Chapter 2: The Concept of EU VAT as a General Consumption Tax

The EU VAT system intends a thorough taxation of private consumption. Since the starting point of harmonization in 1967, the EU VAT directives have called the tax a general tax on consumption. Besides, the idea of taxing consumption is quite old and has gained worldwide acceptance, especially through the introduction of different VAT systems in the second half of the 20th century. This trend is still ongoing.

343 See e.g.: Ben Terra and Julie Kajus (n 126) pp 245 and 269.
344 For a short overview of the harmonization process and the directives see: Ben Terra and Julie Kajus (n 126) pp 287–297 or Ben Terra and Peter Wattel (n 272) pp 111–124 and 173–174; for early publications on harmonization see e.g.: EEC Reports on tax harmonization: the report of the Fiscal and Financial Committee and the reports of the Sub-groups A, B and C: Unofficial translation of the Neumark Report prepared by Dr. H. Thurson (1963) and Neumark Report, Report of the Fiscal and Financial Committee on Tax Harmonization in the Common Market, chaired by Professor Fritz Neumark from Germany.
345 The concept of VAT as a general consumption tax is currently incorporated in Article 1 paragraph 2 of the EU VAT Directive (please note: in the recitals of the EU VAT Directive, EU VAT is not explicitly referred to as a consumption tax); the inclusion of the label "consumption tax" in the First EU VAT Directive was rather a coincidence: Alfons Simons, EC Court of Justice recognizes the legal character of VAT, (5)(2) EC Tax Review (1996) 87 (88–89); the English, German and French versions of the EU VAT Directive do not use homogenous vocabulary concerning the concept of VAT as a general consumption tax: Holger Stadie (n 254) para 123 with further references; Paul Kirchhof, 40 Jahre Umsatzsteuergesetz – Eine Steuer im Umbruch, (46)(1) Deutsches Steuerrecht (2008) 1 (3).
346 Already in the 17th century Thomas Hobbes argued for taxation of consumption instead of income: Thomas Hobbes, Leviathan (1914) p 184; similar: Julio Escolano, Taxing Consumption/Expenditure Versus Taxing Income, in Tax policy handbook (Parthasarathi Shome ed, 1995) pp 50–54; since ancient times, taxes on sales have been imposed under different labels, relying on diverse methods of collection and with various scopes: Ben Terra (n 149) pp 3–4; Robert van Brederode (n 258) pp 1 and 5–9 with further references; Ben Terra and Julie Kajus (n 126) pp 243–245 with further references.
347 The diffusion of VAT has been more quickly than that of any other tax in modern times: Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 1–5; Liam Ebrill et al (n 5) pp 4–8; Kathryn James (n 234) p 1; Alan Tait (n 74) p 3; David Williams (n 1) p 164; the starting point for modern VATs may be the ideas of Wilhelm von Siemens (Carl Friedrich von Siemens, Veredelte Umsatzsteuer (2nd
pared to income, consumption is seen as a fairer and more constant indicator of welfare.\textsuperscript{349} Consumption taxes do not affect savings and investment decisions, as current and future consumption are taxed identically.\textsuperscript{350} It is argued that VAT is the best available option for taxing consumption com-

\begin{itemize}
  \item For a short overview of the most important VAT/GST systems worldwide see: Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 47; see: OECD (2018a), Consumption Tax Trends 2018 (n 248) pp 193–198 for countries which have introduced a VAT; Kathryn James (n 234) attempts to explain the rise of VAT (see especially Part II of the book); see also: David Williams (n 1) pp 164–166; e.g. the Gulf Cooperation Council (GCC: United Arab Emirates, Kingdom of Bahrain, Kingdom of Saudi Arabia, State of Qatar and State of Kuwait) has introduced VAT recently: Yass Alkafaji and Omaima Khanfar, The New VAT Regime in the Gulf Cooperation Council Countries, (71)(10) Bulletin for International Taxation (2017) published online 04.10.2017 or Robert van Brederode and Markus Susilo, The VAT in the Arab Countries of the Gulf Cooperation Council, (28)(6) International VAT Monitor (2017) 435–448; concerning a suggestion to use a cryptocurrency for the GCC’s tax system, see e.g.: Richard Ainsworth, Musaad Alwohaibi and Mike Cheetham, VATCoin: The GCC’s Cryptocurrency, Boston University School of Law, Law & Economics Working Paper No 17–04 (2017) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2916321, last accessed: 01.02.2020).
  \item This may be one reason why a shift from direct to indirect taxation is observed: Ine Lejeune and Jeanine Daou, Designing a Simple and Fraud-Proof VAT System, in Improving VAT/GST: Designing a Simple and Fraud-Proof Tax System (Michael Lang and Ine Lejeune eds, 2014) pp 681–682 with further references; Ine Lejeune, Jeanine Daou-Azzi and Mark Powell, The Balance Has Shifted to Consumption Taxes – Lessons Learned and Best Practices for VAT, in Value Added Tax and Direct Taxation: Similarities and Differences (Michael Lang, Peter Melz and Eleonor Kristoffersson eds, 2009) pp 59–73; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 12–14; for six reasons why a consumption base is more suitable see: Kathryn James (n 234) pp 21–24 (with many many further references).
  \item Alan Tait (n 74) pp 220–222 with further references; concerning intersectoral and intertemporal neutrality of a consumption base see also: Peter Schmidt (n 149) p 1 with further references; see also: Gregory Mankiw (n 131) pp 233–234 who points out that a consumption tax is superior to an income tax as people are not distort in their saving decisions.
\end{itemize}
prehensively,\textsuperscript{351} as it is the most robust one and seeks for neutral taxation.\textsuperscript{352} Besides these characteristics, VAT as a general tax on consumption is popular around the world because of its high contribution to the fiscal budgets of countries.\textsuperscript{353}

\textsuperscript{351} Richard Bird and Pierre-Pascal Gendron (n 254) (287).
\textsuperscript{353} Alan Tait (n 256) p 1; additionally, neutrality and efficiency are arguments to introduce a VAT; see also: Liam Ebrill et al (n 5) pp xi, 1 and 13; Kathryn James (n 234) pp 1–5 and 84–85 (with detailed numbers and further references); Michael Keen and Ben Lockwood, The value added tax: Its causes and consequences, (92)(2) Journal of Development Economics (2010) 138–151; OECD (2018a), Consumption Tax Trends 2018 (n 248) pp 17–21; Jeffrey Owens, Piet Battiau and Alain Charlet, VAT's next half century: Towards a single-rate system?, (No 284)(Q1) OECD Observer (2011); Wolfram Reiß (n 235) para 1; Ben Terra (n 149) p 4; Ben Terra and Julie Kajus (n 126) p 245; is VAT a money machine? – yes, but...: Michael Keen and Ben Lockwood, Is the VAT a Money Machine?, (59)(4) National Tax Journal (2006) 905–928; by contrast, VAT is not a money machine but actually cause a slow down of government growth the higher the VAT share of total tax revenues is: Ali Özdemir, The Effects of Value Added Tax on the Rate of Government Growth: An OECD Panel Study, (4)(3) World Tax Journal (2012) 259–280.
\textsuperscript{355} Tina Ehrke-Rabel (n 289) p 1531; Joachim Englisch (n 317) p 13 (see also p 15: the ECJ often emphasizes a transactional perspective); Klaus Tipke (n 269) p 969.
In its case law, the ECJ has repeatedly highlighted\textsuperscript{354} but not yet discussed in detail\textsuperscript{355} that EU VAT is a general consumption tax. A common guideline which enables the interpretation of consumption under the lens of VAT does not exist\textsuperscript{356} as no fine-grained discussion of the parameters of VAT consumption has (yet) taken place.\textsuperscript{357} However, it is important to interpret the concept of VAT as a general consumption tax uniformly to be able to apply a harmonized EU VAT system.

When EU VAT or other sales taxes are defined, the focus lies on their technical design. The OECD \textit{International VAT/GST Guidelines},\textsuperscript{358} for instance, recommend a broad-based, all-stage VAT system with input tax deduction. The taxes should burden final consumption of private households and not the business sphere. Furthermore, the destination country principle should be applied to create a neutral business environment without any influence on corporate decisions. This definition is exemplary for many more which describe the one or other technical feature. However, the underlying idea is always based on the taxation of private consumption.\textsuperscript{359}

The outline of the European VAT system is included in Article 1 paragraph 2 of the EU VAT Directive (which incorporates the former Article 2 of the First EU VAT Directive\textsuperscript{360}). It defines the basic framework of the
According to law, EU VAT is an indirect all-stage and non-cumulative general consumption tax:362

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

On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.

The common system of VAT shall be applied up to and including the retail trade stage.” [Emphasis added.]

EU VAT is generally charged on transactions of goods and services. It is collected at every stage of the production and distribution chain (regardless of its vertical integration) up to and including the retail stage (indirect all-stage tax). Consequently, VAT is also levied on B2B transactions. To avoid any cumulative effects,363 input tax deductions according to the credit-invoice method364 are granted to taxable persons. The input VAT credits ensure neutrality for the tax-collecting businesses in a national and interna-

361 Paul Farmer and Richard Lyal (n 273) p 85; Ben Terra and Julie Kajus (n 126) p 289; Ben Terra and Peter Wattel (n 272) p 111.
362 Joachim Englisch (n 261) para 10; Ben Terra and Peter Wattel (n 272) p 175.
363 Cumulative effects occur when taxes are calculated on a “tax on tax” basis (= cascading effect), see e.g.: Robert van Brederode (n 258) pp 17–19; Charles McLure (n 248) (137); Ben Terra (n 149) pp 25–27; Ben Terra and Julie Kajus (n 126) pp 264–266 (non-cumulative tax systems are superior to cumulative ones); Ben Terra and Peter Wattel (n 272) p 9; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 2–5; for cumulative effects due to tax exemptions and denials of input VAT deductions, see e.g.: Dieter Dziadkowski, „Heimliche“ Umsatzsteuer infolge von Steuerbefreiungen mit Vorsteuerabzugsverbot, (73)(17) Deutsche Steuer-Zeitung (1985) 419–421.
364 This method is the most common one and originates from Europe. The subtractive-indirect method can be expressed as “t (output) – t (input)” and is based on issued invoices and not on books and accounts (please note: the variable “t” refers to the applicable tax rate): Alan Tait (n 74) pp 4–6; Ben Terra and Julie Kajus (n 126) p 282; for advantages of the method see e.g.: Kathryn James (n 234) pp 72–77 or Alan Tait (n 256) p 4; concerning gambling, the tax is calculated on the sales-subtraction method by taking the difference between gross revenues and inputs which is multiplied by the tax rate: Roland Ismer, Die mehrwertsteuerliche Bemessungsgrundlage bei Glücksspielen, (4)(3) Mehrwersteuer-
In other words, only the value added of each stage of the supply chain is taxed. No intermediate business consumption is taxed and the full tax load rests on the final consumer: only private consumption is burdened. The name “value added tax” is derived from the general way of charging the tax: taxable businesses are obliged to transfer the difference between their output tax and their input tax charge to the tax administrations. This method of tax collection ensures the calculation of a proportional tax amount based on expenditure at each stage of the supply chain.
including the final B2C transaction. Irregularities in the collection process of VAT cause on the one hand double taxation and on the other hand non-taxation. In recent years, such anomalies have caused worries as double and non-taxation disturb the target of single taxation of private consumption. The EU legislator provides some unilateral, coordinated, procedural and substantive measures and soft law approaches to prevent dou-

the value added at the stages of the supply chain: Ben Terra and Julie Kajus (n 126) p 272; similar: Robert van Brederode (n 258) p 107 and Joachim Englisch (n 261) para 16; however, the input VAT credits are also called the “Achilles heel of modern VAT systems” — for a short discussion of the entailed deficits (e.g. carousel fraud, insolvencies, cash flow impacts and high compliance costs) see: Joachim Englisch (n 301) (120–123); therefore, final consumption is taxed on the basis of transactions: Liam Ebrill et al (n 5) pp 1 and 21; Kathryn James (n 234) pp 37–39; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 28 and 30; Alan Tait (n 74) p 5; Alan Tait (n 256) p 4; David Williams (n 1) p 169; similar: Jasmin Kollmann (n 121) p 22.


Roland Ismer and Katharina Artinger (2017) (n 369) (593) with further references; Ben Terra (n 149) p 13; Joachim Englisch points out that the ability to pay principle (see the further discussion on pp 121 et seq) is not violated as businesses and not the private consumers bear the additional tax charge: Joachim Englisch, Wettbewerbsgleichheit im grenzüberschreitenden Handel (2008) pp 807–
ble and non-taxation. However, these various measures cannot solve all cases of excessive or non-taxation. New substantive provisions should be accompanied by procedural solutions.
The EU VAT is a general consumption tax although its definition is mainly based on technical issues. However, the concept of EU VAT as a general tax on consumption has not always been free of doubt. These doubts were often based on the technical form in which the tax is levied. Nonetheless, a tax must be categorized according to its economic objec-

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373 Disagreements have already been occurred since the beginning of the harmonization process: Alfons Simons (n 345) (89); concerning an overview of the doubts see e.g.: Holger Stadie (n 254) paras 90–123 with further references; Wolfram Reiß, Der Belastungsgrund der Umsatzsteuer und seine Bedeutung für die Auslegung des Umsatzsteuergesetzes, in Umsatzsteuer in nationaler und europäischer Sicht (Lothar Woerner ed, DStjG vol 13, 1990) pp 14–18; in Australia similar doubts on the consumption tax character were present: Kathryn James (n 234) pp 300–302 with further reference to High Court of Australia, Commissioner of Taxation v Reliance Carpet Co Pty Limited, [2008] HCA 22 (22.05.2008).

tives (taxation of consumption) and not according to its technical design. It is therefore important to define the consumption concept in order to be able to design, to introduce, to alter and to apply a tax (and accordingly the EU VAT) in everyday’s practice rather than to solve problems “ad hoc” without a guideline on which taxation should be based. Legislators may deliberately deviate from the general concept of a consumption tax in individual cases but should not systematically pursue (short-term) political issues. Yet it turns out that deviations cause a higher complexity regarding the implementation of a tax. Thus, no VAT system worldwide is free of shortcomings. Furthermore, the label of a tax or the way how it is levied is not decisive for its assessment. These issues and a uniform interpretation of the EU VAT law show that it is important to outline the concept of EU VAT as a general consumption tax without, however, completely neglecting the technical design of the tax.

It is prohibited to introduce or to maintain a tax within the EU Member States which is based on the same concept of a general consumption tax as EU VAT. This prohibition is codified in Article 401 of the EU VAT Directive. It does not contain any (further) criteria for the characterization of EU VAT. The features on which the ECJ bases its judgments on Article 401

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375 Similar: Joachim Englisch (n 261) para 22 and Holger Stadie (n 254) para 90.
376 Wolfram Reiß (n 290) p 435; Peter Schmidt (n 149) pp 2–3 with further references.
377 Ben Terra (n 149) pp 7–8; Ben Terra and Julie Kajus (n 126) pp 245–248; concessions are responsible for differences between the good VAT and real VATs: Yige Zu, Reforming VAT Concessions: A Tax Expenditure Analysis, (32)(4) British Tax Review (2017) 418 with further references.
378 Liam Ebrill et al (n 5) p 51; Simons is of the opinion that a VAT is not necessarily complicated, we just made it complicated: Alfons Simons (n 345) (90); concerning the influence of the political decision-making process: Kathryn James (n 234) pp 10–11 with further references.
379 Kathryn James (n 234) pp 9–10.
380 Holger Stadie (n 347) (904).
381 The technical design even supports taxation of private consumption as only the final B2C transaction actually contributes to the fiscal budgets: Wolfram Reiß (n 235) para 41; similar: Robert van Brederode (n 258) p 28 or David Hummel, Entgelt als Bemessungsgrundlage im Umsatzsteuerrecht, (64)(6) Umsatzsteuer-Rundschau (2015) 213 (217); doubts on the fact that the technical design meets the targets of the concept of EU VAT as a general tax on consumption are expressed by: Holger Stadie (n 254) paras 90 and 125.
of the EU VAT Directive are identical to those listed in Article 1 paragraph 2 of the EU VAT Directive. The criteria must be satisfied cumulatively whereas the restriction applies also for taxes which are not identical to EU VAT but jeopardise the functioning of the common VAT system. In most of the cases referred to, the ECJ had no problems with regard to a parallel collection of EU VAT and the relevant taxes.

Exemplary: ECJ of 11.10.2007 – C-283/06 and C-312/06, KÖGÁZ and Others, ECLI:EU:C:2007:598 para 36 with references to further pertinent case law.

Not all VATs are identical and comparisons must be based on the EU VAT system introduced by the VAT directives: Alan Schenk, Italy's IRAP: An Analysis from across the Atlantic, (17)(4) International VAT Monitor (2006) 242 (242–243).

In a nutshell, the EU VAT system is determined by its concept as a general consumption tax, while the law itself mostly contains technical guidelines for levying the tax. Based on these circumstances, the following remarks outline the idea of EU VAT as a general tax on consumption. Firstly, it is shown that the idea of taxing consumption under the EU VAT system is characterized by the taxation of goods and services whose consumption constitutes a benefit for an identifiable individual (I.). Secondly, the various human actions linked to actual consumption make it almost impossible to tax consumption immediately. Therefore, transactions, mostly carried out by taxable persons, are used as a proxy for consumption. By linking taxation to transactions, not all private consumption can be taxed (II.). Thirdly, the EU VAT Directive and ECJ case law make further corrections that influence the concept of EU VAT as a broad consumption tax (III.). The second chapter concludes with a summary of the concept of EU VAT as a general consumption tax (IV.).

I. EU VAT as a General Consumption Tax

According to Article 1 paragraph 2 of the EU VAT Directive, the EU VAT is a general, i.e. a broad-based consumption tax. This implies that the law ideally covers all kinds of goods and services that are consumed within the jurisdictional competence of a country.

385 Private individuals will only es-
cape broad-based consumption taxes if they do not consume.\textsuperscript{386} By taxing overall private consumption, consumption patterns (e.g., the decisions which consumers make when they choose among different available alternatives) are not distorted. But if consumption was not completely taxed, there would be a bias between taxed and non-taxed consumption.\textsuperscript{387} Thus, in order to realize the idea of a broad-based consumption tax, goods and services must be taxed, regardless of the challenges posed by, for example, taxation of intangible services.\textsuperscript{388} Alongside goods, services are a central element of private consumption. Non-taxation of services would trigger a high substitution effect. Goods that can be substituted by services would then be discriminated and consumer choices would be distorted.\textsuperscript{389} The EU VAT system therefore aims to tax both goods and services in accordance with Articles 14 and 24 of the EU VAT Directive.

The EU VAT Directive does not contain a definition of consumption\textsuperscript{390} that would allow the reader to immediately deduce the scope of the directive. Rather, the directive enumerates the taxable events in Article 2 para-
According to this norm, “the supply of goods for consideration within the territory of a Member State by a taxable person acting as such” (lit a), Articles 14–19, 30a-30b of the EU VAT Directive), “the intra-Community acquisition of goods for consideration within the territory of a Member State” (lit b), Articles 20–23 of the EU VAT Directive), “the supply of services for consideration within the territory of a Member State by a taxable person acting as such” (lit c), Articles 31–33 of the EU VAT Directive. The intra-Community supply of goods are taxable according to the general rule in Article 2 paragraph 1 lit a) of the EU VAT Directive. However, they are tax exempt according to Articles 138–139 of the EU VAT Directive. Such border tax adjustments ensure taxation of final consumption (in the state of destination); in order to avoid double taxation or non-taxation, both – the tax-free intra-Community supply of goods and the intra-Community acquisition of goods – need to be interpreted in a uniform manner: Opinion of Advocate General Kokott of 18.11.2010 – C-84/09, X, ECLI:EU:C:2010:252 para 49; concerning cross-border services, solutions can be found by applying the appropriate place of taxation rules – concerning a general overview of cross-border supplies see: Ben Terra and Julie Kajus (n 126) pp 298, 496–511 and 548–549; please note: the technical rules for intra-EU trade will change when the definitive VAT regime will be introduced, see e.g.: EU Commission (2016d), VAT Expert Group: Definitive regime for intra-EU trade First step Issues to be examined (taxud.c.1(2016)5532134 – VEG N 057); EU Commission (2017a), Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: On the follow-up to the Action Plan on VAT Towards a single EU VAT area – Time to act, COM(2017) 566 final; EU Commission (2017b), Proposal for a Council Directive amending Directive 2006/112/EC as regards harmonising and simplifying certain rules in the value added tax system and introducing the definitive system for the taxation of trade between Member States, COM(2017) 569 final, p 12; EU Commission (2018c), Proposal for a Council Directive amending Directive 2006/112/EC as regards the introduction of the detailed technical measures for the operation of the definitive VAT system for the taxation of trade between Member States, COM(2018) 329 final, pp 6–9; see also e.g.: Joachim Englisch (n 261) paras 449–451; Madeleine Merkx and John Gruson, Definitive VAT Regime: Ready for the Next Step?, (28)(3) EC Tax Review (2019) 136–149; Ben Terra and Julie Kajus (n 126) pp 1406–1407, 1611–1212 and 1615–1619; Michael Vellen, Auf dem Weg zu einem einheitlichen europäischen MwSt-Raum?: Erste Vorschläge der Kommission für das endgültige MwSt-System, in 100 Jahre Umsatzsteuer in Deutschland 1918–2018 Festschrift (UmsatzsteuerForum e.V. and Bundesministerium der Finanzen eds, 2018) pp 935–985; critical e.g.: Joachim Englisch (n 109) pp 1495–1513; Anna Zimmermann, Modelle zur Eindämmung des grenzüberschreitenden MwSt-Betrags: Besteuerung auch grenzüberschreitender Leistungen, (66)(15) Umsatzsteuer-Rundschau (2017) 580–591.
as such” (lit c), Articles 24–29, 30a-30b of the EU VAT Directive) and “the importation of goods” (lit d), Article 30 of the EU VAT Directive)\(^\text{393}\) should be taxed.\(^\text{394}\)

The concept of EU VAT as a general tax on consumption is based on a top-down approach whereas excise duties are based on a list of taxable objects.\(^\text{395}\) At first glance, the EU VAT system is not based on a top-down approach by looking at the list which is provided by Article 2 paragraph 1 of the EU VAT Directive. However, the taxable events incorporated in Article 2 paragraph 1 of the directive express the principle of VAT universality, since any supply of goods or services (rendered within an economic activity) theoretically falls within the scope of EU VAT law.\(^\text{396}\) Thus, the broad concept of EU VAT must be interpreted in such a way that taxation will take place if an event is covered by the concept of consumption. It does not matter whether goods or services are actually consumed or whether situations occur within a national territory or across borders.\(^\text{397}\) These latter issues are only relevant in the further assessment and determination of the tax liability.

The top-down approach of the concept of consumption is also emphasized by the definitions of goods and services. A supply of goods is clearly outlined in EU VAT law. Article 14 paragraph 1 of the EU VAT Directive defines it as the “transfer of the right to dispose of tangible property as owner”. By contrast, the definition of a supply of services is a residual one: Article 24 paragraph 1 of the EU VAT Directive determines every transaction as a supply of services when it is no supply of goods.\(^\text{398}\) A residual definition of services can be only used on the basis of a concept of EU VAT con-

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\(^{393}\) Supplies of goods which are destined for non-EU Member States are subject to VAT according to Article 2 paragraph 1 lit a) of the EU VAT Directive but they are tax exempt according to Articles 146–147 of the EU VAT Directive. Taxation of the corresponding imports ensure taxation of final consumption according to Article 2 paragraph 1 lit d) of the EU VAT Directive. Thus, domestic and imported goods are taxed in a similar manner without discrimination of foreign products; concerning the VAT collection on imports of low value goods see: OECD (2015a), BEPS Action 1 – Final Report (n 2) paras 310–313, 322–334 and Annex C: it is one of the greater challenges of taxing the digital economy.

\(^{394}\) Ad van Doesum and Gert-Jan van Norden call these four taxable events the proxies for consumption: Ad van Doesum and Gert-Jan van Norden (n 118) pp 707–708.

\(^{395}\) See the discussion on pp 79 et seqq.

\(^{396}\) Ben Terra and Julie Kajus (n 126) p 298.

\(^{397}\) This approach is similar to: Stefanie Baur-Rückert (n 51) pp 43–70.

\(^{398}\) Article 25 of the EU VAT Directives provides a few examples for services.
sumption which is based on a top-down approach. Such an approach ensures that each kind of consumption is subject to potential taxation.399

The EU VAT Directive ensures a broad-based application of the concept of EU VAT as a general tax on consumption. However, the borderlines of this concept are not further outlined even if the ECJ has clarified the notion to a certain extent: according to the pertinent case law, the concept of EU VAT consumption includes the transfer of a benefit to an identifiable consumer. ECJ case law explicitly introduces this condition for the consumption of services (1.). It is doubtful whether these ideas can also be applied to the consumption of goods. A neutral application of the concept of EU VAT as a tax on consumption is here in contradiction with the wording of EU VAT law. This conflict cannot be completely resolved (2.).

1. Consumption of Services: Benefits for Identifiable Individuals

The first valuable ECJ references concerning the character of EU VAT as a consumption tax were made in the judgments Mohr400 and Landboden-Agrardienste.401 Alfons Simons attests especially the first case an important contribution to the scope of EU VAT and moreover a big step with regard to a specification of the borderlines of the tax.402 In a nutshell, the court

399 Paul Farmer and Richard Lyal (n 273) pp 93 and 99; Jasmin Kollmann (n 121) p 47; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 112–113; Ben Terra and Julie Kajus (n 126) p 511; by contrast, Simons sets the borderlines of the tax within the residual definition of supplies of services: Alfons Simons (n 345) (88).

400 ECJ of 29.02.1996 – C-215/94, Mohr, ECLI:EU:C:1996:72; Deborah Butler, VAT as a tax on consumption: some thoughts on the recent judgment in Parker Hale Ltd v Customs and Excise Commissioners, (15)(5) British Tax Review (2000) 545 (547); Alfons Simons (n 345) (87).

401 ECJ of 18.12.1997 – C-384/95, Landboden-Agrardienste, ECLI:EU:C:1997:627; Deborah Butler (n 400) (545 and 547–548); before that, the ECJ has already referred to VAT as a tax on consumption in: ECJ of 05.05.1982 – C-15/81, Gaston Schul, ECLI:EU:C:1982:135 para 10; for a critical discussion of the two cases see also: Lars Dobratz (n 356) pp 42–47 with further references to German scholarly literature; see also: Jasmin Kollmann (n 121) pp 52–59 with further references.

402 Alfons Simons (n 345) (87 and 90); Simons has already claimed a precision of the scope of VAT in times previous to the ECJ Mohr decision and further claims that it would have been appreciated when the decision had been taken by the full court and not only by the fifth chamber of the ECJ as happened in ECJ of 05.05.1982 – C-15/81, Gaston Schul, ECLI:EU:C:1982:135 to promote acceptance and the development of a comprehensive definition of consumption under EU
pointed out that a supply of services for consideration only takes place when a benefit is transferred to an identifiable consumer.

Both ECJ cases mentioned concerned grants for farmers by different public authorities in Germany. Mr Mohr, a German farmer, got a grant from the Federal Office for Food and Forestry in Germany for stopping milk production. This payment was based on Council Regulation (EEC) No 1336/86 of 6 May 1986 fixing compensation for the definitive discontinuation of milk production (OJ L 119, 08.05.1986, pp 21–24).[^403] In the second case, the company Landboden-Agrardienste got compensation from the Food, Agriculture and Forestry Office of the Calau local authority in Germany.[^404] For the ECJ, it was irrelevant from which authority the payment came.[^405] Mr Mohr did not declare the lump-sum payment in his VAT return.[^406] In the same vein, Landboden-Agrardienste did not state the payment in its VAT return which was linked to a 20% reduction in the company’s annual potato production.[^407] In both cases, the tax authorities imposed VAT on the compensation payments.[^408] According to the opinion of the tax authority, Mr Mohr received a taxable service which it called “discontinuation of milk production”.[^409] Thereupon, the German Federal Fiscal Court questioned whether a supply of services (stopping milk production) against consideration (the lump-sum payment) was given. The service should constitute itself as “the obligation to refrain from an act or to tolerate an act or situ-

[^405]: The major disparity between both cases was that in Mohr compensation was paid by the Community and in Landboden-Agrardienste the money was compensated by a national authority. However, the outcome should be the same: ECJ of 18.12.1997 – C-384/95, Landboden-Agrardienste, ECLI:EU:C:1997:627 para 14.
[^409]: ECJ of 29.02.1996 – C-215/94, Mohr, ECLI:EU:C:1996:72 paras 6 and 16–17: the German and Italian governments argued in favour of the tax authorities for a taxable transaction as the termination of milk production and the corresponding subsidy depended on each other what caused a direct link between the supply and its consideration existed.

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Until then, such grants were treated differently among the EU Member States. According to the ECJ judgment, the payment to Mr Mohr was not taxable as no benefit was attributed to the public authority. The court based its reasoning on Article 2 paragraph 1 of the First EU VAT Directive (now Article 1 paragraph 2 of the EU VAT Directive) which attests VAT the character of a general consumption tax as it is levied on goods and services. Literally, the ECJ stated that “[i]n a case such as the present one, there is no consumption as envisaged in the Community VAT system.” In accordance with the opinion of Advocate General Jacobs the court stated that the grant to Mr Mohr was not categorized as consideration for a service as “the Community does not acquire goods or services for its own use but acts in the common interest of promoting the proper functioning of the Community milk market.” The court argued that the termination of the milk production provided no advantage for the Community or national authorities and that in such a situation, no supply of a service was observable. Consequently, no VAT was charged on the lump-sum payment.

The reasoning in Mohr was confirmed in the case Landboden-Agrardiens. By referring to the Mohr case, the ECJ emphasized that neither the Community nor any other national authority got goods or services for its

410 ECJ of 29.02.1996 – C-215/94, Mohr, ECLI:EU:C:1996:72 para 8; Advocate General Jacobs pointed out that the EU directives need to be interpreted very broadly to all forms of consumption and include an obligation to refrain from an act: Opinion of Advocate General Jacobs of 23.11.1995 – C-215/94, Mohr, ECLI:EU:C:1995:405 para 26.
415 ECJ of 29.02.1996 – C-215/94, Mohr, ECLI:EU:C:1996:72 paras 22–23; Alfons Simons (n 345) (89–90); an advantage was already assumed in: ECJ of 08.03.1988 – C-102/86, Apple and Pear Development Council, ECLI:EU:C:1988:120 para 14; the situation lacked an advantage obtained for own use: Lars Dobratz (n 356) p 43; for another short description of the Mohr case see: Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 114–115.

I. EU VAT as a General Consumption Tax
own use from which they could obtain a benefit.\textsuperscript{416} German representatives claimed that the prerequisite that goods and services must be purchased by public authorities for an identifiable recipient was not included in the VAT laws. More precisely, they argued that the reasoning cannot be based on the consumption tax character but only on the wording of the laws. They concluded that VAT law clearly includes all consumption of goods and services. The notion of a benefit or of any economic impact, however, was not significant.\textsuperscript{417} The ECJ noted that a public authority acting in the common interest can, of course, receive supplies of services for consideration. Moreover, the concept of a supply of services does not presuppose that the buyer must actually use them.\textsuperscript{418} However, the court also emphasized that a taxable event must imply consumption in line with the objectives and the concept of EU VAT which is outlined in Article 2 paragraph 1 of the First EU VAT Directive.\textsuperscript{419} Against this background, a reduction in production does not lead to consumption. In accordance with the arguments of Advocate General Jacobs, the court noted that the farmer did not provide any service (respectively benefit) to the public authority or any identifiable consumer. Consequently, a taxable supply was denied.\textsuperscript{420}

The ECJ restricted the concept of VAT as a general consumption tax to the extent that it did not find any taxable supply in \textit{Mohr} and \textit{Landboden-Agrardienste}. Both cases concerned a potential supply of services to a public authority. Public authorities are just under some circumstances taxable


\textsuperscript{418} See also the discussion on pp 121 et seqq and pp 159 et seqq.


\textsuperscript{420} ECJ of 18.12.1997 – C-384/95, \textit{Landboden-Agrardienste}, ECLI:EU:C:1997:627 paras 23–25; Opinion of Advocate General Jacobs of 25.09.1997 – C-384/95, \textit{Landboden-Agrardienste}, ECLI:EU:C:1997:433 para 26; an identifiable beneficiary is necessary: Lars Dobratz (n 356) pp 50–51; see also: Ben Terra and Peter Wattel (n 272) pp 187–188 with further references to CJEU of 07.10.2010 – C-53/09 and C-55/09, \textit{Loyalty Management UK and Baxi Group}, ECLI:EU:C:2010:590 in which a beneficiary could be identified; see also: ECJ of 25.02.1999 – C-349/96, \textit{Card Protection Plan}, ECLI:EU:C:1999:93 para 21 which makes clear that the person who pays the consideration is the identifiable customer irrespective the supply is destined for another person.
persons. In other situations, they act in the public interest and are somehow equated with private consumers. Public authorities may therefore be described as a transparent layer which is used by EU VAT law in order to capture private consumption. The ECJ held that the reduction of consumption offers no possibility for consumption according to the EU VAT system. Regarding a service which constitutes in “the obligation to refrain from an act or to tolerate an act or situation”, by contrast, the services rendered by Mohr and Landboden-Agrardienste assigned no advantage to an identified individual who makes use of the goods or services. In such situations, neither the Community nor any other national authority nor any private people have the possibility to consume. This interpretation is not contradictory to the wording of the VAT directives (as claimed by the German government in Landboden-Agrardienste) since it respects the concept of VAT as a general consumption tax. In order to tax consumption for EU VAT purposes, an advantage for individual usage has to be transferred. This consumption principle, therefore, restricts the concept of VAT as a general consumption tax.

The limit of transferring an advantage to an identifiable customer is an inner fact which every person can interpret in a different way. It includes the transfer of disadvantages, too. For some people, a specific (good or) service may provide an advantage, others are indifferent and a third group of people may be affected negatively. Schenk, Thuronyi and Cui integrate this consideration in their definition of the object of consumption which should contain goods or services for personal use or individuals’ satisfaction. Lauré also favoured the idea of a non-distortive tax which should lead to “the greatest possible amount of human satisfaction”.

421 See pp 133 et seqq.
425 Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 1: Schenk, Thuronyi and Cui define a tax on consumption as a tax which “generally refers to a tax on final consumption, consisting mainly of goods and services acquired by individuals for their personal use or satisfaction.”; see also: Joachim Englisch (n 317) p 31 who points out: “VAT/GST as a tax on consumption should only impinge on expenses caused by the purchase of goods and services the use and enjoyment of which yields direct utility in terms of satisfaction of private needs[,]”.
426 Concerning the quote see: Mirja Salo, The ideas of Maurice Lauré on VAT in the 1950s, (3)(2) World Journal of VAT/GST Law (2014) 130 (132) with further references to the ideas of Lauré.
step further in his proposal for a common consumption tax where he defines consumption as the satisfaction of human needs.\(^{427}\)

2. Equal Treatment of Consumption of Goods

The two ECJ cases described above, \textit{Mohr} and \textit{Landboden-Agrardienste}, concerned the question whether supplies of services are provided.\(^{428}\) It is questionable whether the corresponding arguments can be applied to supplies of goods, too. So far, the CJEU has not rendered a judgment which concerns this question and which has confirmed or denied the application of the \textit{consumption principle} to supplies of goods.\(^{429}\) According to Advocate General \textit{Jacobs}' opinion in \textit{Landboden-Agrardienste} an equal treatment must be rejected.\(^{430}\) However, in the \textit{Mohr} and \textit{Landboden-Agrardienste} judgments there is only named Article 2 of the First EU VAT Directive, which contains a reference to supplies of goods and services.\(^{431}\) Claims in the scholarly literature\(^{432}\) to extend the case law of \textit{Mohr} and \textit{Landboden-Agrardienste} to the supply of goods, cannot be confirmed or contradicted.

A British court did not apply the reasoning of the two ECJ judgments to the supply of goods. \textit{Parker Hale},\(^{433}\) a British arms manufacturer and retailer, stored weapons whose possession, manufacturing, sale and purchase had become illegal after changes in the law. The company gave the weapons to the police and received compensation for not owning them. The compensation was paid according to the \textit{Large-Calibre Handgun Compensation Scheme}. The Commissioners of Customs and Excise categorized

\begin{itemize}
\item \textit{Beiser} enumerates, for example, food, clothing, habitation, game, hobbies, amusement, vacation, sports, affections and passions but excludes, for example, compensation payments: Reinhold \textit{Beiser}, \textit{Allgemeine Konsumsteuer}, (65)(7) \textit{Umsatzsteuer-Rundschau} (2016) 267 (Section 1 paragraphs 3 and 4 of the suggestion).
\item So far, the transfer of a benefit which does lead to private consumption constitutes the only attempt to define supplies of services. This is not satisfying as such a benefit is not further outlined: Holger \textit{Stadie} (n 347) (915).
\item Deborah \textit{Butler} (n 400) (549).
\item See e.g.: Deborah \textit{Butler} (n 400) (549–552).
\end{itemize}
the transfer as a taxable supply of goods.\textsuperscript{434} Parker Hale went to court arguing that the received compensation was out of scope of VAT taxation.\textsuperscript{435}

The British court considered the situation as taxable. The reasoning of the court was mainly based on Advocate General Jacobs opinion in the case \textit{Landboden-Agrardienste} who argued against equal treatment of supplies of goods and services in such constellations.\textsuperscript{436} The Advocate General emphasized the consumption tax character. In cases where there is no consumption, no tax should be levied.\textsuperscript{437} However, according to him, it is necessary to discriminate between goods and services because of their definitions in the VAT directives. In contrast to the supply of services, the supply of goods is clearly outlined in EU VAT law. Article 14 paragraph 1 of the EU VAT Directive defines a supply of goods as the “transfer of the right to dispose of tangible property as owner”.\textsuperscript{438} The definition of a supply of services is a residual one and as long as no goods are in the centre of interest, the concerned item must be defined as a service according to Article 24 paragraph 1 of the EU VAT Directive. Thus, goods are always consumed is


\textsuperscript{435} Queen’s Bench Division, \textit{Parker Hale Ltd v Commissioners of Customs and Excise}, [2000] BVC 167, 04.04.2000 para 33; Deborah Butler (n 400) (548).


such situations, since the wording of the directives is linked to the transfer of ownership.439

In the pertinent literature, Deborah Butler calls for equality between supplies of services and goods and the application of the consumption principle to both kinds of supplies.440 She challenges the opinion of Advocate General Jacobs in Landboden-Agrardienste and the judgment in Parker Hale. Whereas Jacobs opted for an application of the consumption principle just for supplies of services in Landboden-Agrardienste, he did not point out any difference between the application of the principle to supplies of goods and services in the Mohr case.441 The ECJ itself based its reasoning on Article 2 paragraph 1 of the First EU VAT Directive instead of applying the special rules for supplies of goods and services.442 In the case of Parker Hale, the wording of the definition of the supply of goods inevitably indicates taxation in terms of VAT. However, making distinctions between supplies of goods and services implies differences with regard to the overall concept of consumption. Thus, Deborah Butler favours the application of the consumption principle to goods, too. She admits that the tax authorities cannot check in each individual case whether goods are actually consumed. The advantage criterion is an inside fact and thus hardly verifiable by third parties. Nevertheless, she claims that the consumption principle should always be applied when the recipient of the traded item is the public hand. This would mean that the destroyed weapons in Parker Hale should not have been taxed. Deborah Butler calls for looking beyond the wording of the law, and especially the definition of supplies of goods. According to her, the consumption tax character of VAT would have required non-taxation in Parker Hale, as the public authority acted within the scope of its governmental tasks and did not act as a final consumer. By contrast, concerning contracts such as these in Mohr, Landboden-Agrardienste or Parker Hale, but concluded with another trader or a private individual (instead of a public authority), consumption for VAT purposes should be confirmed and the underlying transactions should be taxed. By concluding


440 Deborah Butler (n 400) (549–552).


a contract with a private party, services and goods are passed down the supply chain to an identifiable individual.\(^{443}\)

The debate as to whether the transfer of a benefit to an identifiable individual must be a condition for the provision of services and goods cannot be answered definitely. The principle of neutrality and a uniform interpretation of the concept of VAT as a general consumption tax may call for an equal treatment of supplies of services and goods to private, business and public recipients. The judgments in *Mohr* and *Landboden-Agrardienste* just concerned possible supplies of services to public authorities. Public authorities are special features in the scheme of EU VAT\(^ {444}\) and can act in the public interest. Thus, depending on the specific issues, no identifiable recipient of services may be available. Concerning regular B2B and B2C constellations, a recipient of a supply who acts assumably in his own interest or in commission for someone else seems mostly available. Only in a few situations, like in *Apple and Pear Development*, no identifiable (business) recipients can be recognized.\(^ {445}\) Moreover, B2B purchases and the subsequent destruction of competing products connotes advantages for the taxable persons who had bought the goods. The same is valid for supplies of services.\(^ {446}\) The destruction of goods after purchase should be generally taxed, as it is assumed by the definition of supplies of goods in Article 14 of the EU VAT Directive. When one considers the definition of consumption for marketing purposes, which describes a consumption process and thus includes the disposal of goods,\(^ {447}\) it becomes clear that the disposal of goods should also fall within the consumption concept for EU VAT purposes. By contrast, excise duties are not levied when products are destroyed or are no longer regarded as taxable goods as a result of an act of destruction.\(^ {448}\) However, when *Parker Hale* is interpreted as meaning that the public authority acted in the public interest and not for individual purposes, taxation could be waived. Whether an equal treatment of goods and ser-

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\(^{443}\) Deborah Butler (n 400) (549–552).  
\(^{444}\) See pp 133 et seqq.  
\(^{445}\) See ECJ of 08.03.1988 – C-102/86, *Apple and Pear Development Council*, ECLI:EU:C:1988:120 para 14: because of a lack of an identifiable recipient, the direct link between the services and the consideration was denied; see the discussion on pp 149 et seqq; Deborah Butler, *The usefulness of the ‘direct link’ test in determining consideration for VAT purposes*, (13)(3) *EC Tax Review* (2004) 92 (93).  
\(^{447}\) See pp 64 et seqq.  
\(^{448}\) See pp 79 et seqq.
services, however, justifies undermining the wording of Artikel 14 of the EU VAT Directive can only be determined by the legislator or the CJEU.

II. Transactions: Proxies for Consumption

Consumption in a literal sense of the word and the accompanied actions can hardly be the taxable object of a tax. Therefore, the EU VAT Directive aims at taxing supplies of goods and services for consideration as indicated in Article 2 paragraph 1 of the directive. In other words, the EU VAT system taxes transactions rendered by taxable persons in order to burden private consumption (1). The ECJ has further defined transactions and requires a direct link between the supply and the consideration received. Furthermore, the connection between the two parties of a transaction must be based on a legal relationship (2). When taxing transactions as a proxy for consumption, it is not possible to tax all kinds of private consumption.

1. Business Transactions Instead of Actual Consumption

The EU VAT system taxes transactions rendered by taxable persons as a proxy for private consumption. In general, a transaction is categorized as an exchange of goods or services for consideration. It turns out that the objective of the tax is to absorb the private individuals’ ability to pay which is expressed through the exchange of money for goods and services (a). In combination with the indirect character of EU VAT, the taxation of transactions implies that only these transactions which are carried out by taxable persons are considered by the tax. Transactions carried out by private individuals are mainly irrelevant for taxation (b).

449 VAT laws hardly contain definitions of the term “supply”: David Williams (n 1) p 189; the concept of supplies is a broad one: Paul Farmer and Richard Lyal (n 273) p 90; any gap in the interpretation of transactions allows the Member States to undermine the broad-based nature of the EU VAT system: Ben Terra (n 149) p 75; Holger Stadie criticizes that the ECJ does not distinguish between the supply and its consideration but investigates the two parts together. According to him, first, the existence of a supply should be assessed. Afterwards, the existence of a consideration should be settled: Holger Stadie (n 347) (914–915); concerning this point see also: Stefanie Baur-Rückert (n 51) pp 43–70; concerning a thorough analysis of supplies for consideration see: Lars Dobratz (n 356).
a. Transactions as Proxies

The use of goods and the enjoyment of services are connected to numerous human actions. Human behaviour is diverse and consequently the links to an instantaneous straightforward taxation of all private consumption of goods and services would be various, too.\(^{450}\) The wide notion of consumption encompasses not only consciously perceived consumption but also everyday actions like teeth brushing as toothpaste is used. Some goods can be consumed immediately and fully (nothing is left after consumption; such goods are known as “consumables” like fruits or shampoo) whereas other things are consumed continuously and are hardly used up at all or only in the long run (e.g., works of arts or immovable properties). Intangibles like patents which have a long usage period fall in this category, too. Actual consumption is then stretched along the lifetime of such durables.\(^{451}\) Similar uncertainties underly services as it may not be clear when a service is actually consumed. The impacts of, for example, a hair cut, can be enjoyed for a longer time. A comparable focus on consumption is applied by the concept of consumption in marketing science which recognizes (private) consumption as the satisfaction of personal needs, irrespective of which nature the needs are.\(^{452}\) This point of view, however, is not advisable for a general consumption tax.\(^{453}\)

Instead of taxing actual consumption, the concept of consumption for EU VAT is similar to some approaches which are used in other research areas. As shown above, the discipline of microeconomics focuses on the intersection of supply and demand.\(^{454}\) The transfer from the business to the private sphere is also the foundation on which the efforts of marketers are based.\(^{455}\) This move from producing companies to private consumers is also reflected in VAT. The outlined technical design of EU VAT supports the tie to transactions. Instead, the area of macroeconomics focuses on the production values which have been finished for consumption, regardless of what has already been transferred to the consumers.\(^{456}\) Concerning other kinds of taxation, the concept of consumption is similar but not identi-
cal to the EU VAT understanding. Direct taxes which are combined with consumption elements are sometimes tied to transactions.457 Furthermore, excise duties are also consumption taxes. Excises are not necessarily levied on the basis of transactions but the fabrication of the products.458

The paradigm of the EU VAT system rests on the intention of absorbing the financial capability of consumers indicated by consumption (ability-to-pay principle).459 More precisely, VAT is intended to tax the final customers’ capability of income or wealth utilization for consuming goods

457 See pp 70 et seqq.
458 See pp 79 et seqq; see also: Holger Stadie (n 254) para 92.
459 A similar intention underlies excise duties, see the discussion on pp 79 et seqq; Tina Ehrke-Rabel (n 289) p 1549: the findings for excise duties are transferable to VAT; this principle accounts for all indirect taxes on consumption: Johanna Hey (n 234) paras 43 and 70 with further references; see also e.g.: Joachim Englisch (n 261) para 13 with further references; Joachim Englisch (n 317) pp 22–25 with further references to German and international literature which in particular promote this perspective on the concept of VAT as a general consumption tax (footnotes 90 and 92); Ferdinand Kirchhof (n 268) p 65; Paul Kirchhof, Bundessteuergesetzbuch – Ein Reformentwurf zur Erneuerung des Steuerrechts (2011), Buch 4, p 35; Roman Seer (n 314) para 47; Clara Sullivan, The Tax on Value Added (1965) pp 4 and 20; Ben Terra and Julie Kajus (n 126) p 250; the ability-to-pay principle was also pointed out by Christian Tenzel in the 16th century, see the short discussion in: Onno Ydenna, The Gold Mine of Netherlands Consumption Taxes in Two Historical International Treaties, in VAT in an EU and International Perspective: Essays in honour of Han Kogels (Henk van Arendonk, Sjaak Jansen and René van der Paardt eds, 2011) pp 210–212; the ability-to-pay principle is also discussed among economists, see e.g.: Gregory Mankiw and Mark Taylor (n 130) pp 190–191 or Gregory Mankiw (n 131) pp 237–239; in contrast to the application of the ability-to-pay principle under VAT: Ben Terra (n 369) p 5; in the same neglecting way also: Paul Kirchhof, Der verfassungsrechtliche Auftrag zur Besteuerung nach der finanziellen Leistungsfähigkeit, (62)(4) Steuer und Wirtschaft (1985) 319 (324); furthermore: income taxes are based on the ability-to-pay principle whereas VAT seeks to tax consumption (consumers who buy the same things are taxed equally): Sigrid Hemels, Influence of Different Purposes of Value Added Tax and Personal Income Tax on an Effective and Efficient Use of Tax Incentives: Taking Tax Incentives for the Arts and Culture as an Example, in Value Added Tax and Direct Taxation: Similarities and Differences (Michael Lang, Peter Melz and Eleanor Kristoffersson eds, 2009) pp 40–43; see also the discussion in: Thomas Ecker (n 372) pp 100–103; it is called economic capacity by: Opinion of Advocate General Colomer of 23.11.2004 – C-412/03, Hotel Scandic Gásabäck, ECLI:EU:C:2004:746.
and services.\textsuperscript{460} The underlying idea is that only people who dispose of money are able to buy goods or services for consumption. In other words, income and wealth enable people to consume and the tax is levied on the spending power respectively the “consumption power” of consumers.\textsuperscript{461} Yet the use of money does not include savings which is why they are not taxed.\textsuperscript{462} Like under the lens of microeconomics, this separation mirrors the trade-off between consumption and saving (i.e., the decision between consuming now or later). Savings are taxed as soon as the saved money is spent for consumption.\textsuperscript{463} In a nutshell, consumption is another indicator for the ability to pay alongside income and wealth.\textsuperscript{464}

\textsuperscript{460} “The aim of VAT as a general tax on the consumption of goods is to impose a tax on consumer capacity, which is demonstrated by consumers’ expenditure of assets to procure a consumable benefit (supply of goods or services).”: Opinion of Advocate General Kokott of 07.06.2018 – C-295/17, MEO, ECLI:EU:C:2018:413 para 28 with further reference to ECJ of 18.12.1997 – C-384/95, Landboden-Agrardienste, ECLI:EU:C:1997:627 paras 20 and 23 and of 11.10.2007 – C-283/06 and C-312/06, KÖGÄZ and Others, ECLI:EU:C:2007:598 para 37; see also e.g.: Ad van Doesum and Gert-Jan van Norden (n 118) p 713; Joachim Englisch (n 261) paras 10–11 with further references; Roland Ismer, Der Stellenwert der Umsatzsteuer in der Steuerpolitik, (5)(17) Mehrwertsteuerrecht (2017) 687 (688) with further references; Ferdinand Kirchhof (n 268) p 65; Wolfram Reiß (n 235) paras 46–47; Wolfram Reiß (n 290) p 434; Wolfram Reiß (n 373) pp 19–20; Harald Schaumburg (n 290) p 32 with further references; Ben Terra and Julie Kajus (n 126) p 250; critical (in particular in terms of excise duties): Albert Beermann (n 294) pp 284–285.

\textsuperscript{461} See e.g.: Harald Schaumburg (n 290) p 35; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 7; Klaus Tirkpe (n 269) pp 976 and 980–981; similar: OECD (2015a), BEPS Action 1 – Final Report (n 2) para 14.

\textsuperscript{462} Wolfram Reiß (n 235) para 10.1; borrowed money is included: Ferdinand Kirchhof (n 268) p 65 with further references; it does not matter where the money comes from: Paul Kirchhof (n 345) (3).

\textsuperscript{463} Klaus Tirkpe (n 269) p 981.

\textsuperscript{464} Income, wealth and consumption can also be interpreted as three logically successive phases of the same process of economic performance (like a transformation process) – economic resources are gained, stored and used to satisfy non-monetary needs: Dietmar Aigner et al (n 80) para 15/1 with further reference to Johanna Hey (n 234) paras 55–56; see also: Gabriele Burmeister, Begriff und Funktion des Steuergutes im Steuerrecht: Zur Bedeutung der Steuerguter für eine inner- und interstaatlich sachgerechte Steuerordnung, (70)(3) Steuer und Wirtschaft (1993) 221–230; similar: OECD (2015a), BEPS Action 1 – Final Report (n 2) para 16; Johanna Hey states that consumption is the best indicator for the ability-to-pay principle: Johanna Hey (n 234) para 52; Kirchhof identifies income and spending power as the two links to financial capability: Paul Kirchhof (n 345) (1); similar: Rainer Wernsmann (n 277) p 101.
The indirect character of the tax does not preclude the aim of capturing the financial capacity of a single consumer. The EU VAT Directive obliges taxable persons to calculate, to collect and to transfer the VAT to the tax authorities. By contrast, private consumers should bear the tax but they mostly do not have to worry about tax collection. In order to be in line with the consumption tax character, the tax charge must be shifted from the business to the private sphere. EU VAT meets this requirement by enabling taxable persons the increase of final prices of goods and services. Private consumers pay the tax in the form of a percentage markup on sales prices directly to the businesses. Because of this shifting, the tax only indirectly absorb the personal financial capability of individuals. The financial circumstances of each consumer remain unknown. Thus, sometimes it is doubted whether EU VAT can justify the aim of capturing the financial capacity of a single consumer. The fact, however, that goods are purchased and services are inquired, implies a certain financial

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465 Taxable persons are (unpaid) tax collectors on behalf of the states, see e.g.: ECJ of 20.10.1993 – C-10/92, Balocchi, ECLI:EU:C:1993:846 para 23; of 21.02.2008 – C-271/06, Netto Supermarkt, ECLI:EU:C:2008:105 para 21; CJEU of 23.11.2017 – C-246/16, Di Maura, ECLI:EU:C:2017:887 para 23; of 08.05.2019 – C-127/18, A-PACK CZ, ECLI:EU:C:2019:377 para 22; Joachim Englisch (n 261) para 12; Ine Lejeune, Wim De Clercq and Mathieu Van De Putte (n 65) p 633; Peter Schmidt (n 149) pp 137–138 with further references; Wolfram Reiß (n 235) para 21; Holger Stadie states that the VAT system disregards this function which is contrary to the consumption tax character: Holger Stadie (n 347) (907–911).


467 Joachim Englisch (n 261) para 12; Holger Stadie (n 254) paras 116–117 with further references; Holger Stadie (n 347) (905); Ben Terra (n 149) p 12; Ben Terra and Julie Kajus (n 126) p 253.

468 Roland Ismer (n 460) (688): shifting by increased prices; the EU legislator allows the transfer of VAT to private consumers, inter alia, by requiring in Article 226 Number 10 of the EU VAT Directive that VAT must be invoiced: Joachim Englisch (n 261) para 12; see also: Kathryn James (n 234) pp 39 and 42; Paul Kirchhof (n 345) (3); Holger Stadie (n 254) paras 129–131 and 223 with further references.

469 Only a typifying consideration is possible: Joachim Englisch (n 370) p 565 with further references; Joachim Englisch (n 261) para 13; Ferdinand Kirchhof (n 268) p 66.

470 See e.g.: Ferdinand Kirchhof (n 268) p 66; Ferdinand Kirchhof, Das Leistungsfähigkeitsprinzip nach dem Grundgesetz – Zustand und Zukunft, (72)(12) Betriebs-Berater (2017) 662 (666); according to him, only the fact that consideration is paid is of importance; Heinrich Kruse (n 314) (328); Klaus Tipke (n 269) p 976.
Thus, spending money at markets (instead of receiving money), justifies the concept of EU VAT as a general tax on (private) consumption. By contrast, each kind of investments for business purposes does not express any capability for private consumption and consequently must be excluded from taxation.

By linking the tax to the spending power of consumers, expenditures are applied as a proxy for consumption. As defined above, a proxy is an instrument to express something else what you want to measure. Concerning taxation, proxies are an instrument that makes it possible to represent the reality in a simplified way while at the same time allowing practical taxation. Spending income or wealth is synonymous with expenditures which the consumers make for goods and services.

In order to capture private expenditures, transactions are considered. These mark the point in time at which money is exchanged for the goods and services which are in-
tended to be consumed.\textsuperscript{478} It must be noted, however, that gratuitous transactions are not connected to any spending of income which is why they are not taxed.\textsuperscript{479} Thus, not all consumption is taxed. Only consumption obtained by spending money is taxed.\textsuperscript{480} In other words, VAT is levied on transactions which are exchange-based. This is in line with the indirect character of the tax and compensates the complexity of directly taxing actual consumption.\textsuperscript{481} Transactions can be easily observed without any major valuation problems, even if it is a challenge to record every single transaction.\textsuperscript{482}

Transactions are consulted to tax consumption. Holger Stadie, however, ascribes the consumption tax character a too narrow scope for the established EU VAT system. Instead, he favours the interpretation of VAT as a \textit{tax on expenditure}. In his opinion, this is a wider notion.\textsuperscript{483} According to Stadie some goods are not consumed but only “used” like, for example, works of arts, jewellery and property. Thus, he concludes that the objective of VAT is not consumption of goods and services but the use of income or wealth instead.\textsuperscript{484} It is true that expenditures are determinative for value-added taxation. Stadie, however, overlooks the meaning of consumption: consumption comprises not only the total elimination of goods, but also their use. The consumption tax character includes both kinds of consumption.

\textsuperscript{478} Linking the tax with transactions does only happen because of technical reasons: Paul Kirchhof (n 345) (3); Wolfram Reiß (n 373) pp 19–20; Victor Thuronyi (n 230) p 307; Rebecca Millar, \textit{Echoes of Source and Residence in VAT Jurisdictional Rules}, in Value Added Tax and Direct Taxation: Similarities and Differences (Michael Lang, Peter Melz and Eleanor Kristoffersson eds, 2009) p 292: “[VAT] taxes transactions in lieu of directly taxing consumption”; similar: Jasmin Kollmann (n 121) p 23; OECD (2015a), \textit{BEPS Action 1 – Final Report} (n 2) para 14; in contrast to transactions respectively expenditures as a proxy for consumption, taxable events are identified as a proxy for consumption by: Ad van Doesum and Gert-Jan van Norden (n 118) p 707.

\textsuperscript{479} Joachim Englisch (n 370) pp 585–586; Ben Terra and Julie Kajus (n 126) pp 316–317; see e.g.: ECJ of 01.04.1982 – C-89/81, \textit{Hong-Kong Trade}, ECLI:EU:C:1982:121; see also the discussion on pp 167 et seqq; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 104–105: personal gifts, transfers after death and donations inter vivos to individuals or trusts constitute no taxable events.

\textsuperscript{480} Without consideration no taxation takes place: David Williams (n 1) p 200.

\textsuperscript{481} Kathryn James (n 234) pp 41–42; partly also: Holger Stadie (n 254) para 90.

\textsuperscript{482} Peter Schmidt (n 149) pp 137–138 with further references.

\textsuperscript{483} Holger Stadie (n 254) paras 141 and 143; by contrast: Marie Lamensch (n 77) pp 11–12.

\textsuperscript{484} Holger Stadie (n 254) paras 143–144 with further references.
Imports of goods (including imports by private individuals\(^{485}\)) are an exception to the general proxy, since taxation is not dependent on transactions and the use of income or wealth, but consumption is nevertheless taxed.\(^{486}\) The decisive criterion for taxing imports is that the goods are moved from outside the Union territory across the boundaries of a EU Member State.\(^{487}\) This reflects the destination country principle.\(^{488}\) Consequently, a change of residence between a third country and a EU Member State also gives the tax administration an opportunity to levy VAT.\(^{489}\) Then, the initial purchase of the goods in the third country as well as the importation to a EU Member State may be taxed.\(^{490}\) Whether double taxation takes place is a matter of refunds in the origin state or tax exemptions in the destination state. However, the taxation of imports reflects the con-

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\(^{485}\) Considering the importation of goods, Articles 2 paragraph 1 lit d) and 201 of the EU VAT Directive are responsible for a direct charging of VAT from private individuals (non-taxable persons) who consume imported goods: Ben Terra and Peter Wattel (n 272) p 183; concerning imports: Wolfram Reiß (n 235) para 33; Joachim Englisch (n 261) paras 12 and 70–71 with further examples.

\(^{486}\) Similar: Ad van Doesum and Gert-Jan van Norden (n 118) p 708; Thomas Ecker (n 372) p 97.

\(^{487}\) By contrast, the rules for intra-Community trade are knitted to transactions and taxable suppliers, which is why a change of residence between Member States causes no second VAT liability on the same goods; see also: Joachim Englisch (n 261) para 20.

\(^{488}\) Joachim Englisch (n 261) para 399; Peter Schmidt (n 149) p 94; please note: concerning imports of services, no special rules exist in Article 2 of the EU VAT Directive (taxation in the destination country is achieved by place of taxation rules).

\(^{489}\) Concerning a change of residence between EU Member States and an involved transfer of a new means of transport see e.g.: Ben Terra and Julie Kajus (n 126) pp 1572 and 1588 (under such circumstances a new means of transport is not taxed according to Article 138 paragraph 2 lit a) of the EU VAT Directive and Article 2 of the EU Implementing Regulation); furthermore, Article 144 of the EU VAT Directive and Article 46 of the 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 (OJ L 77, 23.03.2011, pp 1–22) last amended by Council Implementing Regulation (EU) 2019/2026 of 21 November 2019 (OF L 313, 04.12.2019, pp 14–27) (hereafter: EU VAT Implementing Regulation) exempt certain supplies of services in connection with a change of residence.

\(^{490}\) The second levying of VAT is once again an expression of a time period view on consumption, see the discussion below.
sumption tax character, since without import taxation untaxed consumption opportunities can be transferred to a country.491

Transactions as proxies depict a compromise as it is not questioned whether consumption actually takes place. Transactions anticipate consumption. The tax is levied (at the latest) as soon as the consumer has made the expenditure.492 By taxing expenditure, VAT systems are predictive and tax consumption before it actually occurs.493 This happens in marked contrast to income taxes which generally tax in a reactive way as the tax is levied on actual earned income and not on future income.494 The time divergence between taxation and consumption depends on the kinds of goods and services. Some goods are consumed a certain time after purchase. Services are often consumed immediately or shortly after the buying process. However, this divergence is an accepted compromise as the tie to transactions bears many advantages like observability or quantifiability.495 It does not matter whether the goods or services are consumed or not, as long as money has been spent. Only under certain circumstances (for example, when a product does not meet the promised standards and is returned immediately) the transaction is deemed to not have been occurred. This raises the idea that not consumption, but rather a consumption option, is taxed.496

The anticipation of consumption further implies a reduction of consumption to an immediate point in time. This moment occurs when a con-

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491 Concerning imports, the consumption tax character becomes clear (this accounts also for taxation of deemed supplies): Klaus Töpfe (n 269) p 976; see also e.g.: Joachim Englisch (n 317) pp 26–28 with further references; Paul Kirchhof (n 345) (3); Wolfram Reiss (n 373) p 21; Ulrich Schrömbges, Zur Betrugsbekämpfungsklausel des EuGH bei der innergemeinschaftlichen Anschlusslieferung: Zugleich Besprechung des Vorlageschlusses des österreichischen VwGH v. 29.6.2017, (6)(4) Mehrwertsteuerrecht (2018) 157 (158) with further references; Hartmut Sohn (1975a) (n 374) (17); Holger Stadie (n 254) para 138 with further references; a similar situation is present concerning deemed supplies, see the discussion on pp 167 et seqq.

492 See Articles 63–66 of the EU VAT Directive.

493 Rebecca Millar (n 478) pp 293–294; Peter Schmidt (n 149) pp 262–264; Ben Terra and Julie Kajus (n 126) pp 250–251; similar: Joachim Englisch (n 317) p 27 with further references: no consumption tax system worldwide grants tax reimbursements for goods acquired but never used; similar: Robert van Brederode (n 258) p 164: “Consumption taxes are designed on the assumption that consumption is an immediate event.”; see also: Jasmin Kollmann (n 121) p 19.

494 Kathryn James (n 234) p 41 with further references.

495 Peter Schmidt (n 149) p 264.

496 Ben Terra (n 149) p 10; Ben Terra and Julie Kajus (n 126) pp 250–251.
sumer spends expenditures respectively the tax becomes chargeable. Article 63 of the EU VAT Directive defines the chargeable event as the time of a supply of goods or services. Alternatively, Article 65 of the EU VAT Directive defines the time of payment as the chargeable event when this time is prior to the actual supply of goods or services. A change in use of the products concerned after purchase often does not trigger any tax consequences as consumption in the narrowest sense is not seen as a process.

The correction mechanisms of input VAT deduction under Articles 184 to 192 of the EU VAT Directive introduce a “duration criterion” into EU VAT law. Input tax deductions are allowed as soon as the deductible tax becomes chargeable. However, corrections to the initial input tax deduction must be sometimes made over a period of time. This is especially incorporated in Article 187 of the EU VAT Directive which determines time limits of such kind of adjustments. After the end of the time period, no alterations are necessary any more which consequently implies that the good is “used up”. Thus, the concept of EU VAT consumption is somehow also a periodic measure. Interestingly, the national legislators can fix a five-year period for capital goods and possible extensions up to 20 years for immovable property. These time limits are applied differently among the Member States, which is why the consumption of capital goods may be based on a different period which is distinct from, for example, time periods for

497 Ben Terra (n 149) p 10; Ben Terra and Julie Kajus (n 126) p 251.
498 See Article 64 of the EU VAT Directive for further special cases and Article 66 of the EU VAT Directive for possible derogations.
499 Peter Schmidt (n 149) p 166.
500 A similar aim is pursued by Article 18 lit c) of the EU VAT Directive which allows taxation of goods when a business is quitted, the reasons for the cessation of the business are irrelevant. Such kind of taxation can take place in the time between the initial input tax deduction and the date of abandoning the business activity, regardless any bygone time period; CJEU of 16.06.2016 – C-229/15, Mateusiak, ECLI:EU:C:2016:454; see e.g.: Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 109; Ben Terra and Julie Kajus (n 126) pp 484–487 with further references to pertinent case law; critical: Holger Stadie (n 254) paras 316 and 323.2; this objective also applies to the special arrangements for second-hand goods.
501 Article 167 of the EU VAT Directive.
502 See e.g.: Germany opted for 10 years (Section 15a paragraph 1 sentence 2 of the German VAT Act (Umsatzsteuergesetz vom 21.02.2005, BGBl I 388, last amended by Artikel 9 Gesetz zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften vom 11.12.2018 (BGBl I 2338)), Austria chose a 20 year period (Section 12 paragraph 10 of the Austrian VAT Act (Bundesgesetz über die Besteuerung der Um-
amortisation and depreciation according to income tax laws. However, the duration over which VAT consumption of one and the same capital good extends is therefore not uniform within the EU.

The subjective value of a transaction mirrors the expenditures as a proxy for consumption. VAT should affect a private consumer in his personal financial capacity.503 According to Article 73 of the EU VAT Directive, the tax is calculated on the basis of the subjective value of a transaction which therefore mirrors the actual expenditures of private consumers.504 The amounts which are actually spent (the subjective consideration) must be decisive for the assessment of the tax and should not reflect objective values.505 This must not be confused with the objective character of transactions where the circumstances under which a transaction is carried out are

503 Klaus Tipke (n 269) pp 976 and 990; similar: Joachim Englisch (n 261) para 245; the subjective value is called a fundamental principle: ECJ of 03.07.1997 – C-330/95, Goldsmiths, ECLI:EU:C:1997:339 paras 15–16 with further references; CJEU of 26.01.2012 – C-588/10, Kraft Foods Polska, ECLI:EU:C:2012:40 paras 26–27; of 15.05.2014 – C-337/13, Almos Agrárkülkereskedelm, ECLI:EU:C:2014:328 para 22; concerning a more detailed analysis of consideration see: Ben Terra and Julie Kajus (n 126) pp 759–762; see also: David Hummel (n 381); Jasmin Kollmann (n 121) pp 65–83.

504 Ben Terra and Peter Wattel (n 272) p 202.

irrelevant. The Second EU VAT Directive did not include the term “consideration” but the more intuitive expression “against payment”. The term was changed by the Sixth EU VAT Directive. The concept, however, is still the same: It must be possible to express consideration in monetary terms. Usually, the subjective value of a transaction is often the market price. Amounts below the cost price of the supplier are also qualified as consideration. Microeconomics know the concept of consumer surplus which expresses the difference between the value a private consumer attributes to the possibility of consumption and the actual price which is paid. However, such calculations cannot be used for VAT taxation as the value a consumer attributes to a good or service cannot be determined reliably.

EU VAT deviates from the subjective value and applies objective values in certain circumstances, for example, for transactions between connected


511 See pp 57 et seqq.
people. Apart from that, the EU VAT Directive does not allow any further deviations from the subjective value of a transaction. This treatment also applies to transactions which are based on a mandatory contract because of law or official order or for partial and low payments. The only decisive factor is the fact that a taxable person has sold a good or ren-

512 See Article 80 of the EU VAT Directive; concerning a definition of the open market value under EU VAT law see Article 72 of the EU VAT Directive (the open market value is the normal retail price: Paul Farmer and Richard Lyal (n 273) p 121); concerning its application: Ben Terra and Julie Kajus (n 126) pp 762–766 with further references to pertinent case law; see also: Marie Lamsch (n 108) p 113; see e.g.: CJEU of 26.04.2012 – C-621/10 and C-129/11, Balkan and Sea Properties and Providinvest, ECLI:EU:C:2012:248; further objective values are applied according to e.g. Article 74 of the EU VAT Directive: Ben Terra and Julie Kajus (n 126) pp 771–783.

513 Article 14 paragraph 2 lit a) and Article 25 lit c) of the EU VAT Directive; Holger Stadie (n 254) para 159.

514 Ben Terra and Julie Kajus (n 126) pp 316–317; the fact that the consideration for a supply is higher/lower than cost price/open market value does not matter, see e.g.: ECJ of 20.01.2005 – C-412/03, Hotel Scandic Gåsabäck, ECLI:EU:C:2005:47 para 22; CJEU of 09.06.2011 – C-285/10, Campsa Estaciones de Servicio, ECLI:EU:C:2011:381 para 25; of 12.05.2016 – C-520/14, Gemeente Borsele, ECLI:EU:C:2016:334 para 25; of 02.06.2016 – C-263/15, Lajvér, ECLI:EU:C:2016:392; in Gemeente Borsele and Lajvér it was questionable whether low payments can be considered as consideration for supplies – concerning the difference between consideration for a supply and income in terms of Article 9 of the EU VAT Directive see: Matteo Mantovani, When does the carrying out of transactions for consideration give rise to an economic activity relevant for VAT purposes? An insight into the relationship between the notions of consideration and income according to the Court of Justice of the EU, (6)(1) World Journal of VAT/GST Law (2017) 1–20; not the low prices but the way how the consideration was calculated led to the denial of an economic activity in Gemeente Borsele and Lajvér: Karoline Spies, CJEU Case Law on Taxable Persons in 2018, in CJEU: Recent Developments in Value Added Tax 2018 (Michael Lang et al eds, 2019) p 142; concerning Gemeente Borsele see also: Ulrich Grünwald, Das Entgelt als Determinante der Steuer, in 100 Jahre Umsatzsteuer in Deutschland 1918–2018 Festschrift (UmsatzsteuerForum e.V. and Bundesministerium der Finanzen eds, 2018) pp 680–681 who points out that firstly, it is necessary that an exchange is present and secondly, an economic activity must be on hand; this is in line with: Roland Ismer, Die wirtschaftliche Tätigkeit der öffentlichen Hand im Lichte aktueller Rechtsprechung, (4)(16) Mehrwertsteuerrecht (2016) 654 (660); concerning input tax deduction in relation to low payments for output supplies see e.g.: ECJ of 21.09.1988 – C-50/87, Commission v France, ECLI:EU:C:1988:429 (no economic activity!); in this context see also: Eleonor Kristoffersson, Full deduction of input VAT where goods are sold for a price lower than the cost price, (5)(2) World Journal of VAT/GST Law (2016) 121–125.
dered a service and got a consideration irrespective whether this happened on a voluntary or obligatory basis.\textsuperscript{515} Payments without receiving benefits, on the other hand, are irrelevant for VAT purposes.\textsuperscript{516}

The use of transactions as a proxy does not require a definition of consumption. The difficulties which are involved in the attempt to precisely define consumption for VAT purposes are thereby circumvented.\textsuperscript{517} Scholarly literature supports this interpretation of the concept of VAT as a general consumption tax rather than directly employing an uncertain understanding of literal consumption.\textsuperscript{518} Nevertheless, taxation is always based on the taxation of consumption, regardless of how it is levied. The use of proxies is necessary to avoid a definition of consumption in each individual case, but it is also a measure of simplification. Assuming that rational consumers act in well operating markets, a high correlation between consumption and expenditure can be expected.\textsuperscript{519} The consumption tax character, however, should be omnipresent by the determination of the taxability of transactions.

b. Transactions by Taxable Persons

Due to the indirect all-stage character of EU VAT, four possible kinds of transactions can be taxed. The nature of transactions entails that there are two parties involved: a person who supplies and a person who receives the object of the transaction.\textsuperscript{520} As the EU VAT system is of indirect nature, a link to the business sphere exists. Furthermore, the technical design of EU

\textsuperscript{515} Holger Stadie (n 254) para 162.
\textsuperscript{517} Admittedly, problems also arise by defining transactions.
\textsuperscript{518} See e.g.: Kathryn James (n 234) p 41 with further references; Ben Terra (n 149) p 10; Ben Terra and Julie Kajus (n 126) pp 250–251.
\textsuperscript{519} Peter Schmidt (n 149) p 261.
\textsuperscript{520} Prabhu Narasimhan (n 438) (4–5): this means also that there cannot be a supply of a person to himself except the law states otherwise.
VAT is categorized by an all-stage\(^{521}\) and not just a one-stage system.\(^{522}\) It covers the entire supply chain – from production to retail.\(^ {523}\) Thus, while sales between suppliers (B2B) appear at first sight to be irrelevant as VAT is intended to tax private consumption,\(^ {524}\) they are important for the levying of a multi-stage tax. Furthermore, taxation at the retail stage is essential as it ensures that private consumption is fully captured.\(^ {525}\) In a nutshell, four different kinds of transactions must be assessed: business-to-business (B2B), business-to-consumer (B2C), consumer-to-business (C2B) and consumer-to-consumer (C2C) transactions.\(^ {526}\)

While all B2B and B2C sales are covered by the EU VAT Directive, total private consumption is not taxed. The purpose of EU VAT is to tax private consumption respectively expenditures. Business expenditures (or rather business consumption) are not taxed. As businesses provide added value for final private consumption indirectly,\(^ {527}\) the technical design of the tax supports taxation of B2B (with accompanied input tax deductions) and B2C transactions. Thus, all supplies of taxable persons are covered by the scope of the EU VAT Directive.\(^ {528}\) From the point of view of a single taxable person, the VAT collection technique mirrors his economic contribu-

\(^{521}\) An all-stage tax is a representative of multi-stage taxes. The range of multi-stage levies reaches from dual-stage taxes (manufacturer + wholesaler, wholesaler + retailer, manufacturing + retailer) to all-stage taxes: Ben Terra and Julie Kajus (n 126) pp 264–266; see also: Robert van Brederode (n 258) pp 11–16.

\(^{522}\) A single-stage tax is characterized by being levied only at one stage of the production and distribution chain (e.g. the manufacturer’s level, a wholesaler’s level or at the retailer’s level); for a short overview of three possible sub-systems of single-stage taxes see: Ben Terra and Julie Kajus (n 126) pp 260–264; see also: Peter Schmidt (n 149) pp 41–42; Alan Tait (n 256) p 5.

\(^{523}\) Robert van Brederode (n 258) pp 16–18; Ben Terra (n 149) p 31; the staged collection process is the central design feature of a VAT: OECD (2015a), \textit{BEPS Action 1 – Final Report} (n 2) para 46.

\(^{524}\) Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 37.

\(^{525}\) Ben Terra and Julie Kajus (n 126) p 285.

\(^{526}\) All four categories are present in the digital economy, concerning some examples see e.g.: E.C.J.M. van der Hel-van Dijk and M.A. Griffioen, \textit{Online Platforms: A Marketplace for Tax Fraud?}, (47)(4) \textit{Intertax} (2019) 391 (392) and OECD (2015a), \textit{BEPS Action 1 – Final Report} (n 2) paras 118–121.

\(^{527}\) Wolfram Reiß (n 235) para 41; Ben Terra (n 149) p 10; Ben Terra and Julie Kajus (n 126) p 246.

\(^{528}\) Thus, VAT fulfils the principle of universality at the personal level: Ben Terra and Julie Kajus (n 126) p 298; this statement implies that by setting the focus on the all-stage character, a supplier is in no need to identify the VAT status of his customer and the intended corporate or private use of the goods or services: Holger Stadie (n 254) para 250; concerning considerations like the kind of sup-
tion (his value added) for the final product and the market economy.\textsuperscript{529}
The taxable person who directly sells to a private customer marks the point in time at which the final customer uses his income or wealth for consumption.\textsuperscript{530} By contrast, C2B and C2C transactions are not taxed\textsuperscript{531} as there is no market transaction by a taxable person in these situations.\textsuperscript{532} It can therefore be concluded that by using transactions as a proxy, not all private consumption is taxed.

The EU VAT Directive primarily concerns transactions which are rendered by taxable persons. The definition of taxable persons is included in Article 9 of the directive.\textsuperscript{533} All other entities are not obliged to levy VAT on their output transactions. In short, according to Article 9 paragraph 1 of the EU VAT Directive, a taxable person is a person who independently carries out an economic activity regardless of its purpose or results. An economic activity can be any activity as long as the objective of the activity is to gain a continuous income.\textsuperscript{534} If an entrepreneur acts within the purpose of his economic activity, his output transactions will be subject to VAT.

\textsuperscript{529} David Williams (n 1) p 169.
\textsuperscript{530} Peter Schmidt (n 149) pp 165–166.
\textsuperscript{531} See for a short overview of taxation of C2C and C2B: Peter Schmidt (n 149) pp 264–265.
\textsuperscript{532} Peter Schmidt (n 149) pp 137–138.
\textsuperscript{533} Article 9 paragraph 2 of the EU VAT Directive extends the definition of taxable persons to any person who occasionally sells new means of transportation. The optional provision in Article 11 of the EU VAT Directive opens a possibility for the EU Member States to exclude transactions within a group of businesses. By contrast, the optional provision in Article 12 of the EU VAT Directive opens a possibility for the EU Member States to extend the definition of a taxable person in some circumstances.

\textsuperscript{534} Please note, the question whether an individual is a taxable person according to Article 9 of the VAT Directive is no subject of this academic work. For a detailed analysis in this field please see e.g.: Joachim Englisch (n 261) paras 33–71; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 75–89 with further references; Alan Tait (n 74) pp 365–371; Ben Terra and Julie Kajus (n 126) pp 357–448; Ben Terra and Peter Wattel (n 272) pp 176–183; David Williams (n 1) pp 175–183; concerning challenges ahead see e.g. Xavier Oberson, Taxing Robots? From the Emergence of an Electronic Ability to Pay to a Tax on Robots or the Use of Robots, (9)(2) World Tax Journal (2017) 247–261 who discusses the question whether robots can be assigned a legal personality which would create an electronic ability to pay and the question whether robots may be once included as taxable persons into VAT laws; in this respect see also e.g.: Joachim
On the other hand, when a trader carries out transactions apart from his economic activity (e.g., the private sale of his children’s used toys on an online platform), these are outside the scope of the directive. Furthermore, only input tax on goods and services used for taxed output transactions respectively economic activities are eligible for deduction to ensure taxation of private consumption. The decision whether input tax deduction is permissible lies with the taxable persons. While the definition of an “eco-

535 Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 103–104; Ben Terra and Julie Kajus (n 126) pp 347–348; e.g. hobbies do not constitute economic activities: David Williams (n 1) pp 197–198; for an overview of out-of-scope activities see e.g.: Yves Bernaerts and Sandhya Nathoeni (n 149) (292–293); concerning some consequences for taxable persons without economic activities see e.g.: ECJ of 06.11.2008 – C-291/07, Kollektivavtalsstiftelsen TRR Trygghetsrådet, ECLI:EU:C:2008:609 (cross-border trade).

536 See e.g. ECJ of 08.02.2007 – C-435/05, Investrand, ECLI:EU:C:2007:87 para 22 with further references; of 12.02.2009 – C-515/07, Vereniging Noordelijke Land, ECLI:EU:C:2009:88; David Williams (n 1) p 172; concerning a necessary direct and immediate link between input and output transactions see e.g.: ECJ of 06.04.1995 – C-4/94, BLP Group, ECLI:EU:C:1995:107; of 08.06.2000 – C-98/98, Midland Bank, ECLI:EU:C:2000:300; of 22.02.2001 – C-408/98, Abbey National, ECLI:EU:C:2001:110; CJEU of 21.02.2013 – C-104/12, Becker, ECLI:EU:C:2013:99; Ben Terra and Julie Kajus (n 126) pp 333–345 with references to further pertinent case law: the necessary direct and immediate link is more and more an indirect link but it is based on a misinterpretation of Article 1 of the EU VAT Directive and has lead to unjustified restrictions of the right to deduct input VAT; concerning mixed use inputs and how to calculate pro rata deductions: Robert van Brederode (n 258) pp 135–137 with further references.

537 The initial input tax deduction relies on this decision and can cause irregularities in terms of business use and non-business use within or outside the economic activity – for a discussion of the pertinent ECJ case law see: Thomas Küffner and Georg von Streit, Zuordnung und Verwendung von Eingangsleistungen – Auswirkungen auf den Vorsteuerabzug unter Berücksichtigung des Unternehmensbegriffs: Eine Zusammenfassung vor dem Hintergrund der jüngerer Rechtsprechung von EuGH und BFH, (50)(12) Deutsches Steuerrecht (2012) 581–588; the initial situation can change, corrections of input tax deductions may then be necessary –


539 If every seller of any product or service was forced to pay VAT to the tax authorities, also every wage earner who provides services to his employer (his personal performance on the job) would be a taxable supplier (no country taxes the manpower of an employee): Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 37–38, 59 and 89–90 with further references; see e.g.: ECJ of 18.10.2007 – C-355/06, van der Steen, ECLI:EU:C:2007:615; however, relationships between a company and its shareholders can be qualified otherwise, see e.g.: ECJ of 27.01.2000 – C-23/98, Heerma, ECLI:EU:C:2000:46; non-taxation of employees is no gap in the EU VAT Directive but a gap in the principles of the consumption tax character: Klaus Tipke (n 269) pp 995–996; concerning Article 10 of the EU VAT Directive see also: Ben Terra and Julie Kajus (n 126) pp 383–390.
For the purpose of this paper, it shall be sufficient to note that taxable persons must in principle collect VAT (but should not suffer any loss of income).

Each person (irrespective whether it is an individual or a legal person) who is not a taxable person is a private one. The term “private person” is a residual concept and can therefore not be interpreted literally. This general notion is penetrated by some irregularities. For example, Article 13 of the EU VAT Directive clearly denies states, provinces, municipalities and other institutions under public law the status of a taxable person, with respect to the activities they perform on the basis of their public duties. Only in exceptional cases, public authorities are regarded as taxable persons. It follows that, for VAT purposes, the public sector is often classified as a private individual which disturbs the principle of equal treatment of all forms of organisations.

The non-taxation of public bodies is synonymous with the non-taxation of the final B2C stage which contradicts the intention to tax private consumption of individuals respectively their expenditures. The value added of the last stage of the supply chain is not taxed and therefore consumption

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541 Ben Terra (n 149) p 5.
542 According to Stefanie Baur-Rückert (n 51) p 108 such activities are *res extra commercium*.
543 For the exact conditions please see: Robert van Brederode (n 258) pp 198–201 with further references; Roland Ismer, in Wolfram Reiß, Jörg Kraeuel and Michael Langer, *USTG* (loose leaf 153rd August 2019) § 2b UStG; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 285–308; Ben Terra and Julie Kajus (n 126) pp 404–436; concerning a thorough analysis see: Oskar Henkow (n 424) and Thomas Wiesch, *Die umsatzsteuerliche Behandlung der öffentlichen Hand* (2016); critical e.g.: Michel Aujean, *Harmonization of VAT in the EU: Back to the Future*, (21)(3) *EC Tax Review* (2012) 134 (137–138) with further references.
544 This is also true e.g. for churches: Ben Terra (n 149) p 5; Ben Terra and Julie Kajus (n 126) p 246; the authorities are seen as final consumers concerning parts of their purchased inputs: Liam Ebrill et al (n 5) pp 91–92.
545 Joachim Englisch (n 261) para 54; Thomas Küffner and Alena Kirchinger, *Die öffentliche Hand als Steuerpflichtiger – (fast unlösbare) Herausforderungen nach 100 Jahren*, in *100 Jahre Umsatzsteuer in Deutschland 1918–2018 Festschrift* (UmsatzsteuerForum e.V. and Bundesministerium der Finanzen eds, 2018) p 515.
546 *Inter alia*: Robert van Brederode (n 258) pp 194–195; Paul Kirchhof (n 459) p 815; Klaus Tipke (n 269) p 996; Thomas Wiesch (n 543) p 320 with further references; by contrast, subsidized governmental services may be too cheap to mirror the exact monetary value of private consumption: Sijbren Cnossen (n 388) (403); in the same vein: Roland Ismer (n 543) § 2b para 17 with further references: non-deduction at the level of public authorities may mirror the con-

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expenditures are not fully captured. This is also true when the public sector is seen as a kind of transparent layer to tax private consumption already at the level of governments and other public bodies. By denying public authorities input tax deductions, they are burdened with VAT, even if they do not consume. Tax shifting to the private consumer is not always possible. The scholarly literature, therefore, often argues that the public hand should be fully taxed. Taxation of government spending would be in line with, for example, the Australian GST law then.

Foremost, this would include taxation of private consumption.

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547 Thomas Wiesch (n 543) pp 310–313.
548 E.g.: Michael Aujean, Peter Jenkins and Satya Poddar, A new approach to public sector bodies, (10)(4) International VAT Monitor (1999) 144–149; Robert van Brederode (n 258) p 202; Liam Ebrill et al (n 5) p 93; Joachim Englisch (n 261) para 54 with further references; Pierre-Pascal Gendron, Value Added Tax Treatment of Public Sector Bodies and Non-Profit Organizations: A Developing Country Perspective, (59)(12) Bulletin for International Taxation (2005) 514–526; Alan Tait (n 74) p 78; Paul Kirchhof (n 459) pp 850–852 (discussed in Thomas Wiesch (n 543) pp 379–397); Ben Terra and Julie Kajus (n 126) pp 404–405; Kennetz Vyncke, Axel Cordewener and Luc De Broe, Towards a Simpler, More Robust and Efficient VAT System by Levying VAT at EU Level, (22)(4) International VAT Monitor (2011) 242 (245); see also: Oskar Henkow (n 424) pp 175–189 with further references to pertinent literature; furthermore: Thomas Wiesch (n 543) pp 470–505 with further references.
549 Concerning the Australian GST law on public bodies see e.g.: Michael Evans, Horton’s lesson: Australia’s struggle with ‘truth in drafting’, (1)(1) World Journal of VAT/GST Law (2012) 21 (25); Rebecca Millar and Lorenna Moon, Australia, in Improving VAT/GST: Designing a Simple and Fraud-Proof Tax System (Michael Lang and Ine Lejeune eds, 2014) pp 31–33; Rebecca Millar et al (n 98) pp 166–167 (see also pp 167–168 which includes a description of the law in Singapore which is similar to the Australian one and pp 168–169 concerning the Chinese taxation which includes public bodies); in New Zealand, the public hand underlies taxation, too: Jeffrey Owens, The Move to VAT, (24)(2) Intertax (1996) 45 (49–51) or David White and Eugen Trombitas, New Zealand, in Improving VAT/GST: Designing a Simple and Fraud-Proof Tax System (Michael Lang and Ine Lejeune eds, 2014) pp 255; see also the full taxation models in: Oskar Henkow (n 424) pp 135–172 (New Zealand, Australia and Canada); in the same vein: Ian Crawford, Michael Keen and Stephan Smith (n 75) p 277; concerning Canada see also: Pierre-Pascal Gendron, VAT Treatment of Public-Sector Bodies: The Canadian Model, in VAT Exemptions: Consequences and Design Alternatives (Rita de la Feria ed, 2013) pp 103–133.
(Non-)taxation of holding companies also runs foul of the concept of EU VAT as a general tax on consumption. In this regard, VAT turns out to be not neutral to businesses as holding companies are often attested a non-economic activity. This accounts especially for the mere acquisition, the holding and the sale of shares. A company which only renders non-economic activities is no taxable person according to Article 9 of the EU VAT Directive. Consequently, the holdings are burdened with (input) tax. When, however, the holdings are directly or indirectly involved in...
the management of the company in which they hold shares, they fulfil the requirements as taxable persons in this respect.555 The question whether or not holdings are taxed or not, especially depends on the application of a legal or economic perspective on VAT. This question has not been sufficiently answered by the CJEU yet.556 Concerning the consumption tax character, every transaction which does not lead to final consumption in connection with the issuing of shares and restricted input tax deduction: ECJ of 13.03.2008 – C-437/06, Securenta, ECLI:EU:C:2008:166; see also: CJEU of 06.09.2012 – C-496/11, Portugal Telecom, ECLI:EU:C:2012:557 for an example of deductible input tax by holdings.

555 ECJ of 20.06.1991 – C-60/90, Polysar Investments Netherlands, ECLI:EU:C:1991:268 para 14; Ben Terra and Peter Wattel (n 272) pp 177–179; dividends are always the result of ownership (no economic activity) and no consideration for management services: ECJ of 14.11.2000 – C-142/99, Floridienne and Berginvest, ECLI:EU:C:2000:623 or CJEU of 05.07.2018 – C-320/17, Marle Participations, ECLI:EU:C:2018:537; a holding company actively involved is a taxable person (supplies must be made for consideration, dividends are no economic activity): ECJ (Order) of 12.07.2001 – C-102/00, Welthgrove, ECLI:EU:C:2001:416; concerning input tax deductions by management holdings with regard to the purchase of sales see e.g.: ECJ of 27.09.2001 – C-16/00, Cibo Participations, ECLI:EU:C:2001:495 or CJEU of 16.07.2015 – C-108/14 and C-109/14, Larentia + Minerva and Marenave, ECLI:EU:C:2015:496; concerning the sale of 100 percent of shares within an economic activity see: ECJ of 29.10.2009 – C-29/08, SKF, ECLI:EU:C:2009:665 (a taxable transaction which is tax exempt according to Article 135 lit f) of the EU VAT Directive or a transfer of a going concern); management services without any consideration are no economic activity: CJEU (Order) of 12.01.2017 – C-28/16, MVM, ECLI:EU:C:2017:7; concerning input VAT deduction concerning the purchase of shares and a planned management involvement: CJEU of 17.10.2018 – C-249/17, Ryanair, ECLI:EU:C:2018:834 (see for a discussion of the case e.g.: Karoline Spies (n 514) pp 132–138).

556 See the arguments in: Ad van Doesum (n 506); the same competitive relationship exists e.g. concerning exemptions related to the leasing or letting of immovable property, see: Richard Teather, Reverse premiums and VAT – return to the beginning, (19)(1) British Tax Review (2004) 37–45 with references to pertinent ECJ case law; concerning input tax deduction (not solely in the context of holdings but in general) the economic perspective instead of a direct link between inputs and outputs is also favoured by: Kennetz Vyncke, Axel Cordewener and Luc De Broe (n 548) (244–245) with further references to pertinent ECJ case law; concerning the “look-through approach” developed by the ECJ see: Caroline Heber, Issues of shares and partnership interests, and the look-through approach within the scope of VAT and GST, (2)(1) World Journal of VAT/GST Law (2013) 24–45; the court looks more and more to the economic reality: Ben Terra and Julie Kajus (n 126) p 1344; see e.g.: ECJ of 20.02.1997 – C-260/95, DFDS, ECLI:EU:C:1997:20; of 27.09.2001 – C-16/00, Cibo Participations, ECLI:EU:C:2001:495; of 26.05.2005 – C-465/03, Kretztechnik, ECLI:EU:C:2005:320; of
should be relieved from VAT. This also applies to the case of the relationship between holdings and their subsidiaries. For the aforementioned reasons, all operations of holdings should be categorized as economic activities respectively lead to the classification of holdings as taxable persons.  

As regards the B2C stage, the threshold exemption for small enterprises is another example of non-taxation of parts of final consumption. Practically, it is hard to capture every single (business) seller of any good or service. Administration and compliance costs would be too high. At the beginning of the EU VAT harmonization process, the EU legislator allowed the exclusion of the (complete) retail stage from taxation. Today, EU VAT is an all-stage tax that requires taxation of retailers. The inclusion of the retail stage expands the tax base and ensures to fully capture the consumable outputs of the production chain. However, the EU Member States

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557 Ben Terra and Julie Kajus (n 126) p 1344; Caroline Heber (n 556) (36): By contrast, holdings are taxed in line with the consumption tax character as these situations are part of the non-economic activity of businesses. The receipt of income stands in the focus, not consumer expenses.

558 See e.g. in Germany, the threshold for small traders divides the number of taxable persons by half: Roland Ismer (n 460) (689).

559 Joachim Englisch (n 261) paras 68–69; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 37–38; Alan Tait (n 74) pp 110–111; Ben Terra and Julie Kajus (n 126) p 285; similar: Ian Crawford, Michael Keen and Stephan Smith (n 75) p 309: the single reason for exempting small enterprises is to lessen collection costs; concerning the dependencies between exclusions of small enterprises and collection costs see also: Robert van Brederode (n 258) pp 123–126 with further references.

560 The Second EU VAT Directive allowed the Member States to choose whether to apply VAT at the retail stage: Ben Terra and Julie Kajus (n 126) pp 285 and 290; the option to exclude the retail stage was withdrawn with the Sixth EU VAT Directive, see: Paul Farmer and Richard Lyal (n 273) p 87; it was feared that in particular small retailers could not keep adequate books and therefore could not guarantee an efficient VAT collection process: Ben Terra and Peter Wattel (n 272) p 110 with further references; please note: sales taxes which exclude the retail stage are not recommended and should only constitute an interim solution: Alan Tait (n 74) pp 6–8; see also: Alan Tait (n 256) p 5.

561 Ben Terra and Julie Kajus (n 126) p 285.
have the possibility to apply special rules for small businesses.\textsuperscript{562} As a consequence, transactions which are rendered by small traders may be out of scope of the directive. It is argued that small traders only make a small contribution to the economy. Consequently, their exclusion should have only minor impact on the taxed value added.\textsuperscript{563} This, however, does not alter the fact that a B2C transaction carried out by a small trader is exempt and that private expenses are not fully taxed.\textsuperscript{564} Furthermore, the new possibilities of the digital age enable more private consumers to act as micro entrepreneurs (e.g., “prosumers”).\textsuperscript{565} With the exclusion of the corresponding transactions from the scope of the EU VAT Directive, the proportion of untaxed private consumption increases.

In general, the EU VAT Directive does not consider C2C and C2B transactions.\textsuperscript{566} As explained above, private people do not fulfil the definition of a taxable person according to Article 9 of the directive. They do not sell regularly. When they act as sellers, sales items are, for example, homemade products or used goods. Such sales contribute little to the whole economy’s value added.\textsuperscript{567} However, there is no comprehensive taxation on individuals’ consumption expenditures, since the tax can be avoided by buying from private people.\textsuperscript{568} Concluding, the seller’s status is decisive for taxation of transactions or their non-taxation. Currently, digitalization is the reason for the increase of sales numbers of second-hand or home-made products. It further enables an economic revival of traditional flea markets as it simplifies the convergence of supply and demand. “Offline” flea markets are replaced by online offers like “eBay” or mobile applications as, for

\begin{footnotesize}
\begin{enumerate}
\item[563] Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 38.
\item[564] The same applies to B2C tax exemptions for other companies, which cannot deduct their input tax.
\item[565] See pp 195 et seqq.
\item[566] See the suggestion of a common consumption tax by Beiser who likes to tax C2C transaction when the seller can sell a good with profit: Reinhold Beiser (n 427) (271); Robert van Brederode (n 258) p 169.
\item[567] This seems to be similar to small and medium-sized businesses: Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 37–38.
\item[568] Not all expenditures for private consumption are taxed: Wolfram Reiß (n 235) para 45 at footnote 18.
\end{enumerate}
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example, “shpock”.569 Due to the increased sales figures, the total value which is not covered by VAT, increases. This could be a regrettable development. However, as long as private individuals do not act as taxable persons, these transactions are not covered by the EU VAT system and its underlying concept of consumption.

A further trend concerns the extension of the interpretation of the definition of taxable persons. This development can be recognized in the offline and online world and is based on an increased market interaction of private people. Indirect collection of the tax entails a smaller number of tax collectors than direct collection from private consumers.570 However, the CJEU certified, inter alia, private operators of photovoltaics as taxable persons,571 thereby extending the number of taxable persons. The German Federal Fiscal Court rendered decisions in line with this trend, too. For example, the successive sale of collected oldtimers572 was seen as an economic activity. The sale of private goods via an online auction platform also resulted in the fulfilling of the criteria of a taxable person. The seller had to

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570 In this way the administration and collection process can be made more cost-efficient: Peter Schmidt (n 149) pp 27–28 and 137–138 with further references.


572 BFH of 27.01.2011 – V R 21/09, BStBl II 2011, 524.
levy tax on the transactions.\textsuperscript{573} As long as the thresholds for small and medium-sized companies are exceeded or the option for taxation is exercised, the categorization of more and more private individuals as taxable persons makes an additional source of VAT revenue available to EU Member States. The trend of taxing privately motivated sales or use of private assets is disputable from a socio-political perspective.\textsuperscript{574} However, by acting as a taxable person, the individuals contribute to the resources of an economy and their supplies cause EU VAT consumption which must be taxed.

Final consumption is taxed when the goods and services leave the business sphere for the first time and enter the private sector (B2C transaction). Re-sales of (durable) goods between two consumers (C2C transactions) cause per se no VAT issues.\textsuperscript{575} Some goods which had been once sold for private consumption are not fully consumed and may be consumed by another private person.\textsuperscript{576} In such cases, the product remains in the consumers’ sphere. It is not taxed once again as it is handed on to a person who does not operate a taxable business. A C2C transaction shifts the pos-


\textsuperscript{574} Patric Schwarz (n 20) (784).


\textsuperscript{576} Ian Roxan (n 144) (610); Ben Terra (n 149) pp 10–11; Ben Terra and Julie Kajus (n 126) p 251; the resale by taxable persons cause no special problems as such transactions are categorized as B2B or B2C sales.
sibility of consumption from one consumer to another. The second one also spends his income or wealth for getting the opportunity to consume a product. But he is not taxed. Nonetheless, non-taxable C2C transactions are in line with the principle of single taxation. If C2C transactions were taxed, this would lead to double taxation as the first consumer (the recipient of the B2C transaction) has no right to deduct his input tax.

Consumption possibilities which lack a transactional exchange, are not taxed either. Thus, in addition to C2B and C2C transactions, household production (e.g., cooking or renovation) are not subject to VAT, although they give the consumers satisfaction. The precondition of a market interchange is similar to the microeconomic exchange of supply and demand at marketplaces. The GDP, however, includes some consumption possibilities which are obtained without a market transaction as the macroeconomic figures include calculated values (e.g., for fictitious rents for own houses). Just as the current trend towards the private sale of second-hand goods is fashionable, so are home-made production. Hence, the non-taxable share of private consumption is rising. However, this does not alter the fact that home-made production are not based on a transactional exchange that could be taxed.

A decisive criterion of taxable transactions is the market participation of businesses. Therefore, a C2B transaction is not covered by the EU VAT Directive but marks the re-entry into the business sphere. As this kind of transactions is rendered by private consumers, C2B transactions are not taxable. However, the concerned product re-enters the business sphere and may become the object of a further VAT burden, once the buyer (a taxable person) re-sells the good in a B2B or B2C transaction. The taxable person is not allowed to deduct any input VAT. If the company re-sells the item to another private consumer, VAT will be charged. Thus, the product is taxed twice. In contrast to a C2C transaction, both consumers are taxed according to their use of income or wealth. The key point for the different treatment of these two kinds of transactions is the involvement of an intermediate taxable person interacting on the market. This approach also im-

577 Peter Schmidt (n 149) pp 18–19 with further references.
578 See pp 57 et seqq.
579 See pp 51 et seqq.
580 By contrast, it is argued that as the level of development increases, the share of this kind of consumption decreases and no longer adds value: Peter Schmidt (n 149) p 139.
581 Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 179; Holger Stadie (n 254) para 175.
plies the possibility of consecutive taxation (due to consumption at several points of time).  

By taxing a product after re-entering the business sphere, there is a tension among single taxation of a product and the intention to tax private expenditures for consumption. This has led to the introduction of measures which seek to mitigate the possible cascading effects. The corresponding measures worldwide are not uniform. The EU VAT laws incorporate special arrangements for second-hand goods, works of art, collectors' items and antiques which are contained in Articles 311 to 343 of the EU VAT Directive and Annex IX. In a nutshell, only the margins between a second-hand dealer's output and his respective input transactions are taxed. This is a special way to calculate a business tax liability which considers the lack of input tax deduction. An exact calculation of the input tax is not possible as different tax rates may be applied. Double imposition of VAT is therefore mitigated but not completely avoided. Additionally, differences concerning the values of the initial B2C transaction, the C2B transaction and the subsequent B2C transaction cannot be accurately indicated. Another limitation of the scheme is that not all taxable persons are categorized as "dealers" and that only certain goods are included in the limited scope of the special scheme. The majority of business purchases of used goods cannot profit from the provisions and have to accept cascading effects of VAT.

Despite the special scheme for second-hand goods, a special rule for intra-Community acquisitions of new means for transportation makes a fur-

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582 Robert van Brederode (n 258) p 165–166; Widmann does not identify any problems concerning the double taxation as every customer involved gives up some of his financial resources: Werner Widmann (n 286) (13–14).
583 Some countries do not apply a margin scheme due to tax fraud possibilities: Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 180–182; Peter Schmidt (n 149) pp 273–281; Ben Terra and Julie Kajus (n 126) pp 251 and 799; critical of excessive taxation: Robert van Brederode (n 258) pp 165–166.
584 Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 180–181; Ben Terra and Peter Wattel (n 272) p 254; concerning an overview with further references to pertinent ECJ case law: Ben Terra and Julie Kajus (n 126) pp 251, 799–802 and 1508–1522; for a short historical overview of EU taxation of used goods see: Alan Tait (n 74) pp 102–103 with further references; in the same vein: Robert van Brederode (n 258) pp 172–173.
585 The deduction of the input supply instead of the input tax is a special case of input tax deduction: Holger Stadie (n 254) para 258.
586 Wolfram Reiß criticizes the margin scheme within the context of cross-border transactions: Wolfram Reiß (n 235) paras 50–51.
ther exception to the general rules. In addition to the common rules for intra-Community trade, Article 2 paragraph 1 lit b) ii) of the EU VAT Directive broadens the scope of the directive. This rule includes intra-Community acquisitions for new means of transport irrespective the tax status of the seller.\footnote{Concerning the conditions of the definition of new means of transport see e.g.: CJEU of 18.11.2010 – C-84/09, X, ECLI:EU:C:2010:693; furthermore, the rule is a direct element within the indirect tax collection process as “any other non-taxable person” is made liable to pay VAT.} In this context, C2C constellations – which are normally out of scope – are captured, too.\footnote{Michael Langer, in Wolfram Reiß, Jörg Kraeusel and Michael Langer, UStG (loose leaf 153rd August 2019) Artikel 1–4 MwStSystRL para 39.} The rule may also create confusion with regard to the distinction between new and used goods. Article 2 paragraph 2 lit b) i) of the EU VAT Directive defines a new means of transport as a “motorised land vehicle, where the supply takes place within six months of the date of first entry into service or where the vehicle has travelled for no more than 6 000 kilometres”. This definition is not perfectly elaborated. For example, a ten-year-old car which was driven only 5 000 kilometres is included so that a further intra-Community sale would be subject to VAT.\footnote{Ben Terra and Julie Kajus (n 126) pp 502–507.} Input tax relief for the initial purchase of a ten-year-old car, which according to Article 172 of the EU VAT Directive is only permitted at the time of an intra-Community resale,\footnote{Ferdinand Huschens, in Wolfram Reiß, Jörg Kraeusel and Michael Langer, USIG (loose leaf 153rd August 2019) MwStSystRL Art. 167–177 paras 165–169.} might be difficult to obtain after several years of own use. Though the rule may help to tax consumption within the country of consumption, it contains contradictions as it breaks the logic of the EU VAT concept of consumption (especially with regard to the principle that only business transactions at markets are included).

2. Further ECJ Requirements for Transactions

Transactions are the proxy for private consumption. Neither Article 2 paragraph 1 of the EU VAT Directive nor other provisions define transactions, the exchange of goods or services for consideration. However, according to pertinent ECJ case law, a supply of goods or services must be directly linked to the consideration (a.). Furthermore, the transactions must be based on a legal relationship (b.). These two prerequisites are briefly examined below.
a. Direct Link Requirement

A taxable transaction requires a direct link between the supply and its consideration.591 Whether a supply is linked to the expenditure depends on the question whether consideration is spent because of the supply; the label of the consideration is irrelevant.592 Moreover, a link exists only if the consideration reflects the actual value of the supply.593 Additionally, in Hong Kong Trade the ECJ expressed that an agreement for a consideration is required in advance.594

A direct link requires reciprocity between a supply and its consideration. An indirect link is not sufficient. For example, in Coöperatieve Aardappelenbewaarplaats, the ECJ had to decide on a potato warehouse. Businesses stored potatoes and paid for the service. Additionally, they owned shares of


592 Holger Stadie (n 254) para 163 with further references.

593 Ben Terra and Julie Kajus (n 126) pp 321–322; e.g.: ECJ of 03.03.1994 – C-16/93, Tolsma, ECLI:EU:C:1994:80 para 14; of 05.06.1997 – C-2/95, SDC, ECLI:EU:C:1997:278 para 45; of 26.06.2003 – C-305/01, MGK-Kraftfahrzeuge-Factoring, ECLI:EU:C:2003:377 para 47; CJEU of 27.10.2011 – C-93/10, GFKL Financial Services, ECLI:EU:C:2011:700 para 18.

594 ECJ of 01.04.1982 – C-89/81, Hong Kong Trade, ECLI:EU:C:1982:121 para 10; see for a short discussion of the case: Ben Terra and Julie Kajus (n 126) pp 316–317; in this context see as well: ECJ of 03.03.1994 – C-16/93, Tolsma, ECLI:EU:C:1994:80 para 12.
the warehouse. In one year, the warehouse did not charge any storage fees. In the same year, however, the values of the shares decreased. The court concluded that the loss of value of the shares was not a consideration for the storage services, as the reciprocity was missing: The exact loss of the value of shares was not predictable. Thus, the supplies were not taxed due to the lack of a directly linked consideration. The court also denied a direct link in Apple and Pear Development Council. The Council, a body which had been governed by public law, charged fees for publicity and research services. The ECJ determined that the paid fixed fees were no consideration for the services as (1) the individuals only benefited indirectly from the services and (2) the businesses’ sales figures differed from each other. The received benefits and the paid money were unconnected. Some paying members might even received no advantages at all. Furthermore, non-members could also benefit from the measures. Because of an absent direct link, no taxable supplies had been identified.

Regarding the anticipation of consumption due to the tie to transactions, the case Kennemer Golf must be distinguished from Apple and Pear Development Council. In the judgment Kennemer Golf, the membership fee for the club was considered as a payment for the possibility to use services. The services were neither defined in advance nor personalized in any way. By emphasizing the possibility for consumption respectively the possibility to use the facilities of the club, reciprocal performances were exchanged. The situation was classified as a taxable transaction. This is not inconsistent with the CJEU case Český rozhlas: In the Czech Republic, people must pay mandatory fees for the possession of a television or a radio receiver. The fees are used to fund Czech radio. The CJEU ruled that the direct link

595 ECJ of 05.02.1981 – C-154/80, Coöperatieve Aardappelenbewaarplaats, ECLI:EU: C:1981:38; Simons considers this case from a consumption perspective and confirms the decision as there was no act of consumption by the shareholders: Alfons Simons (n 345) (90); Ben Terra and Julie Kajus (n 126) p 321.

596 ECJ of 08.03.1988 – C-102/86, Apple and Pear Development Council, ECLI:EU:C:1988:120; Ben Terra and Julie Kajus (n 126) p 322; the problem routed in misinterpreting the term „for consideration“: David Williams (n 1) p 169 at footnote 26.


598 Affirmative: Alfons Simons (n 345) (90).

599 ECJ of 21.03.2002 – C-174/00, Kennemer Golf, ECLI:EU:C:2002:200; see also e.g.: ECJ of 03.09.2009 – C-37/08, RCI Europe, ECLI:EU:C:2009:507 para 33; CJEU of 27.03.2014 – C-151/13, Le Rayon d’Or, ECLI:EU:C:2014:185 para 36; of 29.10.2015 – C-174/14, Saudaçor, ECLI:EU:C:2015:733 para 36; Ben Terra and Julie Kajus (n 126) pp 324–325.
requirement is not fulfilled as people do not pay for the possibility to enjoy broadcasting and radio services. Such services are free of charge. The payment is just affected to the possession of the receivers.\textsuperscript{600}

b. Legal Relationship

The requirement of a direct link between reciprocal performances is further accompanied by the need for a legal relationship between the involved parties.\textsuperscript{601} However, it is irrelevant whether the relationship is founded on the basis of a valid civil law contract.\textsuperscript{602} The condition of a legal relationship between the involved parties can be best illustrated by the ECJ decision \textit{Tolsma}. An organ grinder received voluntary donations from pedestrians. The court did not classify the situation as a taxable transaction. It argued that the payments had not been directly linked to the service as

\textsuperscript{600} CJEU of 22.06.2016 – C-11/15, \textit{Český rozhlas}, ECLI:EU:C:2016:470; Ben Terra and Julie Kajus (n 126) pp 326–327.


\textsuperscript{602} The conclusion of a legal contract according to national civil law is not mandatory but of indicative nature: CJEU of 20.06.2013 – C-653/11, \textit{Newey}, ECLI:EU:C:2013:409; civil law interpretations are not binding for EU VAT law: Holger Stadie (n 254) para 158; similar and with further reference to the irrelevance of commercial and consumer law: David Williams (n 1) p 184; furthermore, the legal relationship does not depend on its enforceability as the Member States apply different rules and as such, harmonization would be undermined: ECJ of 17.09.2002 – C-498/99, \textit{Town and County Factors}, ECLI:EU:C:2002:494 para 21; see also: Jasmin Kollmann (n 121) pp 89–91 with further references (a substance over form approach by considering a legal relationship is necessary: p 87).
the street musician voluntarily played music and people freely spent money. Consequently, the payments did not stand in any relationship to the benefits (= services) which the people may have obtained. The court emphasized that there was no agreement between the parties. Under such circumstances, the amount of the donation is solely determined by the pedestrians who had not requested for music (as they would have done if they had bought concert tickets). In a nutshell, the direct link requirement was denied because of a lack of reciprocal performances and a legal relationship between the parties.

The requirement of a legal relationship has been criticized under the lens of the consumption tax character of VAT. Alfons Simons contends that Tolsma should have been decided otherwise. He favours the consideration of the real circumstances and the application of an economic concept of consumption. In his opinion, the act of listening music – whether it is requested or not – is certainly an act of consumption. Ben Terra and Julie Kajus also argue that the requirement of a legal relationship leads to a disregard of private consumption in some situations. They refer to the New Zealand definition of consideration which takes all kinds of payments into account, “whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods and services”.

Following this point of view, both voluntary payments to organ grinders and tips to waiters or taxi-drivers (which are currently defined as gifts and are thus not taxed) would be subject to EU VAT. In each case, private consumers spend income or wealth. This, in turn, would entail an extended scope of the EU tax. However, the current requirement of a legal relationship limits taxa-

603 ECJ of 03.03.1994 – C-16/93, Tolsma, ECLI:EU:C:1994:80; concerning a discussion of Tolsma see: Ben Terra and Julie Kajus (n 126) pp 345–346; see also: Deborah Butler (n 445) (93).
604 ECJ of 03.03.1994 – C-16/93, Tolsma, ECLI:EU:C:1994:80 para 17.
605 Alfons Simons (n 345) (90); see also: Alfons Simons, Neutrality in VAT and the Organ-Grinder, (3)(2) EC Tax Review (1994) 44–45.
606 Ben Terra and Julie Kajus (n 126) p 347; concerning the value of a supply under the New Zealand GST Act see: Goods and Services Tax Act 1985 Public Act 1985 No 141, Section 10; just as critical: Holger Stadie (n 254) para 164 and Holger Stadie (n 347) (915).
607 Ben Terra and Julie Kajus (n 126) p 347: additional payments and payments as gifts would then be treated as considerations; according to the current rules, tips would be not taxed because of a missing direct link between the supply and the voluntary payments: Lars Dobratz (n 356) p 216; Joachim Englisch (n 261) para 245; Ulrich Grünwald (n 514) p 685; when a tip is directly paid to the tax-
III. Additional Adjustments to the Concept of EU VAT as a General Consumption Tax

The structure of the EU VAT Directive and the so far discussed ECJ case law provides a quite technical, but seemingly clear picture of the concept of value-added taxation within the European Union. The wording of the directives serves as a reference point for the scope of EU VAT and it must be interpreted in line with the concept of VAT as a general consumption tax – which marks the borderlines of the tax. In addition to the previous debate, the further discussion points out additional limits for the scope of the EU VAT Directive. This enables a closer look on the concept of consumption. The limits turn out to be important for the further discussion concerning the challenges of digitalization.

The EU VAT law does not include all kinds of private consumption. Within the framework of a general consumption tax, comparable goods and services should be taxed equally without distorting competition. To avoid distortions and unequal treatments, exceptions concerning the tax base should be limited to a minimum. However, the application of transactions as a proxy for private consumption sets a first limit for the general concept of EU VAT as a tax on consumption. Furthermore, the EU VAT system (which is often used as a role model for other sales taxes worldwide), explicitly excludes some transactions which are – under
normal circumstances – taxable supplies, from the scope of the directive. Articles 19 and 29 of the EU VAT Directive concerning the transfer of a going concern are only one set of rules which impede taxation.\textsuperscript{616} In an international context, no country has implemented a sales tax with an overall tax base, even if the New Zealand consumption tax, for example, applies a broader tax base than the European tax. In New Zealand, consumers have only a choice between unbought (and therefore untaxed) goods and services (like leisure or household production) and equally taxed substi-

\textsuperscript{615} Wolfram Reiß (n 235) para 31; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 49–50; David Williams (n 1) p 167; see for a short critical analysis of this model character: Michael van de Leur, A Gentle Reminder to Countries Wishing to Introduce VAT, (25)(3) International VAT Monitor (2014) 128 (128); see: Eivind Bryne (n 388) who points out that the Norwegian VAT system (described as a turnover not a consumption tax) is based on EU directives and adopts also some ECJ judgments; the currently introduced VAT system in the gulf region is also similar to the EU VAT system: Raymond Feen and Ronny Langer, Einführung der Mehrwertsteuer auf der Arabischen Halbinsel, (6)(24) Mehrwertsteuerrecht (2017) 983 (987); the EU tax was the starting point of worldwide expansion: Sijbren Cnossen, A Primer on VAT as Perceived by Lawyers, Economists and Accountants, in Value Added Tax and Direct Taxation: Similarities and Differences (Michael Lang, Peter Melz and Eleonor Kristoffersson eds, 2009) p 135 (see also for some general remarks on a tax on consumption, chapter: pp 125–150); many GST systems are an improved update of the EU model: Ian Dickson and David White, Commentary to Value Added Tax and Excises (chapter 4), in Dimensions of Tax Design: The Mirrlees Review (Stuart Adam et al eds, 2010) pp 387–388.

tutes. The Japanese Consumption Tax also grants only few exceptions.

In addition to the restrictions imposed on transactions, ECJ case law further limits and defines more clearly the concept of EU VAT as a tax on private consumption. More precisely, ECJ case law on illegal transactions restricts consumption to legal products and to products competing with legal products (1.). In addition, the feature of anticipated taxation will be discussed. It will be outlined that taxation is already taking place as soon as the opportunity for consumption is given. Though this feature is usually discussed in connection with supplies of goods, the focus will be on the provision of services here and unused consumption possibilities are distinguished from non-taxable compensation payments (2.). Finally, deemed supplies of goods are further regarded. Case law enlarges the concept of consumption insofar as gratuitous supplies of goods are mostly taxed. (3.).

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617 Marie Pallot, *Recent GST developments in New Zealand*, (6)(1) *World Journal of VAT/GST Law* (2017) 21 (22); Alan Tait (n 74) p 220; within the OECD, sales tax systems like the EU VAT law (which are categorized by a narrow tax base) and sales tax systems like Australia, Canada, Korea, New Zealand, Singapore and South Africa (which apply a much broader tax system) are distinguished: Jeffrey Owens, Piet Battiau and Alain Charlet (n 353); concerning the New Zealand GST as a role model see: Aleksandra Bal (n 247) (16); the EU VAT is the birthplace of modern sales taxes but the New Zealand model should be used as a role model: Robert van Brederode (n 245) p 49.


619 Oskar Henkow (n 424) p 66.
1. Illegal Transactions

EU VAT law hardly makes any distinctions between immoral or even illegal transactions and legal ones. The decisive criterion for taxation is that a supply takes place. For example, thieves who sell their stolen goods would be consulted to charge VAT if they were considered as taxable persons whereas the burglary would not be taxed. This is the case because the conditions of Article 14 of the EU VAT Directive for a supply of goods are fulfilled by the thieves. This also accounts when the buyer has to return the goods. In other words, the seller must not be the owner of the goods; in such a case, bona fide on the part of the customer is sufficient for taxation purposes. In the same context, the CJEU ruled in Dixons Retail that the fraudulent use of credit cards does not disturb the concept of a supply. The consideration was paid by the credit card company and, therefore, no objective criteria which would deny a supply existed. Therefore, the concept of supplies of goods and services constitutes a wider notion than a typical sale.

In particular, in situations in which illegal trade stands in competition with legal economic activity, the illegality or criminal nature of supplies does not exclude tax liability. For example, in Goodwin and Unstead output VAT was levied on the sale of piracy products such as perfume. The fact that the seller did not have any licence and that the goods could therefore not be marketed legally, did not hinder taxation as the goods competed

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620 Concerning an overview of illegal transactions see: Holger Stadie (n 254) para 172 with further references; Ben Terra and Julie Kajus (n 126) pp 299–305; see also: Jasmin Kollmann (n 121) pp 59–61.


622 Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 93 with further references.

623 Ben Terra and Julie Kajus (n 126) p 455 with further discussions.

624 Ben Terra and Julie Kajus (n 126) pp 454–455 with a discussion of CJEU of 21.11.2013 – C-494/12, Dixons Retail, ECLI:EU:C:2013:758.

625 A broad concept is applied: Paul Farmer and Richard Lyal (n 273) p 90; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 93.
with legally traded perfume. Similar, the special rules for a transfer of a going concern must be examined, even if the buyer has no authorisation to continue the business. Neither a tax exemption for a supply may be refused solely on the grounds of illegality. In this context, VAT law is neutral and does not make value judgments.

Illegal sales of goods (and services) which have no legal counterpart are outside the scope of the directive. A broad overall application of the EU VAT law to all kinds of legal and illegal transactions is confined by ECJ case law. Concerning supplies of illegal drugs and counterfeit money the ECJ prohibited the application of the VAT directives and therefore categorized the transactions as res extra commercium. The court justified this distortion of the principle of neutrality with the fact that trade with such kinds of goods is prohibited in all EU Member States. Consequently, illegal transactions are just taxed when both legal and illegal trade compete.


628 E.g., exports are still exempt even they are rendered without a necessary licence: ECJ of 02.08.1993 – C-111/92, Lange, ECLI:EU:C:1993:345 para 16; tax exemptions are not restricted to lawful games of chance: ECJ of 11.06.1998 – C-283/95, Fischer, ECLI:EU:C:1998:276; Christian Lohse (n 627) (583); concerning the principle of neutral treatment see e.g.: ECJ of 05.07.1988 – C-269/86, Mol, ECLI:EU:C:1988:359 para 18; of 05.07.1988 – C-289/86, Happy Family, ECLI:EU:C:1988:360 para 20.

629 The importation and the sale of drugs fall both outside the scope of EU VAT laws (even they are not systematically punished in all Member States): Ben Terra and Peter Wattel (n 272) p 177; Ben Terra and Julie Kajus (n 126) p 299; concerning the importation of drugs: ECJ of 26.10.1982 – C-240/81, Einberger I, ECLI:EU:C:1982:364 (concerning excise duties); of 28.02.1984 – C-294/82, Einberger II, ECLI:EU:C:1984:81 (concerning excise duties and VAT); (domestic) sales of drugs: CJEU of 05.07.1988 – C-269/86, Mol, ECLI:EU:C:1988:359 and of 05.07.1988 – C-289/86, Happy Family, ECLI:EU:C:1988:360.

630 Imports of counterfeit currency are not subject to VAT: ECJ of 06.12.1990 – C-343/89, Witzemann, ECLI:EU:C:1990:445.

631 Joachim Englisch (n 261) para 94; Ben Terra and Julie Kajus (n 126) p 304; critical: Holger Stadie (n 254) para 173 who argues for overall taxation of illegal supplies as a possibility for private consumption is transferred.

632 ECJ of 05.07.1988 – C-269/86, Mol, ECLI:EU:C:1988:359 para 18; with reference to a national prohibition (the transaction can be subject to VAT): CJEU (Order) of 07.07.2010 – C-381/09, Curia, ECLI:EU:C:2010:406 (concerning the case see
Whenever illegal transactions have no legal counterpart, VAT is not levied. The transactions are then “outside the “circuit of economic commerce””. This limitation of EU VAT law just applies to supplies which are themselves illegal. Supplies which are supportive to an illegal non-taxable transaction are taxed. Thus, the rental of tables to a person who sold illegal drugs at this table was classified as a taxable transaction by the ECJ. The same principles must be applied to digital supplies. Yet it is often questionable whether the basic requirements for a taxable supply are met because of an apparent lack of consideration or a direct link within peer-to-peer networks.

Concerning general taxation of consumption, this restriction of value-added taxation is criticized. As EU VAT seeks to capture private expenditures, no distinctions between legal and illegal should be made. In other words, whenever a consumer spends money on goods (or services) for consumption, VAT should be charged. The channels (legal or illegal ones) through which the products reach the consumer should therefore be irrelevant. In the same context, Alfons Simons argues that by applying the consumption tax character correctly, for example, the transactions in the ECJ
cases *Mol* and *Happy Family* (both dealt with illegal trade of amphetamine and illegal narcotics) should have been categorized as taxable supplies.\(^{638}\)

2. Anticipated Consumption

As EU VAT is levied on transactions, the tax does not burden actual consumption but rather the possibility to consume goods or services and thus anticipates consumption.\(^{639}\) Sometimes, consumers purchase goods and services but do not consume them afterwards. EU VAT laws tax such cases of non-consumption. As, however, a transaction can be reversed, it is necessary to distinguish such constellations from taxed non-consumption. Concerning the supply of goods, the rules for returning are clearer.\(^{640}\) Due to their intangibility, the return (respectively non-consumption) of services is a more complex issue which is often discussed in combination with non-taxable compensation payments. The following paragraphs will show that non-consumption (especially concerning services) has to be assessed from an economic perspective.

Concerning non-consumption of goods, two possibilities must be distinguished: Firstly, when goods are purchased but not used afterwards, value-added tax is charged. Secondly, when a customer purchases goods and does not use them, but returns them against full credit, the initial taxable supply may be reversed.\(^{641}\) The customer is then not burdened with VAT as he withdraws his initial decision to consume. The return of goods is a trend which is closely linked to the digital age and changing consumer be-

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\(^{638}\) Alfons Simons (n 345) (90).

\(^{639}\) See the discussion on pp 120 et seqq.

\(^{640}\) Concerning cancellations, refusals, total or partial non-payment and price reductions see Article 90 of the EU VAT Directive. The rule concerns both supplies of goods and services, see e.g.: Ben Terra and Julie Kajus (n 126) pp 824–843 with an indepth discussion of pertinent ECJ case law; for some issues concerning the application see e.g. the discussion in Ad van Doesum and Frank Nellen (n 165) pp 252–274 with further references to pertinent ECJ case law; Frank Nellen and Ad van Doesum, *Taxable Amount & VAT Rates*, in *CJEU: Recent Developments in Value Added Tax* 2018 (Michael Lang et al eds, 2019) pp 207–214; Karoline Spies (n 165) pp 282–289; a discussion of sales on approval *versus* purchases with the right to return see: Stephan Raab and Christoph Jünger, *Kauf auf Probe – eine umsatzsteuerliche Besonderheit?*, (54)(11) *Umsatzsteuer-Rundschau* (2005) 581–588; problematic in terms of the consumption tax character: Klaus Tipke (n 269) p 991.

\(^{641}\) Joachim Englisch (n 261) paras 104–105 and 287.
Online purchases of goods are steadily increasing, and as a result, the number of returns or cancellations of the original transaction is also increasing.\textsuperscript{642}

Distinguishing anticipated consumption and returns of consumption possibilities in terms of supplies of services is more complex than for supplies of goods. In general, the principle of neutrality requires the same possibilities for services as for goods. However, services cannot be returned in the same way as goods as they are intangible and hardly trackable. It has turned out that conflicts concerning the non-consumption of services arise especially with regard to the question whether involved payments are made for taxable supplies of services or whether they are connected to non-taxable compensations. In other words, it must be established whether VAT relevant services are supplied but the buyer does not benefit from the service or whether payments are made as non-taxable compensation for financial losses suffered by suppliers. This distinction can be made on the basis of three ECJ judgments (namely \textit{Air France-KLM},\textsuperscript{643} \textit{MEO}\textsuperscript{644} and \textit{Société thermale d’Eugénie-les-Bains}\textsuperscript{645}), which aim to clarify when taxed non-consumption of services is identical to taxed non-consumption of goods.\textsuperscript{646}


\textsuperscript{646} Similar: Alan Schenk (n 357) (85).}
A situation in which a customer does not exert an acquired right to a service and the supplier retains the full amount of money is a taxable supply of services. The case of Air France-KLM was related to air passenger transport services.\textsuperscript{647} The suppliers sold tickets for flights. The customers had to pay the full gross amount in advance. However, not all customers appeared for their booked flights. In such cases, the company retained the full value of the tickets and did not levy any VAT.\textsuperscript{648} The CJEU ruled that such situations fulfil the requirements of taxable supplies of services.\textsuperscript{649} Regardless of the fact that the customers did not enjoy any benefits (as they did not take the flights),\textsuperscript{650} the option to enjoy air passenger transport services was based on a legal relationship and was directly linked to the renu-
The passengers bought the right to be transported. As long as a company fulfilled its obligations and the customer was responsible for the non-utilization of the services, the non-refunded money was not a non-taxable compensation for any suffered harm. Even if no consumption took place, consumption was anticipated and therefore taxed.

In MEO, customers of a Portuguese company providing telecommunications services withdrew from contracts for the continued provision of services, but still had to pay the full amount of money agreed. MEO calculated the agreed monthly price multiplied by the remaining term period of the contracts for customers who cancelled before the minimum commitment period. The company did not charge VAT on the payments and treated them as non-taxable compensation payments as after termination of the contracts, no goods or services were supplied. The CJEU decided that customers had withdrawn their right to use telecommunications services. Because of the way the payment was calculated, customers had to pay the same amount of money as they would have paid if they had not terminated the contract. The court emphasized the importance of contractual terms and paid also attention to the economic and commercial realities. It once again emphasized the economic perspective on VAT instead of the legal approach.

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The situation was therefore equated with Air France-KLM as the customers do not make a claim on the services. Consequently, the payment was a consideration for a supply of services.

The supplies of services in both cases are comparable to goods purchased but neither consumed nor returned. Such situations lead to value-added taxation on anticipated consumption. Therefore, under the principle of neutrality, a requested and fully paid supply is always taxed, regardless of whether the goods or services are used or not. Thus, the concept of consumption underlying EU VAT laws captures situations in which no consumption takes place. Considering consumption in a literal sense, the scope of VAT laws is therefore too broad. However, due to the use of transactions as a proxy, this is acceptable as actual consumption cannot be monitored by the tax authorities in every single case. Finally, it should be mentioned that from the perspective of VAT collection on the use of income and wealth, the recording of potential (but not actual) consumption is to be welcomed. The two described cases equate taxed non-consumption of services to taxed non-consumption of goods.

Whereas Air France-KLM and MEO both concerned full payments, Société thermale d’Eugénie-les-Bains concerned partial payments of services. The ECJ has specified the treatment of retained (partial) deposits in Société thermale. Société thermale ran thermal baths, hotels and restaurants. Customers had to pay a deposit for reserving rooms in advance. Either the de-

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657 The economic approach is an exceptional case. It is hardly predictable when the court emphasize this approach: Ad van Doesum (n 506) (203–204).
660 For a similar reasoning concerning the Australian GST system see: Rebecca Millar (n 649) (13); similar also: ECJ of 21.03.2002 – C-174/00, Kennemer Golf, ECLI:EU:C:2002:200; such situations are not comparable to a supply of services which constitutes in a right to use which is taxable irrespective the actual use: Jeroen Bijl (2015) (n 649) (136) with reference to Patrick Gallagher and Roderrick Cordara, Supply of Rights and Rights to a Supply, (12)(4) International VAT Monitor (2001) 161–175.
661 Similar: Jeroen Bijl (2016) (n 649) (97).
662 See for a similar case on deposits in Australia: High Court of Australia, Commissioner of Taxation v Reliance Carpet Co Pty Limited, [2008] HCA 22 (22.05.2008); Kathryn James (n 234) pp 300–302: The judgment was the first High Court deci-
posits were subtracted from the final price for accommodation when the customers arrived, or the company retained the forwarded payments in cases the reservations were cancelled. Like in MEO, the customers of Société thermale cancelled their reservation at the hotel whereas customers of Air France-KLM never appeared and also did not withdraw from the concluded contracts. Société thermale did not tax the withheld deposits, since it was assumed that they were not taxable compensation payments for the loss incurred as a result of the cancellations. The national court classified the deposits as direct payments for identifiable supplies of services which comprised of “client reception formalities, opening a booking file for the client and entering into an undertaking to reserve accommodation for him”. The ECJ stated that the deposit was directly linked to the supply of services for accommodation but not to any preparatory services which the hotel had performed before the cancellation. Preparatory services from the supplier were based on the original accommodation contract and not made because...
a deposit had been paid. Instead, the deposit (as a cancellation charge) was characterized as a non-taxable fixed compensation payment, compensating Société thermale for suffered financial harm.

The ECJ judgment Société thermale d’Eugénie-les-Bains laid down the framework for non-taxable compensation payments for terminated contracts. The judgment was issued before Air France-KLM and MEO. So far, it has been established that when preliminary payments are retained, it is necessary to analyze whether the customer receives benefits directly linked to the payment. According to Société thermale any preparatory (back office) services of the supplier with regard to the concluded contract transfer no benefit to the customer as the latter ordered a service which he cancelled afterwards. The reservation services together with the accommodation services formed a package. From an average customer’s perspective, however, only the accommodation services may be important. The reservation service was not recognized as a benefit and the intended consumption of the hotel room was cancelled. According to this argument, the ECJ decision seems to be correct as the customers did not consume at all by “returning” their right to stay overnight. Though the customers had to pay a (fixed) sum, they received no benefits in return; the payment had to be categorized as a non-taxable compensation for the supplier’s financial loss.

668 ECJ of 18.07.2007 – C-277/05, Société thermale d’Eugénie-les-Bains, ECLI:EU:C:2007:440 paras 21–26 with further reference to pertinent ECJ case law; it is important to consider whether the supply is a composite one: Thomas Juhl, Rücktritt und Nichterscheinen im Hotellerie- und Beherbergungsgewerbe, (59)(9) Umsatzsteuer-Rundschau (2010) 321 (323).


670 Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 93–94.

671 Non-taxable compensations are examples of payment of money without getting any goods or services in return. Therefore, no consumption is involved: Opinion of Advocate General Kokott of 07.06.2018 – C-295/17, MEO, ECLI:EU:C:2018:413 paras 29–32.

Compensation payments do not satisfy consumer needs and therefore need to be considered out of scope of the EU VAT Directive.

The judgment in *Société thermale* cannot be fully aligned with *Air France-KLM* and *MEO*. Even if *MEO* also concerned cancelled services, the full price had to be paid and the situation concerned a taxable transaction. The decisive difference is the amount of money. Nevertheless, it seems suspicious that, for example, a 99 per cent deposit does not constitute a taxable transaction whereas a 100 per cent payment does. Advocate General Kokott points out that a “damage equivalent to the profit lost should normally be lower than the agreed net price, as a profit margin equivalent to the agreed (net) consideration is highly unlikely”. This statement can hardly be interpreted to mean that a compensation payment in the sense of *Société thermale* represents at most the net price. The ECJ case law rather leads to an unbalanced limitation in the EU Member States, not least because of different tax rates are applied. Furthermore, it is doubtful whether a company would be compensated by the amount of the net sales price if the loss of profit was cited as a reference point. Additionally, in situations in which a...
composite supply of reservation and accommodation services is split, the payment for a reservation service must be taxed even if the guests never appear. This opens options for tax design and does not comply with the principle of neutrality. A further clarification by the CJEU seems necessary to fully capture taxable non-consumption of services and a possible “return” of services without any VAT consequences as it is possible with supplies of goods.

3. Free Supplies of Goods and Services

The concept of EU VAT embraces supplies of goods and services (which are based on a legal relationship) for a directly linked consideration. When a taxable person gives away goods or services free of charge, these situations do not fall under the law. This seems correct as the private consumer does not spend income or wealth for obtaining the consumption possibilities. Under certain circumstances, the general rules must be adjusted to close loopholes. Such rules are especially incorporated in Articles 16 and 26 of the EU VAT Directive which extend the concept of EU VAT as a consumption tax to free supplies (a.). However, pertinent ECJ case law distinguishes between free supplies of goods and services: based on the wording of Article 16 and 26 of the EU VAT Directive, the scope of taxation of free supplies of goods is far more extensive than this of free supplies of services (b).

a. Free Supplies as Deemed Transactions

As a rule, free supplies of goods and services may not be taxed as the recipient does not spend any income. Nevertheless, rules are needed to ensure taxation in the country of consumption after a free transfer of goods within a company from one EU Member State to another. These special ar-

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677 See for example: Ben Terra and Julie Kajus (n 126) pp 316–317; e.g.: ECJ of 29.04.2004 – C-77/01, EDM, ECLI:EU:C:2004:243 paras 86–88.
678 Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 108–111 with further references; Ben Terra and Julie Kajus (n 126) pp 471–474 or Ben Terra and Peter Wattel (n 272) pp 118–119 and 186; see e.g. Article 17 of the EU VAT Directive which classifies a taxable person’s transfers of business assets from an undertaking in one Member State to a branch in another Member State as taxable supplies.
rangements are no enlargements of the scope of the EU VAT system. On the other hand, some other free give-away goods and services are also included in the scope of the EU VAT Directive: Articles 16 and 26 of the VAT Directive concern the private use of goods and services acquired for business use and the transfer of these to the private sphere.\textsuperscript{679} Thereby, situations which are normally out of scope because of a missing consideration, are integrated in the general definition of the concept of consumption for the EU value-added tax system.\textsuperscript{680} Like imports, such deemed supplies are not based on the generally defined concept of transactions.\textsuperscript{681}

Articles 16 and 26 of the EU VAT Directive tax advantages of persons who are in some way connected with a taxable person who can in turn make deductions for input VAT. The general design of the EU VAT system allows taxable persons to deduct input VAT for goods and services which are destined for business use. However, if the originally planned business use did not take place and the goods or services were used for private purposes, private consumption would not be taxed without any correction. Therefore, Article 16 and 26 of the directive capture the gratuitous usage of goods and services by private people whereas the goods or services initially had been assigned to the sphere of a taxable person. This is mostly connected with the condition of previous input tax deductions.\textsuperscript{682} Free supplies of

\textsuperscript{679} Concerning an overview of changes of business use of capital goods see e.g.: Peter Schmidt (n 149) pp 265–266; similar: Ad van Doesum and Gert-Jan van Norden (n 118) p 709.

\textsuperscript{680} Similar: Thomas Ecker (n 372) p 96 and Holger Stadie (n 254) paras 117 and 134; for a general overview of correction mechanisms (Articles 16–18 and 26 of the EU VAT Directive) see: Ben Terra and Julie Kajus (n 126) pp 467–474, 482–487 and 525–539.

\textsuperscript{681} See e.g.: Joachim Englisch (n 261) para 20; Joachim Englisch (n 317) pp 26–28 with further references; Paul Kirchhof (n 345) (3); Wolfram Reiß (n 373) p 21; Hartmut Söhn (1975a) (n 374) (17); Holger Stadie (n 254) paras 133–135; Klaus Tipke (n 269) p 976; concerning imports see the discussion on pp 121 et seqq; in a more general context: Holger Stadie (n 254) paras 151–152.

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goods and services are deemed to be transactions for consideration and therefore expand the scope of the EU VAT system.

In light of a broad-based consumption tax, the rule in Article 16 subparagraph 1 of the EU VAT Directive must be viewed positively; subparagraph 2 restricts this positive effect. Article 16 subparagraph 1 of the EU VAT Directive rules the transfer of business goods to the private sphere of the entrepreneur or a staff member or for other non-business purposes. Due to the lack of a supply for consideration, the rule ensures taxation of final consumption.\(^{683}\) However, Article 16 subparagraph 2 of the EU VAT Directive provides exceptions for the taxation of deemed transactions. Such concessions are established for samples and gifts of small value.\(^{684}\)

In its decision in the *EMI Group* case, the CJEU outlined the concept of a “sample” as “a specimen of a product which is intended to promote the sales of that product and which allows the characteristics and qualities of that product to be assessed without resulting in final consumption, other than where final consumption is inherent in such promotional transactions”.\(^{685}\) As samples can also be consumed, subparagraph 2 limits the positive intention of the rule and restricts its effects. The limit set by the CJEU (i.e., the rule that EU Member States cannot restrict the definition to specimens which are not offered for sale or such which are the first products in a series and are all handed over to the same person) is therefore not helpful.\(^{686}\)

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\(^{683}\) Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 109–110; Ben Terra and Julie Kajus (n 126) pp 467–470; Ben Terra and Peter Wattel (n 272) p 184.

\(^{684}\) Joachim Englisch (n 261) para 179; Ben Terra and Peter Wattel (n 272) pp 184–185.


Concerning deemed transactions of services, Article 26 of the EU VAT Directive includes the private use of business assets and the rendering of services for purposes outside the business in the scope of taxation. Similar to Article 16 of the EU VAT Directive, Article 26 equates the private use of business assets with other kinds of private consumption. It does therefore not matter whether the entrepreneur or the employee benefits from a service. An initial full or at least partial input VAT deduction is required only for the use of a business asset (Article 26 paragraph 1 lit a) of the EU VAT Directive) but not for the provision of other services (lit b)). In the latter case, accumulation of VAT may take place. Although the Article leads to a more sophisticated taxation of consumption, it does not assure single taxation in each case.

The values of deemed transactions are estimated by taking the purchase price of the goods or the costs for the provision of the goods and services. Free supplies cannot be valued like “normal” transactions as they are not rendered for a consideration. Instead, Article 74 of the EU VAT Directive determines as the taxable basis the purchase price of the goods at the time of the supply and alternatively the cost price where no reference value is on hand. In addition, Article 75 of the EU VAT Directive sets the taxable

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687 According to Article 26 paragraph 2 the “Member States may derogate from paragraph 1, provided that such derogation does not lead to distortion of competition”; Joachim Englisch (n 261) paras 174–178; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 108; Ben Terra and Julie Kajus (n 126) pp 525–529; Ben Terra and Peter Wattel (n 272) pp 186–187.

688 A potential for double taxation is also recognized by: Lars Dobratz (n 356) pp 125–126; Eduard Lechner, Unternehmerischer und unternehmensfremder Bereich, in Umsatzsteuer in nationaler und europäischer Sicht (Lothar Woerner ed, DSTJG vol 13, 1990) pp 52–53 with further references; without discussing potential double taxation in such cases: Joachim Englisch (n 261) para 155.

689 Concerning different aspects of Article 74 of the EU VAT Directive see e.g.: CJEU of 17.05.2011 – C-322/99 and C-323/99, Fischer and Brandenstein, ECLI: EU:C:2001:280 para 80; of 08.05.2013 – C-142/12, Marinov, ECLI:EU:C:2013:292 para 32; of 23.04.2015 – C-16/14, Property Development Company, ECLI:EU:C:2015:265 para 43; Ben Terra and Julie Kajus (n 126) p 468; the taxable amount is determined according to a two step approach – purchase price before costs: Ulrich Grünwald (n 514) p 698.
amount for services deemed to be supplied as the supplier's full cost.\textsuperscript{690} Such amounts are mostly less than the concerned market prices.\textsuperscript{691} The latter must be paid by “usual” consumers. Thus, taxable persons can still benefit from the private use of business assets: On the one hand, the initial input tax deduction leads to cash flow advantages, on the other hand, the output VAT for the private use of business assets is charged step by step.\textsuperscript{692} Deemed transactions therefore extend the scope of the concept of consumption but they cannot mitigate all benefits of gratuitous provisions of goods and services.

b. A Broad Base of Taxable Free Transactions of Goods

The general non-taxation of free supplies is restricted by Articles 16 and 26 of the EU VAT Directive which define deemed supplies and taxes gratuitous supplies of goods and services.\textsuperscript{693} In ECJ \textit{Kuwait Petroleum}\textsuperscript{694} the scope of Article 16 of the EU VAT Directive\textsuperscript{695} was interpreted widely and the scope of taxation of gratuitous consumption was broadened. The CJEU decision in \textit{Marcandi}\textsuperscript{696} has restricted the general taxation of free supplies of goods. However, free goods are far more extensively taxed than free services.

\textsuperscript{690} Ben Terra and Julie Kajus (n 126) pp 771–772; critical of fictitious amounts: Holger Stadic (n 254) paras 294–296 with further references; see also: Opinion of Advocate General Léger of 16.01.1997 – C-258/95, \textit{Julius Fillibeck Söhne}, ECLI: EU:C:1997:19 para 28.

\textsuperscript{691} Joachim Englisch (n 261) paras 253–256 and 259; this is criticized by e.g.: Paul Kirchhof (n 345) (8).


\textsuperscript{693} More generally, the application of Article 16 to promotional schemes is discussed in Nathalie Wittock, \textit{Sales promotion techniques and VAT: a search for neutrality for the sales promoter, also taking into account the other key features and principles of the VAT system} (2019). Wittock analyzes the gross of promotional schemes and their VAT application.


\textsuperscript{695} Formerly Article 5 paragraph 6 of the Sixth EU VAT Directive.

Kuwait Petroleum operated service stations and sold motor fuel. In the years between 1991 and 1996, the company offered a sales promotion scheme. According to that scheme, customers got a “voucher” for every 12 litres of purchased fuel. They were free to accept the voucher whereas the fuel price was independent from the issue. Later, the customers could exchange the vouchers for promotional goods. The company deducted the input VAT which was paid for the promotional goods. Kuwait Petroleum argued that a customer purchased fuel and the promotional goods and paid a combined consideration.697

The ECJ emphasized that a supply of goods is only “for consideration” when a legal relationship, based on reciprocal performances between the parties, exists.698 Thus, it had to be determined whether a reciprocal relationship at the time of purchase of the fuel existed and whether a certain (identifiable or non-identifiable) value could be attributed to the vouchers.699 This was not the case.700 Kuwait Petroleum described the promotional products as gifts.701 Furthermore, the price of the fuel (whether the customers accepted the vouchers or not) did not change.702 The customers provided no services or further benefits to Kuwait Petroleum, except the

700 The sale of the fuel and the transfer of the promotional goods for the vouchers were two separate supplies which is why there must be two separate identifiable considerations: ECJ of 27.04.1999 – C-48/97, Kuwait Petroleum, ECLI:EU:C:1999:203 para 28–29 with reference to Opinion of Advocate General Fennelly of 09.07.1998 – C-48/97, Kuwait Petroleum, ECLI:EU:C:1998:342 para 43 with reference to ECJ of 25.02.1999 – C-329/96, Card Protection Plan, ECLI:EU:C:1999:93.
paid money for the fuel.\textsuperscript{703} On this basis, \textit{Kuwait Petroleum} could not claim that there was charged money for the vouchers or the promotional goods.\textsuperscript{704} Furthermore, the ECJ stated that the issue of promotional goods was not subject to any rebates or price discounts according to Article 11 part A paragraph 3 lit b) of the Sixth EU VAT Directive.\textsuperscript{705} The marketing measure served the purpose of providing customers with goods for free.\textsuperscript{706} A hundred percent rebate or discount thus represented a gratuitous supply of goods under Article 5 paragraph 6 of the Sixth EU VAT Directive.\textsuperscript{707}

This outcome was not changed by the fact that the exchange of promotional goods for vouchers happened for business reasons.\textsuperscript{708} The court argued that Article 5 paragraph 6 of the Sixth EU VAT Directive equate applications of business assets for private purposes with usual purchases of

\begin{itemize}
\item \textsuperscript{703} Opinion of Advocate General \textit{Fennelly} of 09.07.1998 – C-48/97, \textit{Kuwait Petroleum}, ECLI:EU:C:1998:342 para 47: by contrast, the customers in \textit{Empire Stores} provided services in return, see: ECJ of 02.06.1994 – C-33/93, \textit{Empire Stores}, ECLI:EU:C:1994:225 paras 17 and 19.
\item \textsuperscript{707} ECJ of 27.04.1999 – C-48/97, \textit{Kuwait Petroleum}, ECLI:EU:C:1999:203 paras 14–17 and 32; Opinion of Advocate General \textit{Fennelly} of 09.07.1998 – C-48/97, \textit{Kuwait Petroleum}, ECLI:EU:C:1998:342 paras 17 and 48 (no infringement of the principle of neutrality); \textit{Nathalie Wittock} affirms that the promotional goods are an additional supply without consideration. However, she does not recognize a deemed supply. According to the direct and immediate link test (which was first mentioned in ECJ of 06.04.1995 – C-4/94, \textit{BLP Group}, ECLI:EU:C:1995:107 para 19), the costs of the promotional goods would be part of the overall costs of the business: \textit{Nathalie Wittock} (n 686) (133–137).
\item \textsuperscript{708} The input tax charges were deducted: ECJ of 27.04.1999 – C-48/97, \textit{Kuwait Petroleum}, ECLI:EU:C:1999:203 para 19.
\end{itemize}
private consumers. The court and Advocate General Fenelly both pointed out that the wording of the Article made it clear that it covers supplies which are treated like supplies for consideration. Consequently, the disposal of promotional goods free of charge must be subsumed under this rule. Such goods were part of a taxable person’s business and qualified for input VAT deduction. Therefore, the transfer of the goods, even for business purposes, had to be taxed.

By taxing free goods that are provided for business purposes, the ECJ has broadly defined the scope of taxation of free consumption of goods. This is in line with the wording of Article 16 of the EU VAT Directive. As this interpretation taxes actual consumption, this extension is generally to be welcomed. However, it further undermines the proxy transactions and the underlying exchange of goods or services for money. The interpretation of the ECJ cannot be transferred to free supplies of similar services. The wording of Article 26 of the EU VAT Directive does not include the gratuitous provision of services for business purposes.

The recent decision in Marcandi slightly restricts a general taxation of gratuitous goods. Marcandi was a business which sold, for example, mobile


710 This must be seen with regard to the second sentence of the provision, which would otherwise be meaningless: ECJ of 27.04.1999 – C-48/97, Kuwait Petroleum, ECLI:EU:C:1999:203 paras 22–23 with reference to Opinion of Advocate General Fenelly of 09.07.1998 – C-48/97, Kuwait Petroleum, ECLI:EU:C:1998:342 para 26 (with further references to the legislative history of Article 5 paragraph 6 of the Sixth EU VAT Directive).

711 Customers had the possibility to swap the vouchers against services (like concert tickets), too. The provision of such services, however, had not to be answered by the court. These would have been tax free according to Article 6 paragraph 2 lit b) of the Sixth EU VAT Directive (now: Article 26 of the EU VAT Directive); Opinion of Advocate General Fenelly of 09.07.1998 – C-48/97, Kuwait Petroleum, ECLI:EU:C:1998:342 paras 21 and 25; critical of taxation of such goods without taxing such services: Joachim Englisch (n 261) para 158.

712 CJEU of 05.07.2018 – C-544/16, Marcandi, ECLI:EU:C:2018:540; Opinion of Advocate General Tanchev of 07.03.2018 – C-544/16, Marcandi, ECLI:EU:C:2018:164; concerning an analysis of the case see e.g.: Frank Nellen and Ad van Doesum (n 640) pp 197–207; the judgment clarifies the one in Kuwait Petroleum, is quite similar to CJEU of 12.06.2014 – C-461/12, Granton Advertising, ECLI:EU:C:2014:1745 and must be distinguished from CJEU of 16.12.2010 – C-270/09, MacDonald Resorts, ECLI:EU:C:2010:780 in which credits were
telephones and tablets via an online shop or a pay-to-bid website. Customers could buy the goods either for a fixed price or by participating in online auctions.\textsuperscript{713} When a customer wanted to participate in an auction, he needed to buy “credits” first. Such credits could only be used for the online auctions and not for sales at the online shop. Additionally, the credits could not be exchanged for real money, were sometimes awarded for free and expired after different periods of time.\textsuperscript{714} A customer could bid for products by using the credits. When he won the auction, he had to pay the final price of the goods.\textsuperscript{715} In other words, the credits were needed to be allowed to participate in the online auctions. Furthermore, during each auction, customers could buy the products directly. The used credits were subtracted as a discount from the prices of the goods.\textsuperscript{716} Alternatively, customers who had lost the auction received a discount equal to the value of the credits used, which they could deduct from their next purchase.\textsuperscript{717} The tax authorities charged VAT for the issuing of the credits which was identified as a provision of services, namely the allowance to participate in the auctions.\textsuperscript{718} The company stressed that the sale of credits was only an intermediate step. Therefore, only the sales of goods after the online auctions would have to be taxed.\textsuperscript{719}

\begin{enumerate}
\item[713] CJEU of 05.07.2018 – C-544/16, Marcandi, ECLI:EU:C:2018:540 paras 11–12; Opinion of Advocate General Tanchev of 07.03.2018 – C-544/16, Marcandi, ECLI:EU:C:2018:164 para 12.
\item[716] CJEU of 05.07.2018 – C-544/16, Marcandi, ECLI:EU:C:2018:540 para 18; Opinion of Advocate General Tanchev of 07.03.2018 – C-544/16, Marcandi, ECLI:EU:C:2018:164 para 20.
\item[718] CJEU of 05.07.2018 – C-544/16, Marcandi, ECLI:EU:C:2018:540 para 21; Opinion of Advocate General Tanchev of 07.03.2018 – C-544/16, Marcandi, ECLI:EU:C:2018:164 para 23.
\end{enumerate}
Chapter 2: The Concept of EU VAT as a General Consumption Tax

The court ruled that the issuing of credits was a service for consideration which enabled customers to participate in the auctions. Furthermore, the credits which could be subtracted from prices were in all cases discounts even if the discount was 100 per cent. As the credits were already taxed at the time they were issued, this situation was not comparable to that in *Kuwait Petroleum*. Besides the general taxation of free supplies of goods, a supply chain respectively an economic perspective has to be taken. As the decision in *Marcandi* shows, no deemed supplies according to Article 16 of the EU VAT Directive need to be taxed if the credits – as the basis of the free supply – have been taxed in advance.

IV. Summary: The Concept of EU VAT as a General Consumption Tax

The concept of EU VAT is that of a general tax on consumption. It is not defined in the EU VAT Directive which just contains a technical description in Article 1 paragraph 2 of the directive. The tax is rather defined as an indirect, all-stage and non-cumulative general consumption tax. The tax is a broad-based consumption tax, which ideally means that the consumer cannot escape taxation by consuming untaxed alternatives. To achieve this goal, the EU VAT system is based on a top-down approach: consumption of goods and services is taxed. Consumption that is not linked to goods is automatically related to consumption of services.

While the EU VAT Directive does not contain a definition of consumption, the ECJ has returned to the concept of consumption in its case law. According to the pertinent judgments, consumption under EU VAT law is the passing on of a benefit to an identifiable customer. This criterion was firstly mentioned in the ECJ cases *Mohr* and *Landboden-Agrardienste*. Both cases concerned the potential consumption of services by a public authority. The court denied the existence of consumption within the meaning of

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722 Heidi Friedrich-Vache (n 106) p 332.
723 See pp 96 et seqq.
724 See pp 107 et seqq.
EU VAT law and argued that the public authorities had acted in the common interest and not for their own (individual) economic interests. It is questionable whether the transfer of an advantage to an identifiable individual is also applicable to "normal" B2B or B2C situations without the interaction of a public authority. However, as a rule, the buyer of services can probably be identified and he can also advantagely use them. No CJEU judgment has yet been issued on goods without the assignment of an advantage to an identifiable person. A British court negated the application of the rationales in Mohr and Landboden-Agrardienste to goods. The situation confronting the British court concerned the destruction of weapons for payment by a public authority. Due to the different definitions of goods and services ("the transfer of the right to dispose of tangible property as owner" versus the residual definition of services) the British court ruled that the weapons had to be taxed. In general, the application of a coherent approach to consumption is preferable. This would imply that the principle of the transfer of a benefit to an individual should be applied to goods and services. An intended destruction of goods by a public authority would then not be taxed, as no consumable benefit would be transferred to an identifiable individual. However, since the destruction of goods is covered by the wording of the EU VAT Directive, taxation must take place.

Since it is difficult to tax consumption in the literal sense of the word, the EU VAT system is based on transactions that are proxies for consumption. This is in line with taxing consumption and promotes the basic idea of absorbing consumers’ personal financial capability. It is the idea of using money (income or wealth) to buy goods and services for consumption. EU VAT is therefore based on the spending power of consumers which they bring to the markets. Hence, only if a private consumer buys goods or services from a taxable person in a market transaction and hands over money, taxation will take place. Therefore, spent expenditure is an indicator for private consumption. Transactions measure the subjective value that private individuals attach to their consumption options, which is why objective benchmarks are not used. Simultaneously, it must be possible to express the consideration for the transaction in monetary terms. By contrast, transactions without consideration are not taxed as long as the definitions of deemed supplies are not met. Furthermore, import taxation is not

725 See pp 111 et seqq.
726 See pp 116 et seqq.
based on transactions, but complements the concept of EU VAT as a general tax on consumption.\textsuperscript{727}

The link with transactions leads to taxation of private consumption at a point in time. Consumption is tied to too much different human actions of consumables, durables and services. Thus, private consumption under EU VAT law cannot be defined as the real act of consumption. However, the use of proxies to capture consumption leads to inaccuracies. Proxies need to be accepted and complemented with special rules. In particular, the use of transactions reduces EU VAT consumption to a certain point in time. In other words, for tax purposes it is generally irrelevant what happens after a transaction or whether the goods or services are actually consumed. Problems which would result from attempts to measure actual consumption can thus be avoided. The concept of EU VAT as a general tax on consumption has an anticipatory character. Input tax adjustments, however, disturb this concept. In cases where a taxable person no longer uses inputs for business purposes but for private consumption, the rules for adjusting the initial input tax deduction introduce a “duration criterion” into the concept of EU VAT consumption. The adjustments are based on the idea that the items can be used privately even after years of business use.\textsuperscript{728}

The indirect all-stage character of EU VAT combined with the concept of VAT as a general (private) consumption tax requires a differentiation between productive use and final consumption. EU VAT is supposed to be charged only on private consumption, while the direct collection of a tax on private consumption from private individuals is hardly realistic. Businesses (taxable persons) must therefore collect the tax. However, the tax is neutral in terms of production, not least because of the input tax deduction. Taxable persons need to calculate VAT on their B2B and B2C supplies, a final tax burden just lies on B2C transactions. By contrast, a private consumer who makes transactions (C2B or C2C) is not obliged to tax them. However, in order to sustain a broad-based character of the EU VAT concept as a tax on consumption, the concept of taxable person is wide and private individuals are a residual concept.\textsuperscript{729}

In the case of an indirect all-stage consumption tax, taxation of private consumption is ensured by deduction of input tax at the level of taxable persons. According to the all-stage character, not only retailers (the last

\textsuperscript{727} See pp 121 et seqq.
\textsuperscript{728} See pp 121 et seqq.
\textsuperscript{729} See pp 133 et seqq.
stage) but all businesses along the supply chain are required to raise VAT. Thus, all B2B and B2C supplies are captured by the tax. Nevertheless, private consumption is taxed only once, as taxable persons can deduct input tax according to the credit-invoice mechanism (i.e., accumulation of VAT is avoided). From the perspective of a single business, only the tax on the own value added is transferred to the tax authorities. The sum of all individual tax amounts of all companies along the supply chain represents the price of the final B2C transaction and corresponds with the value of private consumption. Hence, VAT is a proportional tax on the amount of expenditure which is spent by final consumers. If a business is not allowed to deduct its input VAT, cascading effects may arise. Such irregularities occur, for example, in connection with public authorities and holding companies.\textsuperscript{730}

The EU VAT Directive does not include a definition of transactions. Therefore, the ECJ has outlined the framework for transactions in its case law. The court ruled that a supply must be directly linked to its consideration. In other words, consideration is paid because of the supply. This intends a certain reciprocity while it also means that an indirect link is not sufficient. Furthermore, a transaction must be based on a legal relationship. Voluntary payments for goods or services are not based on a legal relationship and therefore are not covered by the concept of EU VAT as a general tax on consumption.\textsuperscript{731}

The concept of EU VAT as a general consumption tax is already limited by the use of transactions as a proxy for private consumption. In addition, the ECJ has made further adjustments to an all-encompassing consumption tax on the basis of the EU VAT Directive.\textsuperscript{732}

The illegality of some transactions restricts the coherence of the concept of EU VAT consumption. In general, all supplies which are immoral or illegal are taxed. However, in situations where an illegal supply concerns a product that is prohibited in all EU Member States, the corresponding transactions are categorized as \textit{res extra commercium}. In other words, illegal transactions are only taxed when they compete with legal transactions. This limitation of the EU VAT concept differs from the concept which is employed in macroeconomics. The GDP calculations exclude the whole value which is derived from the underground economy.\textsuperscript{733}

\textsuperscript{730} See pp 133 et seqq.
\textsuperscript{731} See pp 148 et seqq.
\textsuperscript{732} See pp 153 et seqq.
\textsuperscript{733} See pp 156 et seqq.
A further limitation of the concept of EU VAT consumption concerns unused consumption possibilities in comparison with non-taxable compensation payments. This refers to the anticipatory nature of the taxation of consumption (i.e., taxation of consumption takes place before consumption occurs). Goods which are purchased but not used are taxed. In situations when they are returned, taxation is reversed. In cases of unused rights to services, the differentiation between both kinds of situations is not as easy as services cannot be returned in the same way as goods. In the case *Air France-KLM*, the CJEU has stated that in situations when a consumer pays for a service but never enjoys it, VAT must be levied. The taxation of a consumption option is of crucial importance here. Any actual consumption of the advantages granted is irrelevant. The judgment *MEO* confirms this view. It also stresses an economic perspective. However, if a reservation for a service is cancelled and the customer does not get back the full amount he has previously paid, the deposit may be a non-taxable compensation payment as in *Société thermale d’Eugénie-les-Bains*. This might be seen as comparable to goods which are never used but returned to the supplier instead. The final consumer did not enjoy any benefit. Any preparatory services which were already rendered by the supplier are not enough to constitute a taxable supply, as the ordered services are never enjoyed. Consequently, compensation payments do not cause a customer benefit and, therefore, are not covered by the concept of consumption under EU VAT laws. However, the exact distinction is not clear and a 99 per cent deposit which is not taxed (compared to a 100 per cent taxed payment) is hardly logical.\(^{734}\)

Furthermore, the concept of EU VAT as a general consumption tax includes certain kinds of free provision of goods and services. According to a strict interpretation of transactions as a proxy for private consumption, free goods and services are not covered by the EU VAT Directive because no consideration is paid by the recipients of the goods or services. However, the EU VAT Directive includes rules for taxation of certain gratuitous supplies which are predominantly rendered to the private sphere of a taxable person or to other (related) groups of people. The provisions of Articles 16 and 26 of the EU VAT Directive therefore concern fictitious B2C transactions. These broaden the scope of the EU VAT Directive and treat free transfers of goods and services as equivalent to taxable transactions.

\(^{734}\) See pp 159 et seqq.
and neutralize any input tax deductions made in advance. Untaxed final consumption is avoided.\textsuperscript{735}

In comparison to free supplies of services, free supplies of goods are taxed more comprehensively. The ECJ judgment \textit{Kuwait Petroleum} extends the scope of Article 16 of the directive to all kinds of transfers of goods free of charge, irrespective of the relationship between the recipients and the taxable person. The case \textit{Marcandi} limits this wide scope of application. It considers gratuitous supplies from a supply chain perspective and excludes the taxation of free supplies where these goods have already been taxed previously. A double imposition of VAT is not intended. However, the wording of Article 26 of the EU VAT Directive is narrower and does not cover all free supplies to third parties.\textsuperscript{736}

\textsuperscript{735} See pp 167 et seqq.

\textsuperscript{736} See pp 171 et seqq.