European VAT and the digital economy:
recent developments

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Abstract
The article investigates the most recent developments in the field of European VAT in connection to the digital economy and specifically to the treatment and fiscal consequences of peer-to-peer technologies, consumer-to-consumer models, and barter transactions as free supplies. The article’s aim is to understand if, and how, progress has been made in the field, and to discuss the most recent legislative developments. Both practical and theoretical concerns are thoroughly examined and preliminary conclusions are drawn at the end that include an assessment of current regulations under the lens of the rule of law as a cornerstone of European law that must be respected.

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1. **INTRODUCTION**

The creation of the European Digital Single Market is one of the Union’s main priorities, and the European Commission considers VAT one of the core elements of the European Digital Single Market to be addressed in the coming years. The OECD has shared similar interests in their 2015 Final Report on “Addressing the Tax Challenges of the Digital Economy, Action 1”. This paper examines in detail three main tax-related, digital economy issues as mentioned in the OECD BEPS Action 1 documents, and specifically: peer-to-peer technologies, consumer-to-consumer models, and barter transactions as a free supply.

If it is true from a business perspective that the digital economy presents a potential for economic growth, it is also true that the legislative frameworks regulating it, when they even exist, are very often a source of unclarity and uncertainty.

This article investigates the most recent developments in the field of VAT as they relate to the digital economy and discusses them in detail, to understand if, and how, real progress is being made. The fact cannot be underestimated that the introduction of inefficient legislation in the field could make compliance more difficult and hence more costly for economic operators running an economic activity over the internet, and produce social and economic damage in the long run.

The article also will test the current VAT legislation under the lens of the rule of law principle as a cornerstone of EU law that must be respected, with the final goal of identifying areas of possible improvement to further the European digital economy and taxation debate.

2. **THE DEBATE ON THE DIGITAL ECONOMY**

The issue of taxing e-commerce is certainly not new in the field of VAT. The European Commission first defined e-commerce twenty years ago, in a 1997
document titled “A European Initiative in Electronic Commerce”. 9 Indirect taxation, and particularly VAT, was identified there as a relevant element.10 At the international level, the OECD’s own Committee for Fiscal Affairs approached the field in 1998 with their report “Electronic Commerce: Taxation Framework Conditions”. 11 The OECD document also stresses the role of consumption taxation as crucial to the development of e-commerce and the internet as a whole.

More recently, in October 2013, the European Commission established the Commission High Level Expert Group on Taxation of the Digital Economy (hereafter the Expert Group).12 The Expert Group was tasked with providing suggestions aimed at improving the tax framework for the digital sector in Europe through EU-level initiatives. A final report was published in May 2014.13 No significant changes to the VAT system are put forward for consideration in the document, but the Expert Group nonetheless remarks that the EU VAT system already in place needs to be reinforced, supporting VAT neutrality in the digital economy14 and the destination principle, not only within the EU but also at the international level15. Additionally, the Expert Group encouraged a review of the VAT rate structure, something the EU Commission had already considered in their Communication on the future of VAT.16 That document maintains that similar goods and services should be subject to the same VAT rate. Furthermore, technological changes should be taken into account for that specific purpose.17

At the international level, the OECD has introduced their Base Erosion and Profit Shifting (BEPS) project.18 The OECD BEPS Action Plan identifies 15 different areas of intervention.19 BEPS Action 1 targets the digital economy, with the specific aim of understanding the tax challenges therein.

The final report issued by the OECD stresses the importance of the destination principle in B2C transactions for VAT, especially in cross-border B2C supply of services. It also suggests that a simplified registration and compliance regime should be considered to facilitate non-resident suppliers,20 and considers the

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16 COM(2011)851 final, Communication from the Commission to the European Parliament, the Council and the European Economic and Social committee on the future of VAT, Towards a simpler, more robust and efficient VAT system tailored to the single market, Brussels, 06.12.2011.
18 OECD, Addressing Base Erosion and Profit Shifting, 12.02.2013.
possibility to introduce a new tax based on bandwidth usage.\textsuperscript{21} The Expert Group does also not see favorably a new tax based on the ‘collection of data’, because a ‘collection of data’ in the territory of a state does not in itself create a taxable presence in that state.\textsuperscript{22}

3. \textbf{PLACE OF SUPPLY}

At the time of this writing, the place of supply for e-services is derived according to the destination principle, and services are taxed for VAT purposes in the place where they are consumed.\textsuperscript{23} In that respect, Directive 2008/8/EC on the place of supply of services\textsuperscript{24} has introduced changes in relation to cross-border services. Starting January 1st, 2015, a homogeneous regulation based on a new art. 58\textsuperscript{25} has been introduced for B2C e-services, broadcasting, and telecommunication services that rely on a customer location criterion based on the full destination principle. This rule finds general application unless a Member state has adopted the effective-use-and-enjoyment principle.\textsuperscript{26} Thus, starting January 2015, telecommunications, broadcasting and electronic services are as a rule taxed in the customer’s state of location. This regardless of the status of the customer as a taxable or non-taxable person, and regardless of whether the supplier is an EU or a non-EU operator.\textsuperscript{27}

A new VAT Directive, 2017/2455, was pushed forth December 5 2017, amending Directive 2006/112/EC and Directive 2009/132/EC\textsuperscript{28} in respect to the handling of VAT obligations for supplies of services and distance sales of goods.\textsuperscript{29} Newer EU legislation contains a number of provisions regulating cross-border trade and specifically distance sales thresholds from 2021 onwards.\textsuperscript{30} The aim of the new rules is to facilitate the collection of VAT when consumers buy goods and services online.\textsuperscript{31} Directive 2017/2455 is an important part of this so-called e-commerce package and two of the changes it introduced deserve a mention here. Art. 1 establishes that, with effect from January 1 2019, the previously extant art. 58 is amended and the place of supply for telecommunications services, radio and television broadcasting services, and electronically supplied services provided to a non-taxable person will be the place where that person is established or usually resides.\textsuperscript{32} This new provision does not apply if a supplier established in a Member state provides services to non-taxable persons

\textsuperscript{26} Directive 2006/112/EC. Ibidem, see new art. 59a.
established in a different Member state, and if the value of these supplies does not exceed EUR 10000, or the equivalent in national currency, in the current calendar year and did not as well in the course of the preceding calendar year.33

Voices in doctrine argue that the new EU VAT rules introduced with Directive 2008/8/EC may cause difficulties in the phase of implementation.34 Others maintain that B2B and B2C transactions are now treated very similarly, as the destination principle applies to both, and that the competitive advantage of companies located in states with low VAT rates35 has been mitigated.

EU doctrine supports this development as the destination principle should effectively be applied to supplies to taxable as well as non-taxable persons, since such treatment better follows the principle of VAT neutrality36, but also shows concerns for the implicit difficulties in thoroughly adopting the destination principle and the consequent application of the VAT rate of the state of consumption. This also shifts more of the burden of navigating the complexity of the European VAT system to private enterprises, as suppliers have to correctly apply the very different VAT rates of 28 Member states37, from Luxembourg’s 17% to Hungary’s 27%.38

It has to be said that the current situation is still unsatisfactory when it comes to regulating new models such as peer-to-peer or barter-like transactions: the latest changes to EU VAT Directive 2017/2455 that consider the digital economy do not include any specific provisions.39 Doctrine maintains that VAT regulations need clarification, especially in respect to the specific rules of classification that make the taxable status of an individual peer relevant for VAT.40 This is a consequence of the VAT Directive’s own treatment of the place of supply as regulating only transactions among business operators (B2B) and between business operators and private consumers (B2C). As the digital economy generally blurs the lines and thrives on consumer-to-consumer transactions (C2C) such as those happening in peer-to-peer fashion, it is easy to see how this is of concern to both doctrine and operators in the sector.

Similar preoccupations are expressed by the EU Commission in their preparatory work “A European agenda for the collaborative economy”.41 The document touches upon

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33 Dias, G. L., Choulak, L., Bill implementing amendments to EU VAT Directive regarding certain VAT obligations applicable to supply of services and distance selling of goods – adopted, 12 February 2018. IBFD Database.
35 La Valva, C., Il nuovo regime della territorialità dell’Iva nei servizi digitali. La prospettiva italiana, in La digital economy nel sistema tributario italiano ed europeo, Padova, 2015, p. 15.
41 COM(2016) 356 final, Communication from the Commission to the European parliament, the Council, the European economic and Social committee and the Committee of the regions, A European agenda for the collaborative economy. Brussels, 02.06.2016.
several legal issues concerning what they call the ‘collaborative economy’, taxation and VAT among them. The collaborative economy refers to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals.\(^42\) (…) on a peer-to-peer and occasional basis.\(^43\)

The European Data Protection Working Party considers social networks (SN or SNs) such as Facebook or Snapchat collaboration platforms:\(^44\) the above mentioned preparatory work states that supplies provided by means of collaborative platforms are in principle VAT-taxable transactions, even though the practical application of VAT could prove to be difficult.

Supplies of goods and services provided by collaborative platforms and through the platforms by their users are in principle VAT taxable transactions. Problems may arise in respect of the qualification of participants as taxable persons, particularly regarding the assessment of economic activities carried out on these, or the existence of a direct link between the supplies and the remuneration in kind.

The EU Commission then not only maintains that these new supplies provided through or by means of collaborative platforms are in principle subject to VAT, but also that supplies that are provided through the platforms by their users are in principle VAT-taxable transactions,\(^45\) as the EU Commission outlines in their document “Online Platforms and the Digital Single Market Opportunities and Challenges for Europe”.\(^46\) It must be stressed that SNs connect an unprecedented number of people in real-time: they not only provide a natural transactional platform, often across national borders, but some of them have established formally structured marketplaces. While eBay or Etsy are the examples that easily come to mind, it should be noted that Facebook sports its own marketplace accessible to its two billion users,\(^47\) and many online videogames have long been running flourishing parallel markets.\(^48\)

When online platforms perform as marketplaces, not only is the provider of an SNs such as Facebook a provider of the service and hence a taxable person for VAT purposes, but so are also the recipients of these services.\(^49\) For example, users registered on Facebook may in turn become providers through their use of the SNs as a platform for the

\(^{49}\) Trenta, C., EU Regulation 2016/679: the age of consent and possible VAT consequences when accessing information society services, Skattenytt, no. 3, 2018.
marketing and sale of products or services. In such situations, when the sale of products or services is involved, users also may become taxable persons for VAT purposes, as they normally would in a traditional marketplace. A street market or the Facebook market should be, from the perspective of VAT, just two markets. In this context SNs function only as the platform enabling the market to exist.

The European Commission also maintains that a characteristic of these new supplies is that they are often provided by private individuals offering assets or services on an occasional peer-to-peer basis, among consumers/users themselves. This is in line with the OECD’s own BEPS report stating that the reliance on consumer-to-consumer or C2C transactions is a defining characteristic of the digital economy. Nevertheless, EU legislation does not provide guidance as for how to draw a distinction between what we could call peer or amateur providers and professional service providers. This is indeed a new scenario, and one which not only finds EU VAT legislators unprepared, but also possibly unaware. With scholars arguing that the current VAT framework does not regulate distribution based on user participation; as traditional VAT rules are found to be inadequate to both describe and regulate phenomena such as co-production, barter-type transactions, and peer-to-peer, alternative approaches should be considered to fill the regulatory gap and capture, where appropriate, those peer modes of production part of the digital economy that currently escape taxation and specifically VAT, and bring their economic results back into the national tax revenue streams.

4. **THE NEW ADMINISTRATIVE VAT BURDEN FOR FACILITATORS**

Directive 2017/2455 introduces another change also applicable to e-services in its art. 242A, entering into effect from January 1 2021. This provision prescribes the introduction of an administrative burden for taxable persons who facilitate by means of a platform the supply of goods or services to a non-taxable person.

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55 Beretta, G., The European agenda for the collaborative economy and taxation, European taxation, Vol. 56 no. 9, 2016, pp. 400-402.


within the Community. The taxable persons are required to keep “sufficiently detailed” records of the supplies they facilitate:

Where a taxable person facilitates, through the use of an electronic interface such as a market place, platform, portal or similar means, the supply of goods or services to a non-taxable person within the Community in accordance with the provisions of Title V, the taxable person who facilitates the supply shall be obliged to keep records of those supplies. Those records shall be sufficiently detailed to enable the tax authorities of the Member States where those supplies are taxable to verify that VAT has been accounted for correctly.

In 2018, the VAT Expert Group stated a need to clarify the expression\(^{59}\) and provide a stricter definition of the terminology as part of the implementing measures within the Council Implementing Regulation (EU) No 282/2011.\(^{60}\) The VAT Expert Group maintains that issues may rise in respect to when a situation fulfills the conditions for a taxable person to be considered as facilitating sales through the use of an ‘electronic interface’. Very similar preoccupations have been shared by the Group on the Future of VAT\(^{61}\) and it must be said such concerns are not without merit.

In their “The economic and social role of Internet intermediaries”\(^{62}\) the OECD has stressed how different the profile of internet economic operators is from traditional ones, and the problems faced in categorizing them satisfactorily and unequivocally. While it is possible for an internet operator to act as an intermediary and facilitate transactions between third parties, even though the new paradigms are moving away from human intervention and towards algorithmic match-making and disintermediation\(^{63}\), this very operator is potentially playing multiple and sometimes competing roles in the transaction.

Not only providers may give access to, host, broadcast, or index content originating from them or from known or unknown third parties, but distribution protocols such as peer-to-peer completely pull the rug from under the feet of the fundamental concepts on which taxation rests: that a transaction has a clearly traceable origin and destination, that the parties involved are can be identified


and play one and only one specific role, and that a clear geographical boundary can be established.\textsuperscript{64}

The approach taken by the OECD is to focus more on the specific activities of intermediaries rather than on categorizing them,\textsuperscript{65} a difficult and ultimately fruitless task as these continue evolving as part of the consolidation and maturation of the digital economy.\textsuperscript{66} The approach may nonetheless exacerbate the effects of the administrative burden introduced by art. 242A: identifying who falls inside and who falls outside the definition of taxable person who facilitates transactions by means of a platform, and has to bear the VAT duties thereof, remains an unclear process.

5. A LACK OF COORDINATION WITH EU E-COMMERCE LEGISLATION

The identification and categorization of these facilitators is not the only issue introduced with art. 242A: its formulation opens up a potential lack of coordination between the general EU legislative framework on e-commerce and the EU VAT Directive regulating e-services.

In order to support the Digital Single Market and see it flourish, the EU has included in the Directive on certain legal aspects of information society services, the so called “Directive on electronic commerce”,\textsuperscript{67} an exemption from liability for intermediaries as information society service providers.\textsuperscript{68} When these natural or legal persons play a technical role as a mere conduit for third party information\textsuperscript{69}, or for the intermediary activities of caching\textsuperscript{70}, or for hosting information\textsuperscript{71}, a limitation of liability applies.

Furthermore, the Directive on electronic commerce has clearly introduced for these subjects a general prohibition in respect to the obligation to monitor. Art. 15 maintains that

\begin{quote}
Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.
\end{quote}

\textsuperscript{64} Trenta, C. Ibidem, 2015.
\textsuperscript{65} Perset, K. Ibidem, 2010, p. 11.
\textsuperscript{68} Directive 2000/31/EC. Ibidem, see Recital no. 40, (b)oth existing and emerging disparities in Member States’ legislation and case-law concerning liability of service providers acting as intermediaries prevent the smooth functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition.
\textsuperscript{69} Directive 2000/31/EC. Ibidem, art. 12.
\textsuperscript{70} Directive 2000/31/EC. Ibidem, art. 13.
The provision has been examined in detail by the ECJ in the Netlog case\textsuperscript{72}. Art. 15 prohibits national authorities from adopting measures which would require a hosting service provider to carry out general monitoring of the information that it stores (...) In that regard, the Court has already ruled that that prohibition applies in particular to national measures which would require an intermediary provider, such as a hosting service provider, to actively monitor all the data of each of its customers (...). Furthermore, such a general monitoring obligation would be incompatible with Article 3 of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly.\textsuperscript{73}

It is especially important that the ECJ calls for monitoring obligation to be ‘fair and proportionate’ and ‘not be excessively costly’ for business operators. This seems to have escaped the EU legislator in the drafting of Directive 2017/2455 and especially in the laying down of the requirements contained in art. 242A. It is also a most puzzling change of wind in EU policing: while the Directive on electronic commerce sets out to ease the burden laid on internet intermediaries to facilitate the economic development of the online market, the VAT Directive places additional administrative requests on them without providing enough clarity as to who or what a \textit{facilitator} is, and apparently without even questioning whether the move may be outright in conflict with previous policies and jurisprudence or end up resulting in further complications in the VAT treatment of electronic commerce.

6. \textbf{THE PROBLEM WITH CONSIDERATION}

The EU Commission has stated more than once that the ongoing digitalization of the economy has created challenges for taxation policies. Tax legislation needs updates to keep abreast of the phenomenon\textsuperscript{74} and still ensure fairness and support economic growth.\textsuperscript{75}

Art. 2 of the VAT Directive maintains that the supply of services for consideration will be subject to VAT. This fundamental VAT principle has been reinforced by the ECJ in the Hong Kong case\textsuperscript{76}. This poses a problem to VAT doctrine as certain types of transactions carried out in the digital economy, for example those happening in peer-to-peer fashion, become non relevant for consumption taxation purposes since they lack the basic characteristic of being done against payment.

\textsuperscript{72} Case C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV. ECLI:EU:C:2012:85.
\textsuperscript{73} Case C-360/10. Ibidem, paras. 33-34.
\textsuperscript{75} COM(2017) 547 final. Ibidem, p. 3.
\textsuperscript{76} Case 89/81, Staatssecretaris van Financiën v Hong-Kong Trade Development Council. ECLI:EU:C:1982:121. Para. 11.
In their Opinion on the VAT treatment of the sharing economy, the VAT Committee suggests that services provided by individuals through sharing economy platforms may in principle constitute economic activities, hence susceptible to qualify said individuals as taxable persons. A case-by-case assessment would be necessary to ascertain whether or not such transactions fall within or outside the VAT scope, an inevitable additional step required by how different transactions may be whenever supplies of goods or services are exchanged against other goods or services, and where consideration in money is absent.

The latest changes to the EU VAT legislation leave the issue unresolved. The application of art. 2 of the VAT Directive implies that free supplies do not fall within its scope, but this provision is very often at odds with the hybrid, fuzzy nature of current digital services. Its strict interpretation ends up excluding a priori large parts of the digital economy from the scope of VAT.

Many of the services available on the internet are offered for free upon subscription. The current VAT consumption system, even when we consider the more recent changes introduced by Directive 2017/2455, does not allow taxation in case of free supplies, making all current concerns on the destination principle irrelevant for much of the digital economy. Value is often generated through types of transactions that are not taxed, or are very difficult to tax, under existing VAT rules.

Nonetheless, it can be argued that the EU framework obviously sees consideration in kind as a legitimate concept within its VAT perspective. This is clearly spelled out in the modified expression contained in art. 2 (a) of the Second Directive, which substituted payment with consideration. The logical corollary of this assumption is that operations whose consideration is paid in nature are no different than those paid in money, if it is possible to determine a monetary value for what is expressed in nature. The ECJ has recently reiterated this principle in their ruling for the Serebryannay case, discussing how barter contracts fall within the scope of VAT:

> Barter contracts, under which the consideration is by definition in kind, and transactions for which the consideration is in money are, economically and commercially speaking, two identical situations.

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81 Directive 2006/112/EC, art. 2 (1) (a) and (c)
83 Case C-283/12, Serebryannay vek EOOD v Direktor na Direktsia ‘Obzhalvane i upravlenie na izpalnenieto’ — Varna pri Tsentralno upravlenie na Natsionalna agentsia za prihodite. ECLI:EU:C:2013:599. Para. 39.
The VAT Directive, not differently from the Sixth Directive, openly admits that consideration can take many forms and not just a monetary one. This is for example the case of a reciprocal supply of goods, of a reciprocal performance, or of the refraining from performing some acts. The ECJ maintains that the mere fact that consideration might be in kind does not change its legal status\(^{84}\), as the VAT Directive does not differentiate:

> No distinction between consideration in money and consideration in kind is drawn (…) for those provisions to apply it is sufficient if the consideration is capable of being expressed in money (…). Since the two situations are, economically and commercially speaking, identical, the Sixth Directive treats the two kinds of consideration in the same way.\(^{85}\)

As things stand today, this remains an interpretation that finds doctrine divided.\(^{86}\) We are left with either the laborious case-by-case assessment work suggested by the VAT Committee, made worse by even more confusing recent legislation, or with considering the digital economy a treacherous and unfair playground that cannot or should not be regulated. Two opposite views that do not help solving the practical problems of operators nor the policy preoccupations of the EU.

### 7. CONCLUSIONS

The article surveyed the latest EU VAT legislation and current academic debate surrounding the digital economy with particular attention to peer-to-peer technologies, consumer-to-consumer models, and barter transactions as free supplies, making an assessment on whether any progress have been made in the area from a taxation standpoint.

The European academic debate has so far manifestly missed a rather important point. The discussion on VAT has centered by and large on a narrowly-focused assessment or re-assessment of the role of the destination vs origin principle of VAT. However, ‘the tax challenges raised by the digital economy include, but are not limited to, base erosion and profit shifting’\(^{87}\): as digital technology becomes commodity, phenomena such as peer-to-peer\(^{88}\) or co-creation\(^{89}\) are reshaping the traditional economic and social landscape. It is then even more unfortunate that this broadening is seldom if at all ever considered both by national and European tax doctrine when discussing VAT.

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\(^{85}\) Case C-330/95. Ibidem, para. 23.


\(^{87}\) Li, J., Protecting the tax base in the digital economy, Papers on selected topics in protecting the tax base of developing countries, United Nations, Paper no. 9, 2014.

\(^{88}\) Trenta, C. Ibidem, 2015.

\(^{89}\) Tapscott, D., Williams, A. D., Wikinomics, Portfolio, 2010.
A worrying trend is emerging that simply treats the digital economy, and the role of VAT within it, as if it were a new, rebranded version of e-commerce, going through the same motions and reprising conversations from the late Nineties when mainstream commercial exploitation of the internet began and when the actors on the scene could be neatly and unequivocally identified in their roles of suppliers, distributors, and consumers. \( ^{90} \) Today’s digital economy presents a far more nuanced and complex landscape. Traditional staples of tax law, such as the destination v origin principle, or the place of supply, are severely challenged by what people can do efficiently, anonymously, and at scale, through technology.

The EESC recently released an Opinion discussing the “Taxation of the collaborative economy - analysis of possible tax policies faced with the growth of the collaborative economy”. \( ^{91} \) The document argues that fiscal systems and tax regimes should be adapted to the changes brought on by the digital economy, with existing rules and principles adjusted for fairness, efficiency, and the equitable tax treatment of all economic operators. Tax legislation should not allow any disparity to exist between conventional forms of commerce and digital-based ones.

Peer-to-peer transactions are usually non-monetary, but at least theoretically they should be subject to VAT and the destination principle should find application. \( ^{92} \) In practice, many of these transactions present challenges to the concepts of territoriality or tax jurisdiction, as they see the participation in varying capacity of large numbers of anonymous individuals from many different parts of the world. Identifying individual responsibilities and contributions, which also vary through time and can be reconfigured easily and effortlessly via software, is a daunting enterprise. \( ^{93} \) As the EESC correctly observes, ascertaining the basic requirements of VAT could potentially be impossible in certain cases.

Services in the digital economy that do not require monetary payment but rely on the exchange of other benefits, such as for example one’s data and preferences, require a closer examination. The legal framework in this area is indeed presently unclear. The EESC maintains it would be important for the Commission to address and regulate these issues by introducing simplified rules so that VAT could present a more coherent take on the collaborative digital economy. \( ^{94} \)

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\( ^{90} \) Bacache, M. Ibidem, 2015, p. 34.

\( ^{91} \) Council of the European Union, Opinion of the European Economic and Social Committee – Taxation of the collaborative economy - analysis of possible tax policies faced with the growth of the collaborative economy (exploratory opinion requested by the Estonian Presidency), 13925/17 FISC 247. Brussels, 06.11.2017.

\( ^{92} \) Council of the European Union, Opinion of the European Economic and Social Committee – Taxation of the collaborative economy - analysis of possible tax policies faced with the growth of the collaborative economy (exploratory opinion requested by the Estonian Presidency), 13925/17 FISC 247. Brussels, 06.11.2017.

\( ^{93} \) Trenta, C. Ibidem, 2015.

\( ^{94} \) Council of the European Union, Opinion of the European Economic and Social Committee – Taxation of the collaborative economy - analysis of possible tax policies faced with the growth of the collaborative economy - analysis of possible tax policies faced with the growth of the collaborative economy.
That technology should be neutral in respect to taxation is a long-standing OECD principle, first established in 1988 and confirmed in 2011. Hence, it does not matter whether the business model relies on traditional organizational models or on newer constructs, since
taxation should seek to be neutral and equitable between new forms of electronic commerce and between conventional and electronic forms of commerce. Business decisions should be motivated by economic rather than tax considerations.

In 1998, the EU Commission stated very similar principles in their Preparatory work on “Electronic commerce and indirect taxation”: legal certainty, simplicity, and keeping the burdens of compliance to a minimum were to be considered cornerstones in the field of VAT and e-commerce:
in order to allow electronic commerce to develop, it is vital for tax systems to provide legal certainty (so that tax obligations are clear, transparent and predictable) (…) Legal certainty enables commerce to be conducted in an environment where the rules are clear and consistent reducing the risks of unforeseen tax liabilities and disputes (…) Simplicity is necessary to keep the burdens of compliance to a minimum.

The more recent EU VAT legislation, as it emerges from the analysis conducted for this paper, seems to introduce even more discrepancies between what is now to be considered traditional e-commerce, regulated and falling within the scope of VAT, and the more disruptive models brought in by the digital economy such as peer-to-peer C2C models, which are currently unregulated and fall outside the VAT scope. It also fails to address long-standing issues in respect to the nature of those digital economy transactions that can be characterized as free supplies.

Moreover, the EU VAT landscape does not assure fiscal certainty for those economic operators working with the digital economy when they facilitate transactions by means of a platform: the text of art. 242A unfortunately lacks the necessary clarity. The present situation could even be represented as having a human rights profile: the European Court of Human Rights maintains that the law must be pronounced with sufficient clarity to ‘permit a taxpayer to regulate economy (exploratory opinion requested by the Estonian Presidency), 13925/17 FISC 247. Brussels, 06.11. 2017.


his conduct so that he would be aware of the consequences of the actions.\textsuperscript{97} It is worth remembering that art. 6 of the TEU\textsuperscript{98} maintains that

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

Doctrine has defined “tax uncertainty” as the uncertainty that arises because of new, unclear tax legislation coming into force,\textsuperscript{99} stating that taxable persons have not only the right to know fiscal norms exist, but also the right to understand how these govern their business operations.\textsuperscript{100} The increasing importance of the digital economy is clearly a factor impacting said clarity, as business models mutate and technology subverts long-standing assumptions, thus making the tax treatment of new economic transactions unexplored territory.\textsuperscript{101}

The European Commission has recently reminded Member states that the rule of law is one of the common values of the Union,\textsuperscript{102} in accordance with art. 2 of the TEU.\textsuperscript{103} The principle is also imbued in the Charter of the Fundamental Rights, whose Preamble states that ‘the Union (...) is based on the principles of democracy and the rule of law’.\textsuperscript{104} Legal certainty and the predictability of EU legislation, hence including that of EU VAT law, are principles enshrined in the EU system by the rule of law: the ECJ’s own jurisprudence has repeatedly reaffirmed these fundamental criteria\textsuperscript{105} and the necessity of precisely and clearly formulated norms.\textsuperscript{106}

In the Amministrazione delle Finanze dello Stato v Srl Meridionale Industria case, the ECJ ruled that ‘the effect of community legislation must be clear and

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{98} Consolidated Version of the Treaty on European Union, 2010 O.J. C 83/01, art 2. The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.
\item \textsuperscript{99} Sanders, J., International - Recent VAT Implementations and the Rule of Law, International VAT Monitor, Vol. 29, no. 1, Published online, 29 January 2018.
\item \textsuperscript{100} Sanders, J. Ibidem, 2018.
\item \textsuperscript{103} TEU, Ibidem, art 2.
\item \textsuperscript{106} Raitio, J. Ibidem, 2007, p. 59.
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\end{footnotesize}
predictable for those who are subject to it.\textsuperscript{107} This principle is necessary since “rules imposing charges on the taxpayer must be clear and precise so that he may know without ambiguity what are his rights and obligations and may take steps accordingly”.\textsuperscript{108}

In this light, the recent changes to the EU VAT legislative framework concerned with the digital economy seem to be problematic. First, the new administrative burden introduced by art. 242A for facilitators of supplies runs contrary to the overall principles of legal certainty as stated by the EU and the ECJ: simplicity and the need to keep the burdens of compliance to a minimum are general principles that the EU Commission initially stated for e-commerce back in 1998. Second, the principle of proportionality and of reasonable costs for economic operators, as stated by the ECJ in the Netlog case, have also not been taken into account.

The current EU VAT system continues to struggle to keep the frantic pace of the digital economy,\textsuperscript{109} producing either weak, unnecessary, or harmful legislation, or no legislation at all even in the presence of well-established phenomena such as co-production or peer-to-peer. It is probably time to extend the reach and let further investigations consider new and possibly unprecedented approaches: in the words of the Commission, ‘the time to act has now come’\textsuperscript{110} for an efficient tax system in the EU Digital Single Market.

8. References

8.1 EU Treaties, Charters


8.2 Directives


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