualifying requirements provided for them. Regarding the consequences of the qualification as an undisclosed or a disclosed agent, the thesis is limited to the provision of a conceptual framework and brief discussion of some related problematic issues such as the application of VAT exemptions and reduced rates to the supplies an undisclosed agent is deemed to have received and provided.

Moreover, the thesis does not contain an in-depth analysis of the problems on interpretation and application of *lex specialis* (except for Article 14a of the VAT Directive which qualifying requirements are elaborated on in section 3.2 of this thesis). It only considers such special rules to the extent required for the purpose of their systematization.

1.5 Outline

The second chapter specifies the use of terminology in this thesis; following, it introduces the concepts of a disclosed agent and an undisclosed agent, gives a conceptual framework of the “deemed supply” rule as the consequence of the establishment of an undisclosed agent and shortly discusses the VAT treatment of the deemed supplies in terms of VAT exemptions and reduced rates. Further, it presents *lex specialis* concerning intermediaries in a systematic manner.

Subsequently, the third chapter elaborates on the qualification as an undisclosed or a disclosed agent. Based on the interpretation of the VAT Directive and the case law, it analyzes each of the qualifying requirements that should be met in order to be considered as a taxable person falling within the category of an undisclosed or a disclosed agent. Furthermore, it includes an analysis of the qualification of a platform as a deemed supplier under Article 14a of the VAT Directive.

Finally, the fourth chapter discusses the validity of Article 9a of the Implementing Regulation¹¹ considering the pending *Fenix International* case. It is followed by the conclusion to this thesis.

¹¹ Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax.

2 Types of intermediation for VAT purposes: qualifying requirements and consequences

2.1 Intermediation for VAT purposes: use of terminology

The terms “intermediary”, “undisclosed agent” and “disclosed agent” find inconsistent application in the sources of law and legal literature. This part briefly presents the various approaches to the application of this terminology and clarifies which one is used in this thesis.

The VAT Directive does not operate the terms “undisclosed agent” and “disclosed agent” as such. Neither does the CJEU. Nevertheless, they are extensively applied in the legal literature. As it was mentioned above, when a taxable person acts in the name and on behalf of another person, it is regarded as a disclosed agent. When it takes part in a supply of goods or services in its own name but on behalf of the seller or the buyer, it constitutes an undisclosed agent (or a commissionaire, or a commission agent).¹²

How do these terms correlate with the concept of an intermediary? The VAT Directive does not give a clear answer to this question. On the one hand, a textual analysis of Articles 306 and 79(1)(c) is a testimony to the fact that the term “intermediary” is to be applied only to taxable persons acting as disclosed agents. Article 306 devoted to travel agents¹³ states that when taxable persons are acting “*solely as intermediaries*”, the special VAT scheme is not applicable¹⁴ but Article 79(1)(c) applies. This article, in its turn, refers to persons acting “*in the name and on behalf of the customer*”.¹⁵

On the other hand, the VAT Directive also operates the phrase “*intermediary, acting in the name and on behalf of another person*”¹⁶ which may be seen as implying that “intermediary” is a wide concept that may cover disclosed agents but is not limited to them: otherwise, the VAT Directive could have simply used the term “intermediary”.

Furthermore, the legal literature also does not provide a unified approach. Some authors argue that the term “intermediary” should be used in the context of VAT only regarding persons acting in the name and on behalf of other persons, i.e., disclosed agents.¹⁷ At the same time, others apply it as a general term covering both the persons acting in their own name and in the principal’s name.¹⁸

¹² Terra B., Kajus J. (2020). Op. cit., p. 88.

¹³ See subsection 2.3.1.1 of this thesis for a further analysis.

¹⁴ Council Directive 2006/112/EC on the common system of value added tax of 28 November 2006, Article 306.

¹⁵ Ibid., Article 79(1)(c).

¹⁶ Ibid., Articles 46, 153.

¹⁷ Jespersen C. (2011). “Intermediation of Insurance and Financial Services in European VAT”, *Kluwer Law International B.V.*, p. 113.

¹⁸ See, for example, Terra B., Kajus J. (2020). Op. cit., p. 88; Henkow O. (2017). “Acting in One’s Own Name on Someone Else’s Behalf: A Changing Concept”, *Momsloven 50 år - festskrift i anledning af 50 års jubilæet for Danmarks første momslov*, p. 242.

In this thesis, the term “intermediary” is used in a wide sense as comprising both the taxable persons acting in their own name but on behalf of others (undisclosed agents) and the ones acting in the name and on behalf of others (disclosed agents). It is also applied regarding the platforms facilitating certain supplies of goods and governed by Article 14a of the VAT Directive (which is applicable regardless of whether a platform is acting on someone else’s behalf).

2.2 Undisclosed and disclosed agents

This section provides a further comparative analysis of the above-described concepts of an undisclosed agent and a disclosed agent conducted in light of the provisions of the VAT Directive and the CJEU’s case law. Moreover, it briefly discusses the “deemed supply” rule as the consequence of being qualified as an undisclosed agent as well as some related to it issues, namely the application of VAT exemptions and reduced rates to the deemed supplies to and from an undisclosed agent. Notably, the “deemed supply” rule and the treatment of the deemed supplies are only discussed in subsection 2.2.2 and will not be elaborated on in the following parts of the thesis.

2.2.1 Undisclosed and disclosed agents: differences

As for the concept of a disclosed agent, it is recognized by the VAT Directive in Article 46. It introduces an exception to the general rule on the place of business-to-consumer supplies of services according to which the place of supply is the supplier’s place of establishment.¹⁹ The article states that the place of supply of the intermediation services provided to non-taxable persons by intermediaries acting in the name and on behalf of other persons is the place of supply of the underlying transaction.²⁰ An underlying transaction may be a supply of goods or a supply of services.²¹ Such a special rule allows ensuring that the disclosed agents established outside the EU are liable for VAT.²²

Therefore, the place of supply of the disclosed agent’s services to non-taxable persons depends on the rules applying to the services or goods provided from the principal (a supplier or a buyer) to the principal’s counterparty (a buyer or a supplier, respectively). Regarding the provision of intermediation services to taxable persons, no special rules are introduced. Thus, the general rule on the place of business-to-business supplies applies: the place of supply is the place of the customer’s establishment.²³

In respect of the transactions with the participation of undisclosed agents, the VAT Directive introduces a legal fiction of two supplies: to and from such

¹⁹ Council Directive 2006/112/EC on the common system of value added tax of 28 November 2006, Article 45.

²⁰ *Ibid.*, Article 46.

²¹ Terra B., Kajus J. (2020). *Op. cit.*, p. 327.

²² *Ibid.*, p. 327-328.

²³ Council Directive 2006/112/EC on the common system of value added tax of 28 November 2006, Article 44.

agents. Depending on whether an undisclosed agent takes part in a supply of services or goods, Article 28, or Article 14(2)(c) applies.

Particularly, Article 28 states that where a taxable person acting in its own name but on behalf of another person participates in a supply of services, this person must be deemed to receive and supply these services itself.²⁴ Article 14(2)(c) uses a different, misleading²⁵ wording: it states that a transfer of goods pursuant to an agreement “*under which a commission is payable*” is a supply of goods for VAT purposes.²⁶

Based on the wording of Article 14(2)(c), it may be argued to not contain a requirement for a taxable person to act in its own name, i.e., not concern the undisclosed agents.²⁷ However, a well-established understanding of the article is that a commission contract it refers to is a contract under which an intermediary agrees to carry out a transaction in its own name but on behalf of another person.²⁸ It follows from a teleological interpretation of Articles 28 and 14(2)(c), namely, their objective to create “*a legal fiction of two consecutive supplies*”^{29,30} This is also supported by a contextual and consistent interpretation: application of “*a similar concept of intermediation*”.³¹ Put it differently, Article 14(2)(c) has the same scope and effect as Article 28. As a result, when an undisclosed agent participates either in a supply of services or in a supply of goods, it is treated in a similar way: as being deemed to receive and supply such services or goods itself.

For further clarifications on the interpretation and application of the above-mentioned provisions, *Henfling* case is of great interest. The CJEU, comparing the circumstances of the case with *United Utilities* case, drew a line between disclosed and undisclosed agents based on their level of independence. Besides assessing whether the intermediaries were acting in their own name, it analyzed if they were making independent decisions regarding the underlying supply of services. While in *United Utilities* case, the intermediaries simply answered the calls and recorded the bets on the conditions provided by the principal³², in *Henfling* case, they were in charge of deciding on the acceptance or refusal of bets and paying winnings to

²⁴ Ibid., Article 28.

²⁵ Avery Jones J.F., “What is a “Contract under which Commission is Payable”?”, in Van Arendonk H., Jansen S., Van der Paardt R. (2011). “VAT in an EU and International Perspective: Essays in honour of Han Kogels”, *IBFD*, p. 24.

²⁶ Council Directive 2006/112/EC on the common system of value added tax of 28 November 2006, Article 14(2)(c).

²⁷ Jespersen C. (2011). Op. cit., p. 199, 247-248; Henkow O. (2017). Op. cit., p. 243.

²⁸ Judgment of the Court (Fourth Chamber) of 3 September 2015, *Fast Bunkering Klaipėda*, C-526/13, paras. 32-33; Judgment of the Court (Fourth Chamber) of 4 May 2017, *Commission v Luxembourg*, C-274/15, paras. 84-89.

²⁹ Ibid., para. 86; Judgment of the Court (Seventh Chamber) of 14 July 2011, *Henfling and Others*, C-464/10, para. 35.

³⁰ Terra B., Kajus J. (2021). “A Guide to the European VAT Directives 2020. Volume I: Introduction to European VAT”, *Global Topics IBFD*, p. 257.

³¹ Jespersen C. (2011). Op. cit., p. 199, 248.

³² Judgment of the Court (Second Chamber) of 13 July 2006, *United Utilities*, C-89/05, para. 9.

bettens.³³ Such involvement led to the conclusion that the intermediaries in *Henfling* case were acting as undisclosed agents. This decision implies that undisclosed agents are supposed to have a higher degree of independence.³⁴

In conclusion, intermediaries – persons, acting on behalf of other persons – are generally divided into disclosed and undisclosed agents, contingent on the fact of disclosure of the principal. As it follows from the case law, undisclosed agents are distinguished by a comparatively high level of independence. The VAT Directive recognizes disclosed agents in Article 46 by way of introducing a special rule on the place of supply of intermediation services rendered by them. As for undisclosed agents, when they take part in a supply of goods or services, a legal fiction of two consecutive supplies applies to such a supply. The latter is discussed in the following subsection.

2.2.2 “Deemed supply” rule

The legislator’s intention to regulate undisclosed agents’ activities is caused by the need to ensure the effectiveness of VAT (including the principle of avoidance of double taxation³⁵) not only when the buyer and the seller are known but also where one of them prefers not to reveal itself. As it was mentioned above, to this end, the above-discussed Articles 14(2)(c) and 28 of the VAT Directive include the “deemed supply” rule – a legal fiction of two identical supplies. According to it, when an undisclosed agent takes part in a supply between two other persons, two separate transactions occur for VAT purposes: (1) between the principal (the initial supplier) and the intermediary that becomes a supplier and (2) between the intermediary and the buyer.³⁶ For VAT purposes, both supplies are treated as if they were actual supplies; accordingly, an intermediary receives a VAT treatment as if it was an actual supplier/customer.

Such a special rule allows ensuring the right of undisclosed agents to deduct the input VAT. In other words, it creates an exception to the general rule according to which the input VAT is deductible provided that (1) the goods or services are used for taxable transactions by a person incurring the VAT (2) when there is an invoice issued in its name. When an undisclosed agent participates in a supply of goods, the invoices are made out to and by it, however, the goods are used for taxable transactions by the principal. Thus, unless the principal is disclosed, the general rule deprives the undisclosed agents of the right to deduct. However, to disclose the seller or the buyer (the principal) would not be an appropriate solution as it would be contradictory to the idea of using an undisclosed agent (the agent would not be “undisclosed” anymore).³⁷

³³ Judgment of the Court (Seventh Chamber) of 14 July 2011, *Henfling and Others*, C-464/10, para. 32.

³⁴ Rendahl P. (2013). “EU VAT and Double Taxation: A Fine Line between Interpretation and Application”, *Intertax*, 41 (8-9), p. 451.

³⁵ Terra B., Kajus J. (2020). Op. cit., p. 116.

³⁶ Jespersen C. (2011). Op. cit., p. 121.

³⁷ Terra B., Kajus J. (2020). Op. cit., p. 88.

How are the deemed supplies to and from an undisclosed agent are treated in terms of VAT exemptions and reduced rates? As for VAT exemptions, the general rule states that to ensure the principle of neutrality, the supplies to and from an intermediary should receive the same treatment as the original supply.³⁸ However, when an exemption is applicable under specific requirements that an intermediary does not meet, this rule may be abandoned. This is the case when an exemption requires a certain use of the goods by the customer³⁹ or a certain status of the taxable person⁴⁰. To conclude, the exemptions apply where their criteria are “*impersonal*”.⁴¹

Whereas the application of VAT exemptions seems to be certain, the application of reduced rates has not been clarified by the CJEU, thus is subject to debate. In particular, it is controversial whether it would be in line with the principle of neutrality to apply the VAT rates that would apply to the original supply. As Rendahl P. notices, it is not arguable that equal supplies must receive equal treatment (the principle of neutrality), however, it may be arguable if the supplies from the principal to the intermediary and from the latter and the buyer⁴² are equal considering that the reduced rates may have purposes different from the ones the VAT exemptions pursue.⁴³

To summarize, the “deemed supply” rule creates a legal fiction of two consecutive supplies under which an undisclosed agent is considered as having received and supplied the underlying goods or services. The “deemed supply” rule constitutes an exception to the general VAT rule on the right of deduction and ensures the right to deduct the input VAT by the undisclosed agent although another taxable person (the principal) uses the goods or services supplied to conduct taxable transactions.⁴⁴ The treatment of the deemed supplies (particularly, in terms of the applicable VAT rates) may cause disputes. This will not be elaborated on in this thesis, however, is worth noticing for future research.

2.3 *Lex specialis*

This section analyzes *lex specialis*⁴⁵ that is suggested to divide into three groups. The first group includes the special schemes related to travel agents and tour operators as well as organizers of sales by public auction when they

³⁸ See, for example, Judgment of the Court (Seventh Chamber) of 14 July 2011, *Henfling and Others*, C-464/10, paras. 36-37.

³⁹ See Judgment of the Court (Fourth Chamber) of 3 September 2015, *Fast Bunkering Klaipėda*, C-526/13 regarding Article 148(a) of the VAT Directive; Terra B., Kajus J. (2021). Op. cit., p. 587-588.

⁴⁰ Certain financial services are exempt only when they are rendered by persons granting the credit (see *Ibid.*, p. 299); some exemptions are granted only to small and medium-sized enterprises (see Ehrke-Rabel T., Zechner L. (2020). “VAT Treatment of Cryptocurrency Intermediation Services”, *Intertax*, 48 (5), p. 264).

⁴¹ *Ibid.*, p. 265, Terra B., Kajus J. (2021). Op. cit., p. 591.

⁴² In the other case (when the principal is a buyer but not a seller), the supplies are deemed to take place between the initial seller and the undisclosed agent and between the latter and the principal.

⁴³ Rendahl P. (2013). Op. cit., p. 453, 461.

⁴⁴ Terra B., Kajus J. (2020). Op. cit., p. 88.

⁴⁵ This list excludes the special rules provided by the Annexes of the VAT Directive.

are acting as undisclosed agents. The second one concerns the exemptions for certain services provided by disclosed agents: insurance and reinsurance related services, and services provided by intermediaries participating in certain supplies (exportation, international transport and certain transactions treated as export; supplies of investment gold). The third group includes two specific “deemed supply” rules applying to the transfer of single-purpose vouchers and services rendered by platforms.

2.3.1 Special schemes for undisclosed agents

2.3.1.1 Travel agents and tour operators

In regard to the services rendered by travel agents and tour operators, the VAT Directive provides the Tour Operator Margin Scheme.⁴⁶ As it was mentioned above⁴⁷, it was introduced in response to the special nature of the industry.⁴⁸ Specifically, it was required to ensure the fulfilment of the VAT obligations by the agents providing their customers with the packages of services previously purchased in their own name from a third party.⁴⁹

The special scheme affects the calculation of the taxable amount and the place of supply of services. According to it, the taxable amount is the agent’s margin: the difference between the amount paid by the traveller and the actual cost borne by the agent.⁵⁰ It allows ensuring that the services purchased by travel agents from third parties are taxed at the place where they are enjoyed but not at the place where a travel agent is established, whereas the VAT on the services provided to travellers is paid by them at the travel agent’s place of establishment.⁵¹

Generally, while purchasing the travel services, travel agents may act both in the name and on behalf of the customer and in their own name. However, for the application of the special scheme, a travel agent must act in its own name, i.e., as an undisclosed agent.⁵² Otherwise, the general rule on taxation of disbursements applies. It simply excludes the sum paid by a travel agent for the services purchased from third parties in the name and on behalf of the traveller from the taxable amount.⁵³

Even though the interpretation of the special scheme has been extensively clarified by the CJEU, Member States apply it inconsistently. The analysis of

⁴⁶ Council Directive 2006/112/EC on the common system of value added tax of 28 November 2006, Articles 306-310.

⁴⁷ See section 1.1 of this thesis.

⁴⁸ Tarhova E., Yoncheva E. (2020). *Op. cit.*, p. 205.

⁴⁹ Terra B., Kajus J. (2021). *Op. cit.*, p. 817.

⁵⁰ 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, Article 26(2) (now - Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, Articles 307-308).

⁵¹ Terra B., Kajus J. (2021). *Op. cit.*, p. 817.

⁵² Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, sentence 2 Article 306(1) in conjunction with Article 153.

⁵³ *Ibid.*, Article 79(1)(c).

the controversial issues⁵⁴ falls out the scope of this thesis, however, have been provided, for instance, by Tarhova E. & Yoncheva E.⁵⁵

2.3.1.2 Organizers of sales by public auction

The EU Member States may apply a special scheme for taxation of the profit margin received by undisclosed agents taking part in supplies of second-hand goods, works of art and collectors' items or antiques (Article 333 of the VAT Directive).

Application of the special arrangements depends not only on whether an intermediary acts in its own or the principal's name but also on the status of the principal (taxable or non-taxable person) and the underlying supply. Thus, if the principal is a taxable person, in order to fall within the special arrangements, the supply must be exempt in accordance with Articles 136, 282-292 or be subject to the VAT margin scheme (Article 335 of the VAT Directive).

Further analysis of these provisions is provided, *inter alia*, by Terra B. & Kajus J.⁵⁶

2.3.2 Exemptions for the services supplied by disclosed agents

The VAT Directive exempts from taxation the following services provided by intermediaries: insurance and reinsurance related services (Articles 135(1)(a)), intermediation services provided by intermediaries participating in certain supplies of services and goods (Articles 153 and 347 of the VAT Directive). In each case, for the services carried out by an intermediary to be exempt, it must act as a disclosed agent – in the name and on behalf of a party to the underlying supply of services. Otherwise, when an intermediary is acting in its own name, Article 28 of the VAT Directive applies. In this case, according to the “deemed supply” rule, an intermediary is treated as a supplier/customer of the underlying services.

Regarding Article 135(1)(a) of the VAT Directive, it exempts from VAT insurance and reinsurance related services rendered by insurance brokers and agents.⁵⁷ The terms “agents” and “brokers” are not defined in the VAT Directive⁵⁸, however, it follows from the case law that both of them act on behalf of a party to an insurance agreement with the difference that a broker

⁵⁴ For example, the VAT Directive lacks a clear definition of the term “travel facilities” (Article 306(1) of the VAT Directive), thus, the scope of the special scheme causes confusion. Other problematic areas are the regulation of wholesale supplies and mixed packages, the different treatment of EU and non-EU operators, etc. See Tarhova E., Yoncheva E. (2020). Op. cit., p. 207-208.

⁵⁵ Tarhova E., Yoncheva E. (2020). Op. cit., p. 206-211.

⁵⁶ Terra B., Kajus J. (2021). Op. cit., p. 831-836.

⁵⁷ Council Directive 2006/112/EC on the common system of value added tax of 28 November 2006, Article 135(1)(a).

⁵⁸ For example, see Judgment of the Court (Fifth Chamber) of 20 November 2003, *Taksatorringen*, C-8/01, para. 38.

acts on behalf of a prospective insured party, whereas an agent acts on behalf of an insurance company.⁵⁹

Furthermore, Article 153 provides an exemption to supplies of services by disclosed agents when they participate in transactions falling within Chapters 6, 7 and 8 of Title IX of the VAT Directive. Namely, such transactions are as follows: exempt supplies outside the EU (exportation); supplies of goods and services related to international transport; and transactions treated as exports or carried out outside the territory of the EU. To fall within the exemption, an intermediary must act as a disclosed agent. Moreover, the VAT Directive provides an exemption for services provided by disclosed agents taking part in the supplies of investment gold for their principal (Article 347).

The analysis of the above-mentioned provisions may be found in the book by Terra B. & Kajus J.⁶⁰ Also, the rules regulating intermediation of insurance and financial services has been comprehensively analyzed by Jespersen C.⁶¹

2.3.3 Specific “deemed supply” rules

2.3.3.1 “Deemed supply” of the single-purpose vouchers

According to Article 30(b)(1), each transfer of a single-purpose voucher is treated as a supply of the related goods or services, whereas the actual provision of the goods or services is not considered as an independent transaction. To whom such a supply is ascribed depends on whether a transfer is made by an undisclosed or a disclosed agent. When a taxable person is acting as an undisclosed agent, a supply of a single-purpose voucher is treated as a supply of the underlying goods or services by this person; otherwise – when he acts as a disclosed agent – the supply is ascribed to its principal.

The “deemed supply” rule in regard to the supplies of single-purpose vouchers has been elaborated by, for example, Amand C.⁶² and Terra B. & Kajus J.⁶³

2.3.3.2 “Deemed supply” rule for platforms’ services

Coming as a part of the new rules relating to electronic commerce, Article 14a of the VAT Directive introduces the VAT liability of platforms participating in certain supplies of goods from business to consumers.⁶⁴ The purpose of this article is to ensure an effective collection of VAT and decrease

⁵⁹ Opinion of Mr Advocate General Mischo of 3 October 2002, *Taksatorringen*, C-8/01, para. 86; Jespersen C. (2011). Op. cit., p. 100.

⁶⁰ Terra B., Kajus J. (2021). Op. cit., p. 522-529, 594-595, 838.

⁶¹ Jespersen C. (2011). Op. cit.

⁶² Amand C. (2017). “EU Value Added Tax: The Directive on Vouchers in the Light of the General Value Added Tax Rules”, *Intertax*, 45 (2), p. 153.

⁶³ Terra B., Kajus J. (2021). Op. cit., p. 302-303.

⁶⁴ Council Directive (EU) 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, Article 2 (2).

the administrative burden borne by the taxable persons and tax administrations.⁶⁵

Per Article 14a, when a taxable person “*facilitates, through ... an electronic interface*” (1) “*distance sales of goods imported from third territories or third countries*”⁶⁶ or (2) domestic or intra-EU supplies of goods by non-EU businesses⁶⁷, it becomes a deemed buyer and supplier of such goods. These supplies distinguish by the location and the value of the goods as well as the place of establishment of the underlying supplier. The first category of goods includes the ones of value under EUR 150 imported from a third country, irrespective of the supplier’s place of establishment; the second category is related to the goods of any value and in free circulation in the EU that are to be supplied to the customer by a non-EU business.⁶⁸

As a result, Article 14a splits the underlying supply into a business-to-business supply followed by a business-to-consumer supply. While considering the application of VAT rules, these supplies must be taken into account separately and depending on whether they fall under the first or the second paragraph of Article 14a.⁶⁹

Notably, to be regarded as a deemed supplier, a platform is not required to act in the name or on behalf of a principal⁷⁰ – it must only “facilitate” the supply. Although the provision seems to be an extension of Article 14(2)(c) of the VAT Directive⁷¹, it does not require acting as an undisclosed agent. Hence, a platform may fall within the “deemed supply” rule being a disclosed or an undisclosed agent.⁷²

The concept of facilitating a supply will be elaborated in section 3.3 in comparison with the concept of taking part in a supply.

2.4 Conclusion to Chapter 2

Intermediaries may be generally divided into disclosed agents – taxable persons acting in the name and on behalf of the principal, and undisclosed agents – taxable persons acting in their own name but on behalf of the principal. The VAT Directive recognizes disclosed agents in Article 46 by

⁶⁵ Explanatory Notes on VAT e-commerce rules of 30 September 2020, European Commission, URL: https://ec.europa.eu/taxation_customs/sites/taxation/files/vatecommerceexplanatory_28102_020_en.pdf [16.05.2021], para. 2.1.2.

⁶⁶ Council Directive 2006/112/EC on the common system of value added tax of 28 November 2006, Article 14(a)(1).

⁶⁷ Ibid., Article 14(a)(2).

⁶⁸ Explanatory Notes on VAT e-commerce rules of 30 September 2020, European Commission, URL: https://ec.europa.eu/taxation_customs/sites/taxation/files/vatecommerceexplanatory_28102_020_en.pdf [16.05.2021], para. 2.1.3.

⁶⁹ Ibid., para. 2.1.4.

⁷⁰ Papis-Almansa M. (2019). “VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field?”, *ERA Forum*, (20), p. 218.

⁷¹ Terra B., Kajus J. (2021). Op. cit., p. 263.

⁷² The concept of facilitating a supply is analyzed in section 3.2 of this thesis.

providing a special rule on the place of supply of intermediation services. Also, it provides a special regulation for supplies of goods or services with the involvement of undisclosed agents, namely the “deemed supply” rule, in Articles 28 and 14(2)(c).

The VAT Directive contains *lex specialis* regulating certain cases of intermediation and supplies of certain services and goods rendered by undisclosed and disclosed agents. Amongst them, there are two special margin schemes for services provided by the travel agents (and tour operators) and organizers of sales by public auction. The schemes are applicable provided that intermediaries act as undisclosed agents.

Another group of *lex specialis* consists of the exemptions for certain services rendered by intermediaries. This includes insurance and reinsurance related services provided by insurance brokers and agents; services rendered by disclosed agents participating in the transactions referred to under the exemptions of exportation, international transport and certain transactions treated as export as well as supplies of investment gold. The intermediaries’ services are exempt under the condition that they act as disclosed agents; in other cases, they become deemed suppliers/purchasers of the services under Article 28 of the VAT Directive.

Furthermore, the VAT Directive include specific “deemed supply” rules for intermediaries supplying single-purpose vouchers and electronic platforms⁷³. Notably, the application of the special rule in the latter case does not require a platform to act in the name or on behalf of another person – it is sufficient to facilitate a supply.

⁷³ Comes into force on July 1, 2021.

3 Qualification under the rules on intermediation

3.1 Role of a direct link

This section focuses on the question of how a relationship should be assessed in order to be regarded as a supply with the involvement of an intermediary. In particular, it analyzes the role of a direct link between the services or goods supplied and the consideration received in qualifying a situation as falling or not falling within the VAT rules on intermediation.

For a transaction between two persons to be subject to VAT, it must constitute a taxable supply.⁷⁴ As a rule, a taxable supply occurs when a provider and a recipient are bound by a legal relationship comprising a direct link between the services or goods supplied and the consideration received.⁷⁵ Therefore, the application of a VAT rule to a supply requires the existence of a direct link. When there is no direct link, VAT regulation may not be applicable.⁷⁶

In the context of transactions involving intermediaries, this rule suggests the following: prior to the establishment of whether there is an intermediary and whether it is acting as an undisclosed or a disclosed agent, it must be ascertained that the supply (between the principal and the end user⁷⁷) the intermediary is involved in, is a taxable supply. In other words, to apply the rules regarding intermediaries, a two-step test may be applied where, in the first place, (1) it should be established that a relationship between the principal and the end users constitutes a supply of goods or services for VAT purposes; following this, (2) an intermediary, acting on behalf of the principal, should be ascertained as acting as a disclosed or an undisclosed agent. Depending on the result of this analysis, the question of the application of the “deemed supply” rule, the special rule on the place of supply, or *lex specialis* is to be answered.

Such a two-step test has been repeatedly employed in the CJEU’s case law. One of the most recent cases, *UCMR* case, may serve as an example. In its judgement, the CJEU, firstly, found a taxable supply and, secondly, regarded an intermediary involved in this supply as an undisclosed agent.

The case concerns a three-part relationship involving a copyright holder (the initial supplier), performance organizers (the end users) and UCMR – a collective management organization (the intermediary). UCMR is an organization appointed by the Romanian Copyright Office to represent the copyright holders, to manage such right, and to be responsible for collecting royalties from the users of musical works for public performances such as

⁷⁴ The concept of a supply is elaborated on in subsection 3.2.2 of this thesis.

⁷⁵ Judgment of the Court (Sixth Chamber) of 3 March 1994, *Tolsma*, C-16/93, paras. 13-14; Judgment of the Court (Eighth Chamber) of 19 December 2019, *Amărăști Land Investment*, C-707/18, paras. 25-26.

⁷⁶ Council Directive 2006/112/EC on the common system of value added tax of 28 November 2006, Article 2(1)(c); Opinion of Mr Advocate General Jääskinen of 8 December 2011, *Lebara*, C-520/10, para. 30.

⁷⁷ Unless the existence of an intermediary is established, they are simply a supplier and a buyer of goods or services.

shows and concerts.⁷⁸ As the first step of the analysis, the CJEU looked into the relationships between the initial supplier and the end users. Following Advocate General (AG) Richard de la Tour's Opinion,⁷⁹ it concluded that there was a legal relationship between the copyright holder, authorizing the public performance on the users' requests, and the end users, paying the fee for this service. Subsequently, it found a direct link between the services and the remuneration. This allowed qualifying the relationship as a taxable supply of services under Article 2(1)(c) of the VAT Directive.⁸⁰ As the second step of the analysis, the CJEU determined that an intermediary constituted an undisclosed agent taking part in a supply of services and, accordingly, Article 28 of the VAT Directive was applicable to the situation.⁸¹

Interestingly, in the first part of its analysis, the CJEU compared the case with *SAWP* case. This case, at the first sight, had a similar factual background. However, in it, the CJEU did not proceed to the question of whether a taxable person was an intermediary (an undisclosed or a disclosed agent) as it had established no legal relationship between the right holder and the end users. The reason for this was that the obligation to pay the fee ("consideration"), including its amount, was prescribed by the national law but not the contract between the parties.⁸² The fee was intended to cover harm from reproducing the works borne by the rightsholders, hence, no direct link between the service supplied and the consideration received could be found.⁸³

To make an interim conclusion, it is evident that since only supplies comprising a direct link between the services or goods supplied and the remuneration received are relevant for VAT purposes, no question of whether there is an intermediary (an undisclosed or a disclosed agent) may arise until it is established that there is a direct link in the relationships between the potential principal and end users.

Another example of the application of the two-step test may be found in AG Jääskinen's Opinion in *Lebara* case. The AG emphasizes the importance of a direct link between the principal and the end user and, furthermore, demonstrates the consequences of a direct link existing between not these two persons but, on the one hand, between the principal and the intermediary and, on the other hand, between the intermediary and the end users.

The case concerned a company (*Lebara*) that sold phonecards for international calls with the use of distributors' services. Under the agreement between *Lebara* and the distributors, the latter undertook to buy the

⁷⁸ Judgment of the Court (Third Chamber) of 21 January 2021, *UCMR – ADA*, C-501/19, para. 19.

⁷⁹ Opinion of Advocate General Richard de la Tour of 1 October 2020, *UCMR – ADA*, C-501/19, para. 47.

⁸⁰ Judgment of the Court (Third Chamber) of 21 January 2021, *UCMR – ADA*, C-501/19, paras. 34-36.

⁸¹ *Ibid.*, para. 46.

⁸² Judgment of the Court (Eighth Chamber) of 18 January 2017, *SAWP*, C-37/16, paras. 27-28.

⁸³ *Ibid.*, paras. 28-29.

phonecards from the company and distribute them to the end consumers.⁸⁴ The question raised concerned the interpretation of the situation from the perspective of VAT rules: whether Lebara carried out two supplies for consideration (to the distributors and to the end users)?⁸⁵

In his Opinion, AG Jääskinen considered several options of constructing the situation, *inter alia*, as (1) a supply chain and (2) a supply with the involvement of an undisclosed agent. The core issue was whether there was a direct link between the communication services provider and the end users. AG found a direct link evident as to have an international call, an end user had to dial a certain PIN code which was automatically received by Lebara's switches and proved that the card had been purchased.⁸⁶ Therefore, the service was supplied by Lebara. Also, Lebara received consideration for the service: as the AG noticed, there was a "*flow of consideration*" from the end users to the company through the distributors.⁸⁷ Accordingly, the AG insisted on interpreting the situation as a supply with the involvement of an undisclosed agent and, subsequently, on the application of the "deemed supply" rule. The other way of interpretation – recognition of a supply chain – would require ignoring the existence of a direct link between Lebara and the end users and declaring it between Lebara and the distributors.⁸⁸

This case illustrates that where there is one direct link between the principal and intermediary and the other one between the latter and end users, then the situation constitutes a distribution chain. In other words, the intermediary becomes an actual buyer and reseller of the services or goods, therefore the question of applicability of the "deemed supply" rule becomes irrelevant.

However, the approach of the CJEU is not always consistent and in line with the general rule on taxable supplies and, as a result, the two-step test discussed above. One example is the recent judgement of the CJEU in *Amărăști* case.

The case concerned a two-stage sale of land where the first stage consisted of a bilateral promise to sell, including the obligation of the purchaser (Amărăști) to perform for the vendor its statutory obligation to be registered in the Land Register, and the second one – a sale contract. This contract was valid only if the statutory obligation to register had been fulfilled. Under the promises to sell, the purchaser undertook to complete the registration process with neither re-invoicing the costs borne on the necessary services of the specialists (lawyers, notaries etc.) nor considering them as a part of the land's price.⁸⁹

⁸⁴ Judgment of the Court (Third Chamber) of 3 May 2012, *Lebara*, C-520/10, paras. 9-14.

⁸⁵ *Ibid.*, para. 20.

⁸⁶ Opinion of Mr Advocate General Jääskinen of 8 December 2011, *Lebara*, C-520/10, paras. 37, 66.

⁸⁷ *Ibid.*, para. 66.

⁸⁸ *Ibid.*, para. 81.

⁸⁹ *Ibid.*, paras. 16-26.

In its judgement, the CJEU proceeded straight to the question of whether the purchaser acted as an undisclosed agent.⁹⁰ It did not tackle the question of a direct link although it can be argued that there was no taxable supply between the vendor and the registration service providers.

Firstly, in this case, the services were paid by the purchaser of land at its own expense. Furthermore, the contract between the purchaser and vendor stipulated that the registration-related costs were to be recovered by the vendor only if it had not fulfilled its obligation to conclude the contract of sale.⁹¹ However, even in this case, the sum to be paid was fixed in advance and could differ from the costs actually borne by Amărăști. Hence, this sum seems to be not the consideration for the services supplied⁹² but simply a payment covering the costs of the purchaser in the case of the non-fulfilment of the obligations by the vendor which may be compared with the “fair compensation” set in *SAWP* case.⁹³ Therefore, due to the absence of any remuneration provided by the vendor, for VAT purposes, it seems evident that there was no taxable supply of services between it (the claimed principal) and the specialists provided the services. A direct link seems to exist only between the payment made by the purchaser (the claimed intermediary) and the third parties supplied the services.

Summing up, as a rule, a taxable supply is a supply that contains a direct link between the services or goods supplied and the remuneration received. When there is no direct link, a transaction is irrelevant for VAT purposes. It follows from this that for a VAT rule on intermediation to be applicable, there must be a direct link between the services or goods supplied and the remuneration received between the principal and the end users. Otherwise, from the VAT perspective, a supply in which an intermediary might be involved is simply non-existing. Accordingly, application of the rules on intermediation may be seen as a two-step test where it should be, firstly recognized that the underlying supply is taxable for VAT purposes; secondly assessed if an intermediary is acting as an undisclosed or a disclosed agent. Such a two-step test has been recognized by the CJEU, however, is followed by it inconsistently: in *Amărăști* case, the CJEU departed from it by establishing an undisclosed agent although a direct link between the services supplied and the remuneration received can be strongly argued to be absent.

3.2 Qualification as an undisclosed or a disclosed agent

Provided that a taxable supply between two persons is established, it should be ascertained whether there is a person acting on behalf of the supplier or the buyer to such a supply. As it was discussed above, such a person, intermediary, constitutes an undisclosed agent when it is taking part in a

⁹⁰ The CJEU proceeded to the question after confirming that the VAT Directive does not preclude the parties from agreeing on a clause as the one at the issue.

⁹¹ Judgment of the Court (Eighth Chamber) of 19 December 2019, *Amărăști Land Investment*, C-707/18, para. 21.

⁹² Judgment of the Court (Eighth Chamber) of 18 January 2017, *SAWP*, C-37/16, para. 25

⁹³ *Ibid.*, para. 25.

supply acting on behalf of the supplier or the buyer but in its own name.⁹⁴ In the other case, when it is acting on behalf and in the name of the supplier or the buyer, it is regarded as a disclosed agent.

The VAT Directive does not define the criteria for identifying a taxable person as an undisclosed or a disclosed agent which leaves it for the CJEU and the national courts of the EU Member States to interpret them. Notably, a well-established approach of the CJEU is to provide guidance on the issues to be taken into account but, in the end, leave it for the relevant national court to ascertain if a taxable person is acting as an undisclosed or a disclosed agent.⁹⁵ To do this, the national court is expected to access all the facts of the case, including the relationships between the parties of the three-side relationship.⁹⁶

Below, each of the criteria is elaborated on. The analysis of them follows the discussion of the question of whether consideration of an intermediary may have an impact on the qualification of it as an undisclosed or a disclosed agent conducted in light of *Amărăști* case.

3.2.1 Should an intermediary act for consideration?

An answer to the question of whether an intermediary must receive consideration for its activity depends on whether a case concerns an undisclosed or a disclosed agent. As it follows from the above-discussed general rule, only services supplied for consideration are to be considered for VAT purposes. Accordingly, for the intermediation services – services rendered by a disclosed agent – to be considered for VAT purposes, a disclosed agent must receive consideration for them.

Regarding undisclosed agents (the application of the “deemed supply” rule), the approach is different. As the CJEU held in *Amărăști* case, the fact that the intermediary was not remunerated for the participation in the supply and the costs were not refunded were considered not altering the conclusion that it acted as an undisclosed agent.⁹⁷ The CJEU stated that this follows from an interpretation of the wording of Article 28 of the VAT Directive.

It should be emphasized that by “consideration” is meant an intermediary’s profit. The profit of an intermediary should be distinguished from the

⁹⁴ Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, Articles 14(2)(c), 28; Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015 (Council Implementing Regulation (EU) No 1042/2013) of 3 April 2015, *European Commission*, URL: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/telecom/explanatory_notes_2015_en.pdf [16.05.2021], para. 3.4.1; Opinion of Mr Advocate General Jääskinen of 8 December 2011, *Lebara*, C-520/10, para. 73.

⁹⁵ Opinion of Mr Advocate General Jääskinen of 8 December 2011, *Lebara*, C-520/10, para. 78; Judgment of the Court (Seventh Chamber) of 14 July 2011, *Henfling and Others*, C-464/10, paras. 42-43.

⁹⁶ Jespersen C. (2011). Op. cit., p. 251-252; Rendahl P. (2013). Op. cit., p. 452.

⁹⁷ *Ibid.*, paras. 39-43.

consideration it may receive and transfer to maintain the flow of consideration between the principal and the end users. In the first case, an intermediary is paid for its services by its principal according to the agreement between them, whereas in the second case, it simply facilitates payment between two other parties.

It follows from the above that disclosed agents should always act for consideration otherwise their services would fall outside the scope of VAT. As for undisclosed agents, they may act without making any profit. A situation in which an undisclosed agent is remunerated should be distinguished from a situation when it is simply responsible for gathering and transferring consideration between the principal and end user.

3.2.2 Acting on behalf of the principal

To be regarded as a disclosed or an undisclosed agent, a taxable person must act on behalf of another person. Acting on its own behalf and in its own name would exclude a taxable person from the scope of the provisions of the VAT Directive on intermediation⁹⁸ as it would be regarded as a provider or a purchaser.⁹⁹ Acting on its own behalf but in the name of another person would, in fact, transform the taxable person (intermediary) into a principal and the initial supplier (acting in its own name towards the customer) – into an undisclosed agent.¹⁰⁰

The concept of acting on behalf of someone else is closely related to the concept of a supply.¹⁰¹ The reason is that an intermediary should not provide and receive a supply itself but act on behalf of a party that does. Otherwise (when an intermediary provides or receives a supply itself), there is no need for a legal fiction of two supplies.¹⁰² Therefore, it is crucial to determine what it means to be a supplier (customer) for VAT purposes.

As it follows from a well-established case law, while determining a supply, an emphasis should be put on a transfer of the right to dispose of but not whether and how many transfers of legal ownership have taken place. For example, such a view on the definition of a taxable supply may be demonstrated by *FBK* case.¹⁰³

The case concerns a supply of fuel between FBK and the operators of the vessels in which an “*intermediary acting in its own name*” participated. The question raised concerned the applicability of the exemption under Article 148(a) of the VAT Directive. It applies only when the goods are used for

⁹⁸ Articles 14(2)(c), 28 and 46 of the VAT Directive.

⁹⁹ Opinion of Advocate General Kokott of 23 April 2020, *XT*, C-312/19, para. 56. Also, see section 2.1 of this thesis.

¹⁰⁰ Jespersen C. (2011). *Op. cit.*, p. 123-124.

¹⁰¹ *Ibid.*, p. 253.

¹⁰² Sanders J. (2016). “Implications of the FBK Case on Chain Transactions”, *International VAT Monitor*, 27(1), p. 5.

¹⁰³ Judgment of the Court (Fourth Chamber) of 3 September 2015, *Fast Bunkering Klaipėda*, C-526/13. It is in line with the CJEU’s earlier judgements such as Judgment of the Court (Sixth Chamber) of 8 February 1990, *SAFE*, C-320/88, paras. 7-8; Judgment of the Court (Fifth Chamber) of 6 February 2003, *Auto Lease Holland*, C-185/01, para. 32.

navigation on the high seas (by operators) but not for the future transfer of them to such operators (by intermediaries).¹⁰⁴

Following the AG’s line of reasoning, the CJEU held that the exemption might apply if the operators were the ones receiving the right to dispose of the fuel, that is to say, there was only one taxable supply: between FBK and the operators. In case the intermediary obtained such a right (alongside the legal ownership), the exemption was not applicable.¹⁰⁵ Unfortunately, the CJEU has not elaborated on Article 14(2)(c) of the VAT Directive¹⁰⁶ in the case, although the “*intermediary acting in its own name*”, being the operator’s representatives,¹⁰⁷ seemed to also act on their own behalf, thus, constituting undisclosed agents.¹⁰⁸

Therefore, it is clear that for a taxable person to be regarded as a supplier or a customer for VAT purposes, such a person must be entitled to transfer or to be transferred the right to dispose of. An intermediary, in its turn, may act on behalf of such a taxable person.

Notably, the right to dispose of is one of the two components of economic ownership. The other one is the economic liability for the profits and losses related to the goods (services).¹⁰⁹ It was referred to by AG Jääskinen in his Opinion in *Lebara* case. Namely, the AG held that the economic risk is a decisive factor in determining whether a person is acting on its own or another person’s behalf. In that case, the distributors provided the phonecards to consumers without an obligation to pay the principal any consideration to Lebara if they did not manage to release the cards.¹¹⁰ Since they did not bear the economic risk, they were regarded as acted on behalf of the principal that borne such a risk.

This position has been also implemented by the national courts. In particular, the Administrative Court of Appeal in Sweden decided in *RI* case that the distributor acted on behalf of another person as the latter carried the economic risks of the supply even though the distributor acted with an “*economic intent*”.¹¹¹

¹⁰⁴ Council Directive 2006/112/EC on the common system of value added tax of 28 November 2006, Article 148(a).

¹⁰⁵ Judgment of the Court (Fourth Chamber) of 3 September 2015, *Fast Bunkering Klaipėda*, C-526/13, para. 53; Opinion of Advocate General Sharpston of 5 March 2015, *Fast Bunkering Klaipėda*, C-526/13, para. 58.

¹⁰⁶ The “deemed supply” rule in regard to supplies of goods.

¹⁰⁷ Request for a preliminary ruling of 7 October 2013, ‘*Fast Bunkering Klaipėda*’ UAB, C-526/13, para. 8.

¹⁰⁸ Sanders J. (2016). Op. cit., p. 2.

¹⁰⁹ Opinion of Mr Advocate General Van Gerven, *SAFE*, C-320/88, para. 6.

¹¹⁰ Opinion of Mr Advocate General Jääskinen of 8 December 2011, *Lebara*, C-520/10, para. 75.

¹¹¹ Judgement of the Administrative Court of Appeal in Sundsvall (Kammarrätten i Sundsvall) of 20 March 2012, Case 2741-2743-10; Rendahl P. (2013). Op. cit., p. 455; See also Zechner L. (2019). “How to Treat the Ride-Hailing Company Uber for VAT Purposes”, *International VAT Monitor*, 30(6), p. 263.

Consequently, a supplier (or a customer) – a potential principal – is a taxable person that not only has a right to dispose of but also bears the economic risks of the supply. These two components constitute economic ownership.

Regarding the foregoing considerations, the recent *XT* case seems to be of interest. It concerned a partnership under a joint activity contract according to which two persons undertook to purchase land and construct buildings for further selling. After selling the first building (out of five), the partnership was terminated with the transfer of the fourth and the fifth buildings to the second partner. Later, the first partner (*XT*) sold the second and the third buildings; also, it undertook to sell the fifth one. The question raised was who was liable for VAT on the supplies of the buildings.¹¹²

Following AG Kokott's Opinion, the CJEU established that *XT* was the taxable person acting in its own name and on its own behalf and bearing the economic risk, thus carrying economic activity and liable for VAT on the selling of the first three buildings. As for the fifth building, it was noted that *XT* might act as a commissionaire – in its own name but on behalf of the partner – as the building had been allocated to the partner.¹¹³ Interestingly, under the agreement between *XT* and the partner, *XT*, on the one hand, entered the Land register as an owner of the building but, on the other hand, was obliged to immediately transfer the sum from selling to the partner.

Thus, while *XT* had legal ownership (the building was registered in its name), the partner could be argued to economically possess the building as the decision to sell it was made pursuant to the agreement with it and it was the one receiving the sum from the sale. Also, *XT* might be assumed not to be obliged to pay consideration to the partner in the case of not selling the building, therefore bear no economic risk. If it were an intention to make *XT* bear the economic risk (basically, pay for the building), it is likely that the partners would have simply included the expected sum from the sale in the amount *XT* agreed to pay to the partner to compensate for the difference between their initial contributions and allocated assets.¹¹⁴ Hence, *XT* case confirms that acting on behalf means acting for someone who has economic ownership.

Furthermore, for the determination that an intermediary is acting on behalf of a supplier or a customer, it may be required to have an agreement under which it is entitled to act on behalf. This criterion has not been mentioned in any of the above-analyzed cases, however, may be found in *ITH* case.¹¹⁵ In this case,

¹¹² Judgment of the Court (Eighth Chamber) of 16 September 2020, *XT*, C-312/19, paras. 19-32.

¹¹³ *Ibid.*, paras. 44-48, 50; Opinion of Advocate General Kokott of 23 April 2020, *XT*, C-312/19, paras. 57, 59.

¹¹⁴ Under the agreement terminating the partnership. Judgement of the Court (Eighth Chamber) of 16 September 2020, *XT*, C-312/19, para. 24.

¹¹⁵ Judgment of the Court (Eighth Chamber) of 12 November 2020, *ITH Commercial Timișoara*, C-734/19. In the thesis, an unofficial translation of the judgement has been used. See, for example, Summary, Judgment of the Court (Eighth Chamber) of 12 November 2020, *ITH Commercial Timișoara*, C-734/19, *IBFD*, URL: https://research-ibfd.org.ludwig.lub.lu.se/#/doc?url=/linkresolver/static/ecji_c_734_19 [08.04.2021].

the CJEU emphasized the need for an agency agreement as one of two requirements following from a textual interpretation of Articles 14(2)(c) and 28 of the VAT Directive.¹¹⁶

The case regarded a taxable person that had purchased land intending to build a factory for subsequent letting to another person. In this case, the question of whether the first person acted as a commissionaire in relation to the services purchased in order to build a factory was raised. The answer to it was put into dependence on the existence of an agreement between the parties although the services provided were intended to meet specific needs of the alleged principal.¹¹⁷ However, the CJEU does not seem to be consistent in the application of such a formal criterion. For example, this requirement has not been mentioned in the CJEU's judgement in *UCMR* case which was delivered after the one in *ITH* case.

Interestingly that in some cases, it is sufficient to access the provisions of the national legislation to determine if a person is acting on behalf of another person. This may be demonstrated by two recent cases. In *Amărăști* case, the CJEU held that the taxable person was deemed to carry out registration property in the Land Register on behalf of another person as it was the latter's statutory obligation.¹¹⁸ In the other case, *UCMR* case, a taxable person was regarded as acting on behalf of another person since the rights and obligations of a collective management organization in the relationships between the copyright holders and the end users which made it an undisclosed agent, were prescribed by the national legislation. This related both to the copyright holders that had granted authorization to the collective management organizations and those that had not.¹¹⁹

As shown, to determine whether a taxable person is acting on behalf of another person, it is crucial to analyze the economic reality of the three-part relationship this person is involved in. Such analysis should aim to establish who has economic ownership of the goods (services) included in the underlying supply, i.e., who can be a principal. Moreover, the provisions of the national legislation, as well as the existence of an agreement entitling a person to act on behalf of another person may play an important role. However, the latter does not seem to be widely supported in the case law.

3.2.3 Acting in its own or in the principal's name

When it is established that a taxable person is acting on behalf of another person, to apply the rules on undisclosed agents and, in certain cases, the special schemes¹²⁰, it is crucial to determine whether it is acting in its own

¹¹⁶ Ibid., para. 52. The other requirement is that the goods/services supplied from another person to the commissioner, and the ones from the latter to the principal must be identical.

¹¹⁷ Ibid., para. 53.

¹¹⁸ Judgment of the Court (Eighth Chamber) of 19 December 2019, *Amărăști Land Investment*, C-707/18, paras. 40-41.

¹¹⁹ Judgment of the Court (Third Chamber) of 21 January 2021, *UCMR – ADA*, C-501/19, paras. 32, 44, 47.

¹²⁰ See subsection 2.3.1 of this thesis.

name or the name of a principal. Otherwise, a taxable person is regarded as a disclosed agent.

It seems reasonable to state that the concept of acting in one's own name shall find a consistent application within the VAT Directive. Such an approach follows from a literal interpretation of the provisions and is in line with the principle of consistent and contextual interpretation.¹²¹ Therefore, the interpretation of the concept can be derived not only from the case law on the articles providing a legal framework for the regulation of transactions involving undisclosed agents¹²² but also *lex specialis*.

It follows from the case law on the travel agent special scheme that the interpretation of the concept of acting in one's own name requires to analyze all the facts of the case with particular attention to the contractual obligations between the travel agent and the travellers.¹²³ To put it in a more general context, to find if a taxable person is acting in its own name, the national court has to ascertain how the responsibilities towards the third parties are allocated between it and the principal.¹²⁴ As it arises from the concept of an undisclosed agent¹²⁵, the main question the national court has to answer is whether the third parties consider the intermediary as the end supplier or buyer.¹²⁶

It may be claimed that the analysis of the contractual obligations between the parties may be influenced by the national contract law.¹²⁷ Indeed, it is not harmonized throughout the EU.¹²⁸ On the other hand, in *Henfling* case, the CJEU held that the national provisions, including the ones relating to the application of tax regulations, should not extend the provisions of harmonized VAT rules.¹²⁹

Moreover, as it has been demonstrated by *XT* case, when the contractual and factual activities contradict, the priority is to be given to the latter. In the case, *XT* was considered to act in its own name even when the partnership contract stated that, in relation with third parties, he was acting in the name of both partners.¹³⁰ This conclusion was reached as *XT* did not mention the partnership or the other partner when it obtained the plot of land and a construction permit, concluded the property development, and sell agreements.¹³¹ This seems to be in line with a well-established case law that

¹²¹ Jespersen C. (2011). Op. cit., p. 251.

¹²² Council Directive 2006/112/EC on the common system of value added tax of 28 November 2006, Articles 14(2)(c), 28, 46.

¹²³ Judgment of the Court (Third Chamber) of 12 November 1992, *Van Ginkel*, C-163/91, para. 21; Judgment of the Court (Second Chamber) of 13 October 2005, *iSt*, C-200/04, para. 20.

¹²⁴ Rendahl P. (2013). Op. cit., p. 452.

¹²⁵ See section 2.2 of this thesis.

¹²⁶ Jespersen C. (2011). Op. cit., p. 251.

¹²⁷ *Ibid.*, p. 252.

¹²⁸ Rendahl P. (2013). Op. cit., p. 452.

¹²⁹ Judgment of the Court (Seventh Chamber) of 14 July 2011, *Henfling and Others*, C-464/10, para. 43.

¹³⁰ Judgment of the Court (Eighth Chamber) of 16 September 2020, *XT*, C-312/19, para. 43.

¹³¹ *Ibid.*, paras. 22, 42.

states that the national court must ascertain if the intermediary in fact acts in its own name.¹³²

To conclude, while the determination of on whose behalf a taxable person is acting mainly concerns the relation of the perspective undisclosed agent and the principal to the underlying supply, the determination of whether a person is acting in its own name focuses on the analysis of the relationships between the alleged undisclosed agent and the principal and the third parties. The analysis requires to focus on whether the agent in fact acts in its own name, i.e., if the third parties (sub-suppliers¹³³) recognize it as their counterparty.

3.2.4 Taking part in a supply

When does a taxable person take part in a supply and, hence, may be considered as an undisclosed agent? In other words, how should the functions in regard to the underlying supply be allocated between an undisclosed agent and its principal to apply the “deemed supply” rule?

Based on a comparison of different language versions of the VAT Directive, “taking part” may be considered as actually rendering the service to the end users.¹³⁴ The CJEU seems to support this position in *ITH* case where it held that one of the conditions of the application of Articles 14(2)(c) and 28 of the VAT Directive is that the supply between the undisclosed agent and the end users must be identical to the one between the former and the principal.¹³⁵ However, if a third party actually provides a supply, would not it undermine the need for a legal fiction of two identical supplies (the “deemed supply” rule¹³⁶)?

At the same time, another interpretation might be derived from Article 9a of the Implementing Regulation¹³⁷ which seems to suggest a narrower understanding of the concept than equating “taking part” with actually supplying. This article simplifies the identification of the service provider in supplies of services through “*a telecommunications network, an interface or a portal*”¹³⁸ by a presumption that an intermediary participating in such a supply acts as an undisclosed agent. Thus, it reflects only some of the possible

¹³² Judgment of the Court (Seventh Chamber) of 14 July 2011, *Henfling and Others*, C-464/10, para. 39.

¹³³ Judgment of the Court (Eighth Chamber) of 19 December 2019, *Amărăști Land Investment*, C-707/18, para. 39.

¹³⁴ Jespersen C. (2011). Op. cit., p. 249-250.

¹³⁵ Judgment of the Court (Eighth Chamber) of 12 November 2020, *ITH Commercial Timișoara*, C-734/19, paras. 51, 54.

¹³⁶ Judgment of the Court (Fourth Chamber) of 4 May 2017, *Commission v Luxembourg*, C-274/15, para. 86.

¹³⁷ Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, Article 9a.

¹³⁸ Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015 (Council Implementing Regulation (EU) No 1042/2013) of 3 April 2015, *European Commission*, URL: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/telecom/explanatory_notes_2015_en.pdf [16.05.2021], paras. 3.2-3.3; Ehrke-Rabel T., Zechner L. (2020). Op. cit., p. 505; Henkow O. (2017). Op. cit., p. 245.

practical situations legally framed in Article 28 of the VAT Directive. Although Article 9a of the Implementing Regulation is narrowed down to the supplies through certain electronic instruments, some of the indicators of whether a person is “taking part” in the supply seem to be applicable to other types of situation, i.e., relevant for Article 28, too.¹³⁹

Amongst the indicators that may be found in the Explanatory Notes, the ones which with “*no doubt*” suggest that a person takes part in a supply for the purposes of Article 9a seem to be of “general” applicability.¹⁴⁰ They concern the cases when a taxable person authorises (1) the charge or/and (2) the delivery of the service to the customer, or/and (3) set the general terms and conditions of the supply.¹⁴¹ Also, a person may be considered to take part in a supply when it, for instance, is (1) responsible for collecting payment, (2) controls or has influence over pricing, (3) is obliged to issue a VAT invoice/receipt/bill to the end user, (4) provides customer care/support, (5) bears legal liabilities or obligations regarding the service, (6) is entitled to credit a sale without the principal’s permission where the supply was not properly received.^{142;143}

Application of some of these criteria was demonstrated in mentioned above AG Jääskinen’s Opinion in *Lebara* case. In this case, the AG claimed that the distributors took part in a supply as they took responsibility for the distribution of access to phone calls, the transfer of consideration, and the activation of users’ accounts – customer care.¹⁴⁴

The list of the indicators is not exhaustive. For the situations, falling outside it, the Explanatory notes provides the general rule: to ascertain whether a person is taking part in a supply, both the facts of a particular case (economic reality) and contractual obligations should be taken into account. This seems to correspond to the methodology for determining whether a taxable person is acting in its own name and on behalf of another person.¹⁴⁵

Consequently, the concept of taking part in a supply requires investigating how the obligations and liabilities between an intermediary and its principal are allocated.¹⁴⁶ For this purpose, not only the formal but also factual

¹³⁹ The interaction between Article 9a of the Implementing Regulation and Article 28 of the VAT Directive will be analyzed in Chapter 4 of this thesis.

¹⁴⁰ Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015 (Council Implementing Regulation (EU) No 1042/2013) of 3 April 2015, *European Commission*, URL: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/telecom/explanatory_notes_2015_en.pdf [16.05.2021], para. 3.4.3. (subparagraph 7).

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, para. 3.4.3. (subparagraph 9, points 3-6, 8, 10).

¹⁴³ The rest of the indicators provided in Article 9a seem to relate to the specific nature of the supplies under this article.

¹⁴⁴ Opinion of Mr Advocate General Jääskinen of 8 December 2011, *Lebara*, C-520/10, para. 76.

¹⁴⁵ The concepts of acting in another person’s name and on another person’s behalf are analyzed in subsections 3.2.2 and 3.2.3 of this thesis.

¹⁴⁶ The concept of taking part in a supply is compared with the concept of facilitating a supply in section 3.3 of this thesis.

(economic) elements of their relationships must be considered. Based on the case law and Article 9a of the Implementing Regulation as the only source defining this concept, an undisclosed agent must participate in a supply but not render the services or goods itself.

3.3 Article 14a of the VAT Directive: “facilitating” a supply

As stated above, both Article 14a of the VAT Directive and Article 9a of the Implementing Regulation regulate the application of the “deemed supply” rule when a supply is rendered with the use of an electronic marketplace, platform, or portal and are to ensure an effective collection of VAT.¹⁴⁷ The former article governs supplies of goods, whereas the latter refers to supplies of services; thus, they relate to the rules inserted in Articles 28 and 14(2)(c)¹⁴⁸ of the VAT Directive, respectively.

To apply Article 14a, a taxable person must be “facilitating” a supply, meanwhile, to apply Article 9a, such a person must be “taking part” in it. Starting with the similarities between these concepts, both of them require analyzing the contractual relationships and the economic reality with prevalence given to the latter.¹⁴⁹ Also, in both cases, there are three situations each of those automatically includes a taxable person into the scope of these articles. Namely, (1) when a taxable person authorizes the terms and conditions of the supply or (2) authorize the charge to the customer. The third one (3) mainly concerns the delivery; however, under Article 9a an authorization of the delivery is required whereas for Article 14a it is sufficient to be “*involved in the ordering or delivering*”.

Article 14a elaborates on each of these criteria but Article 9a simply provides for a separate list of the indicators. Regarding the ones, covered by the concept of setting the terms and conditions in Article 14a and also included in the list of the indicators in Article 9a, they are: (1) owning or managing the platform etc., (2) owning the customer data related to the supply, (3) having control or influence over the pricing. In both cases, this concept is to be interpreted broadly, as covering “*any terms and conditions*”.¹⁵⁰ Therefore,

¹⁴⁷ Explanatory Notes on VAT e-commerce rules of 30 September 2020, European Commission, URL: https://ec.europa.eu/taxation_customs/sites/taxation/files/vatecommerceexplanatory_28102_020_en.pdf [16.05.2021], para. 3.3, subparagraph 3; Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015 (Council Implementing Regulation (EU) No 1042/2013) of 3 April 2015, European Commission, URL: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/telecom/explanatory_notes_2015_en.pdf [16.05.2021], para. 2.1.2.

¹⁴⁸ Terra B., Kajus J. (2021). Op. cit., p. 263.

¹⁴⁹ Explanatory Notes on VAT e-commerce rules of 30 September 2020, European Commission, URL: https://ec.europa.eu/taxation_customs/sites/taxation/files/vatecommerceexplanatory_28102_020_en.pdf [16.05.2021], para. 2.1.6.1, subparagraph (a), point 3.

¹⁵⁰ Ibid., para. 3.4.3, subparagraph 9; Explanatory Notes on VAT e-commerce rules of 30 September 2020, European Commission, URL: https://ec.europa.eu/taxation_customs/sites/taxation/files/vatecommerceexplanatory_28102_020_en.pdf [16.05.2021], para. 2.1.6.1, subparagraph (a)(3).

when a taxable person decides on the rights and obligations such as an arrangement of payment, delivery, guaranties etc., it is regarded as facilitating (Article 14a) and taking part (Article 9a) in supply. However, Article 14a also covers the conditions regarding the use of a platform but the other article does not mention it.¹⁵¹

As for the authorization of the charge, both articles refer to the situation when a taxable person influences “*whether, at what time or under which conditions the customer pays*”.¹⁵² Moreover, a person that only processes a payment, is excluded from both the concepts of facilitating and taking part.

Regarding the third situation, in the case of Article 9a, it only concerns the authorization of the delivery, whereas Article 14a operates a wider concept covering taxable persons involved in the (1) ordering and (2) delivery. Article 9a limits the participation to the influence on “*whether, at what time, or under which preconditions the delivery is made*”; Article 14a allows influence “*in any way*” in regard to both the ordering and delivering. For example, it is sufficient for a platform to provide an online shopping cart to fall within the “deemed supply” rule.¹⁵³

It follows from the above that Article 14a of the VAT Directive may have a broader interpretation than the one given to Article 9a of the Implementing Regulation.¹⁵⁴ Consequently, more platforms may be found covered by the “deemed supply” rule in the case of the relevant supplies of services (which types are limited by Article 14a) than supplies of goods. This is aligned with the conclusion made by the Group of the future of VAT in 2018.¹⁵⁵ However,

¹⁵¹ Ibid., para. 2.1.6.1, subparagraph (a)(2); Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015 (Council Implementing Regulation (EU) No 1042/2013) of 3 April 2015, *European Commission*, URL: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/telecom/explanatory_notes_2015_en.pdf [16.05.2021], para. 3.4.6, subparagraph 7.

¹⁵² Ibid., para. 3.4.3, subparagraph 7; Explanatory Notes on VAT e-commerce rules of 30 September 2020, *European Commission*, URL: https://ec.europa.eu/taxation_customs/sites/taxation/files/vatecommerceexplanatory_28102_020_en.pdf [16.05.2021], para. 2.1.6., subparagraphs 3, 5.

¹⁵³ Ibid., para. 2.1.6.3(a)(b); Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015 (Council Implementing Regulation (EU) No 1042/2013) of 3 April 2015, *European Commission*, URL: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/telecom/explanatory_notes_2015_en.pdf [16.05.2021], para. 3.4.6, subparagraph 5.

¹⁵⁴ It was assumed by Lamensch M. See Lamensch M. (2018). “European Union – Rendering Platforms Liable to Collect and Pay VAT on B2C Imports: A Silver Bullet?”, *International VAT Monitor*, 29 (2), p. 1.

¹⁵⁵ Group on the future of VAT, GFV No. 072 REV 2, 23rd meeting, *CIRCABC*, URL: https://circabc.europa.eu/ui/group/cb1eaff7-eedd-413d-ab88-94f761f9773b/library/0f4062ac-5597-4abd-8560-9c5643560fe2?p=1&n=10&sort=modified_DESC [16.05.2021], p. 2; Papis-Almansa M. (2019). *Op. cit.*, p. 217.

until the practice makes adjustments to the new article, it seems too early to make final conclusions.

3.4 Conclusion to Chapter 3

Chapter 3 argues that the interpretation of a particular situation as being subject to the rules on intermediation may be seen as a two-step test. As the first step, a taxable supply for VAT purposes must be identified. As it follows from a general well-established rule, a taxable supply is a supply containing a direct link between the services or goods supplied by a supplier and the remuneration received by it from a customer.

When an underlying supply is determined as being taxable for VAT purposes, it may be proceeded to the second step. It aims at analyzing whether there is an intermediary acting as an undisclosed or a disclosed agent. The VAT Directive does not explicitly define what “acting on behalf of the principal”, “acting in the name of the principal”, and “taking part” in a supply mean. However, the case law provides for a rule that the analysis of these criteria should be based on the examination of the contractual relationships between the intermediary, the principal, and the end users as well as the criterion of economic reality.

In more detail, for the determination of whether a taxable person is acting on behalf of another person, it must be found that the latter economically possesses the goods (services) supplied. In case an “intermediary” has economic ownership (regardless legal ownership), it becomes a supplier for VAT purposes. Further, the assessment of in whose name a taxable person is acting mainly refers to the analysis of its relationships with third parties. The question to be answered is whether such third parties are aware of the existence of an initial supplier or buyer. It is clear that an undisclosed agent takes place when the third parties recognize it as their counterparty. Finally, whereas disclosed agents simply provide their services to the principal, undisclosed agents are required to take part in a supply. Namely, an undisclosed agent seems to be expected to participate in a supply but not render the services or goods itself. The question of the minimum threshold of participation is unclear and seems to be established on a case-by-case basis.

Notably, when a situation involves a platform, it is not required to ascertain that it acts on someone’s behalf and whether it acts in its own or someone’s name for the application of the “deemed supply” rule under Article 14a of the VAT Directive. As for the requirement of taking part in a supply, it is replaced with the requirement to facilitate a supply. The comparative analysis of these two criteria shows that the latter one has a broader meaning.

4 Further considerations: validity of Article 9a of the Implementing Regulation

As it was discussed above, Article 9a of the Implementing Regulation provides a legal presumption applicable when services are supplied with the use of telecommunications networks, portals, or interfaces. The Explanatory Notes to this article may be seen as a source clarifying what the requirement to take part in a supply means not only in the context of Article 9a but also Article 28 of the VAT Directive.¹⁵⁶

However, the scope of the presumption is argued to be excessively wide: covering almost any platform participating in a relevant supply. This may serve as a basis for declaring Article 9a as going beyond Article 28 of the VAT Directive, hence, invalid. The discussion on the invalidity of Article 9a has been started in legal doctrine and received a new round of development in the preliminary ruling in *Fenix International* case. This chapter presents the discussion and assesses the article.

Fenix International case concerns an electronic platform that is used for the interaction of two categories of users: “creators” supplying services and “fans” paying for such services *ad hoc* or monthly. The platform and facility by way of which payments are made are provided by a company – Fenix. The tax authority claimed that Fenix fell within the legal presumption provided by Article 9a of the Implementing Regulation.¹⁵⁷ Indeed, Fenix seems to have several indicators of a taxable person taking part in a supply: for instance, it sets the terms and conditions on using the platform and collects and distributes the payments (in its own name: its name was used in the user’s bank statements).^{158;159} In response, Fenix did not appeal on a factual basis but questioned the validity of Article 9a. Thus, the dispute before the CJEU is whether Article 9a is invalid as going further than Article 28.

Fenix argues that Article 9a shifts the liability and the burden of taxation to the platforms involved even in a relationship where the principal’s identity is revealed and “*the fact of agency is clear*”.¹⁶⁰ This divests the parties’ contractual autonomy and creates a new legal fiction. In other words, it goes beyond Article 28, therefore, is invalid.¹⁶¹ This position is supported by the UK tax tribunal having doubts on the validity of Article 9a as it may be considered as not being strict enough to be considered as an implementing

¹⁵⁶ See subsection 3.2.4 of this thesis.

¹⁵⁷ Request for a preliminary ruling of 22 December 2020, *Fenix International*, C-695/20, para. 14.

¹⁵⁸ *Ibid.*, paras. 7-12.

¹⁵⁹ Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015 (Council Implementing Regulation (EU) No 1042/2013) of 3 April 2015, *European Commission*, URL: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/telecom/explanatory_notes_2015_en.pdf [16.05.2021], para. 3.4.3., subparagraph 7 and 8 (points 1,3).

¹⁶⁰ Request for a preliminary ruling of 22 December 2020, *Fenix International*, C-695/20, para. 28.

¹⁶¹ *Ibid.*, paras. 28-30.

measure.¹⁶² Based on the CJEU's case-law, AG Opinions and other sources, it argues that by introducing Article 9 with no impact assessment, the legislator changed the legal framework, therefore the article is not simply a technical measure.¹⁶³

The tax authorities, in contrast, claim that Article 9a simply provides guidance on the application of Article 28 in the specific situation. It is in line with the general aims of Article 28 and the VAT Directive, is necessary or appropriate for the implementation of Article 28 and does not amend it. Hence, it meets all three criteria of an implementing measure.¹⁶⁴

Well ahead of this request for a preliminary ruling, the interaction between Article 9a and Article 28 was discussed by Henkow O. Firstly, he held that Article 9a must be applied as a source of interpretation of Article 28 regarding the whole range of types of services it concerns but not only those ones that are specified in Article 9a. Such an approach is in line with the principle of neutrality (it ensures equal treatment for equal situations) and the CJEU's statement on the general scope of Article 28 made in *Henfling* case.^{165;166} Secondly, he stated that irrebuttable presumptions are in fact new rules.¹⁶⁷ When an "implementing" article introduces new rules, it may not be considered to be a technical measure. In this case, it does not meet at least one of the criterion for acts to be considered implementing¹⁶⁸: such acts "*may neither amend nor supplement the legislative act, even as to its non-essential elements*".¹⁶⁹ Moreover, Weidmann M. supports the view that Article 9a may be not in line with Article 28 stressing that the presumption of Article 9a should be rebuttable when a taxable person is acting in the name of the provider (acting in its own name is crucial for a commissionaire).¹⁷⁰

Indeed, to rebut the legal presumption under Article 9a, firstly, the provider must be explicitly indicated as the supplier by the intermediary. This must be reflected in the (1) invoice, (2) bill or receipt to the final customer. Secondly, the intermediary must not (3) authorize the charge or (4) delivery to the customer or (5) set the general terms and conditions of the supply – in any of these cases, the taxable person with no doubt takes a part in a supply. Finally, all five points must be included in the contract between the parties (for example, between an app store and content maker¹⁷¹).¹⁷²

¹⁶² Ibid., paras 37-38.

¹⁶³ Ibid., paras. 35-50.

¹⁶⁴ Ibid., paras. 32, 34.

¹⁶⁵ Henkow O. (2017). Op. cit., p. 249-250.

¹⁶⁶ Judgment of the Court (Seventh Chamber) of 14 July 2011, *Henfling and Others*, C-464/10, para. 36.

¹⁶⁷ Henkow O. (2017). Op. cit., p. 251.

¹⁶⁸ Treaty on the Functioning of the European Union, Official Journal of the European Union, C 202, 7 June 2016, Articles 290(1) and 291(2).

¹⁶⁹ Judgment of the Court (Second Chamber), 15 October 2014, *Parliament v Commission*, C-65/13, para. 45.

¹⁷⁰ Weidmann M. (2015). Op. cit., p. 113.

¹⁷¹ Ibid., p. 111.

¹⁷² Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added

The list of the indicators that a person is taking part in a supply is not exhaustive and includes vague formulations as “*controlling or exerting influence*”¹⁷³ (over the pricing, presentation of the marketplace, etc.).¹⁷⁴ In contrast, the list of the conditions for the rebuttal (which must be met cumulatively) is strictly defined. The exceptions to the rebuttal undoubtedly create new rules. Hence, Article 9a may be accepted as going beyond Article 28. However, it is for the CJEU to decide.

If the CJEU follows this line of argumentation and supports the position of Fennix, this will cause a different treatment of the supplies of services and the supplies of goods rendered with the use of electronic platforms, etc. In other words, while supplies of goods through the platforms will be regulated by Article 14a of the VAT Directive, no special regulation will be provided for supplies of services. Consequently, unless an article governing such supplies of services is introduced, only the general rule under Article 28 of the VAT Directive will be applicable to them. Hence, with no presumption of acting as an undisclosed agent, supplies of services through electronic platforms will be less likely to fall within the “deemed supply” rule (or will not fall within it at all). Such a development seems to be out of accordance with the general trend on the regulation of electronic commerce.¹⁷⁵

Importantly, due to *erga omnes* nature of the CJEU’s judgements on invalidity¹⁷⁶, such an effect of the decision will be relevant for every Member State of the EU.

Summing up, Article 9a of the Implementing regulation may be strongly argued as going further than a simply implementing act. The reason is that the presumption introduced by it may be claimed irrebuttable, hence constituting a new rule. The question of the validity of the article is to be solved by the CJEU in the pending case. In case if the CJEU regards the article as invalid, it may have an effect of a different regulation of the supplies of goods and services rendered through electronic platforms. Moreover, it will reduce the legislator’s control over electronic supplies which is not in line with the trend strengthening the regulation of electronic commerce. Once the CJEU’s judgement is delivered, it will have an effect for all the EU Member States.

tax, Article 9a; Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015 (Council Implementing Regulation (EU) No 1042/2013) of 3 April 2015, *European Commission*, URL: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/telecom/explanatory_notes_2015_en.pdf [16.05.2021], paras. 3.4.2.

¹⁷³ Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, para. 3.4.3.

¹⁷⁴ Weidmann M. (2015). Op. cit., p. 113.

¹⁷⁵ Demonstrated, *inter alia*, by the introduction of Article 14a of the VAT Directive.

¹⁷⁶ Treaty on the Functioning of the European Union, Official Journal of the European Union, C 202, 7 June 2016, Article 267.

5 Conclusion

This thesis examines the VAT provisions governing the transactions with the involvement of intermediaries, the relevant case law of the CJEU and the legal literature with the purposes of (1) identifying the types of intermediaries; (2) assessing the conditions and requirements for a taxable person to be regarded as an undisclosed agent, a disclosed agent, or a platform subject to Article 14a of the VAT Directive; (3) systemizing the rules regulating intermediaries' activities.

Generally, there are two types of intermediaries: disclosed and undisclosed agents. Disclosed agents are taxable persons acting in the name and on behalf of the principal, whereas undisclosed agents are taxable persons taking part in a supply acting on behalf of the principal but in their own names.

The VAT regulation concerning disclosed agents is limited to the special rule on the place of supply of disclosed agents' services (Article 46 of the VAT Directive). As for undisclosed agents, their involvement in a supply of goods or services gives rise to the application of the "deemed supply" rule – a legal fiction of two consecutive supplies (to and from the intermediary) in accordance with Articles 14(2)(c) and 28 of the VAT Directive.

Besides these rules, the VAT Directive also provides for *lex specialis*. This thesis suggests that these special provisions may be divided into three groups: (1) the rules providing special schemes to certain intermediaries when they are acting as undisclosed agents; (2) the VAT exemptions for services rendered by disclosed agents; (3) the specific "deemed supply" rules. Application of such special rules (except for Article 14a of the VAT Directive) is contingent on whether an intermediary is acting as an undisclosed or a disclosed agent.

What is more, this thesis argues that a two-step test may be applied for analysing a particular situation as being covered by a VAT rule governing transactions with the involvement of an intermediary. The first step requires establishing a taxable supply for VAT purposes. To this end, as follows from a general well-established VAT rule, a direct link between the services or goods supplied and the consideration received must be identified. Following this, it should be ascertained, firstly whether there is a person acting on behalf of the supplier or the buyer of the goods or services; secondly whether such a person (intermediary) is acting as a disclosed or an undisclosed agent.

In more detail, the second step requires determining whether a taxable person is (1) acting on behalf of another person, (2) acting in its own or another person's name, (3) taking part in the underlying supply of goods or services. The VAT Directive does not provide guidance on the interpretation of these criteria, but it may be derived from the CJEU's jurisprudence that the analysis of them requires considering the contractual relationships between the persons involved as well as the commercial and economic reality. Nevertheless, the final assessment of a particular case is usually left for the relevant national court.

The determination of whether a taxable person is acting on behalf of another person is closely related to the underlying supply and requires establishing the supplier (buyer) of the supplied goods or services for VAT purpose. For this purpose, economic ownership must be ascertained; legal ownership is irrelevant. An economic owner is characterized by having the right to dispose of and bearing the economic risk. Only this person may be regarded as a supplier or buyer of the goods or services and constitute the principal of an undisclosed or a disclosed agent.

Further, whereas the establishment of “acting on behalf” focuses on how the persons involved in a supply relate to the goods or services supplied, in order to establish whether an intermediary is acting in its own name or in the name of the principal, its relationships with third parties (end users) should be assessed. Intermediaries recognized by third parties as their counterparties are regarded as undisclosed agents.

Finally, to ascertain whether an intermediary is taking part in a supply, it should be analyzed what obligations and liabilities towards the underlying supply it has. In general, being interpreted in light of the case law and Article 9a of the Implementing Regulation, the requirement to take part in a supply obliges an intermediary to participate in a supply but not render the services or goods itself. It seems to be unclear what the minimum threshold for participation is in order for an intermediary to be considered as taking part, hence being an undisclosed agent.

Interestingly, the above-discussed criteria are irrelevant for a platform to be ascribed as being subject to Article 14a of the VAT Directive. The only condition for the application of the “deemed supply” rule towards platforms is to facilitate a certain supply of goods. Based on a comparative analysis of the concept of facilitating a supply and the concept of taking part in a supply provided by Article 9a of the Implementing Regulation, the former seems to have a broader scope.

Further development of the issues on the establishment of undisclosed agents is connected with the question of the validity of Article 9a of the Implementing Regulation being a subject matter in the pending *Fenix International* case. In the case of Article 9a being regarded as being broader than a simply implementing act and, therefore invalid, it may cause a weaker regulation of electronic supplies of services in comparison with the supplies of goods. This seems to be out of line with the current trend for the increase in the regulation of electronic commerce.

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