Taxing Consumption in the Digital Age

Challenges for European VAT
Steuerwissenschaftliche Schriften

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To my parents
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I have written this academic paper during my time as a research assistant at Friedrich-Alexander University Erlangen-Nuremberg at the Chair of Tax Law and Public Law. Case law and scholarly literature are considered until February 2020.

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Nuremberg, June 2020

Katharina Artinger
Abstract

Digitalization tremendously affects the interaction between businesses and their customers. Especially multi-sided online companies question familiar linear supply chains and involve customers themselves in their value creation. The EU VAT system, which was introduced at a time when customers were buying goods and services for consumption without further active involvement in the supply chain, appears to have difficulties in dealing with digital developments. It is not unambiguously clear whether multi-sided online businesses offer their customers free services or whether the users “pay” with their personal data. In order to solve this uncertainty, it needs to be analyzed whether such “free” online services can be subsumed under the concept of EU VAT as a general tax on consumption. If such “free” online services are covered by the concept, VAT must be levied, otherwise no VAT may be charged.

The concept of EU VAT as a general tax on consumption has not been explained in detail yet. Comparisons between the concepts of consumption which are applied in macroeconomics, microeconomics, marketing, direct taxation and excise duties disclose some similarities with taxation of consumption under EU VAT. What all the concepts have in common is that they are not based on a direct recording of consumption. All disciplines rely on proxies that are designed to measure consumption. The proxies, however, differ from discipline to discipline which is why it is not possible to derive the concept of EU VAT (as a general tax on consumption) from other theoretical models. It is necessary to explain the concept inherent in VAT itself.

The notion of consumption under EU VAT has been sketched by the ECJ as a transfer of benefits to an identifiable individual. This case law can be applied to the consumption of services. However, it is not clear whether this is also applicable to the consumption of goods. Since even the EU VAT system does not tax actual consumption, transactions are used as proxies for consumption. This means that the exchange of goods and services for (monetary) consideration is taxed. Therefore, the ability of the consumer to pay for goods and services can be seen as a basic idea of EU VAT. As EU VAT is designed as an indirect all-stage tax, B2B and B2C transactions are taxed. Transactions carried out by consumers are mostly not covered. Consumption is therefore reduced to the time point when a
transaction takes place. Whether actual consumption occurs after a transac-
tion is irrelevant. Only under certain circumstances, for example, of
changes in the business use of durables, initial input tax deductions need
to be corrected at business level. These corrections indicate a period in
which consumption takes place. Furthermore, supplies of goods and ser-
vice must be directly linked to the consideration paid and the exchange
must be based on a legal relationship. If a transaction lacks at least one of
these criteria, it will not be taxed.

The link to B2B and B2C transactions of goods and services for consider-
ation already limits taxation of all possible kinds of consumption. The ECJ
case law, however, further restricts the scope of taxation for EU VAT pur-
poses. Illegal transactions are taxed, but only such ones which compete
with legal transactions. If a legal sale is not possible, the illegal transactions
will not be taxed either. Furthermore, by linking consumption to transac-
tions, an anticipated consumption concept is pursued, which categorizes
actual consumption as not decisive. When purchasing goods, for example,
it can still be observed whether goods are returned unused and therefore
do not fall under the anticipatory consumption concept. With regard to
services, however, the ECJ was not yet been able to draw a clear distinction
between anticipatory consumption that is to be taxed and non-taxed com-
pensation payments. Finally, certain free transactions of goods and services
are also taxed, which is eroding the underlying idea of exchange. Accord-
ing to ECJ case law and the wording of the relevant rules in the EU VAT
Directive, free transactions of goods are subject to a wider scope of applica-
tion than free transactions of services.

It is possible to subsume the challenges of the digital age under the con-
cept of EU VAT as a general tax on consumption. Different trends (such as
the growing importance of trade in services and the sharing economy) fit
into this pattern. Bitcoins, as a representative of new bidirectional virtual
currency schemes, was recognized by the CJEU as a new means of payment
and thus has also been brought into line with the traditional ideas of EU
VAT. The “free” services of multi-sided online businesses can also be sub-
sumed under the concept of EU VAT consumption. It is argued that such
businesses provide “free” online services to their users, who in turn con-
sent to the exploitation of their personal data. For example, in cases where
a use of "free" online services is only possible when users consent to the
use of their personal data, a direct link is established between the two ser-
vice. The exchange provides a benefit for both and is based on a legal rela-
tionship documented in the terms and conditions. The users are still to be
categorized as private individuals, as with their consent to data exploita-

Abstract

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Generiert durch IP '54.70.40.11', am 17.07.2021, 18:47:22.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.
tion, they usually do not carry out any economic activity and are therefore not taxable persons. Consequently, B2C barter transactions must be taxed. The tax is to be calculated on the basis of suppliers’ costs using internal accounting principles. The tax legislator should issue guidelines to facilitate uniform implementation and review of the calculations. However, on the condition that online companies actually provide free services without any consideration, there is no taxation. The wording of Article 26 of the EU VAT Directive does not cover such situations. An extension of the provision de lege ferenda in order to cover such free online services should not be considered.

In a nutshell, the EU VAT system can meet the challenges of digitalization. There is no need to fundamentally adapt the concept of EU VAT as a general tax on consumption or to introduce a completely new one. However, it is necessary to interpret digital business models and the transactions associated with them from an economic perspective. This approach seems acceptable, as the ECJ itself emphasizes such a view from time to time.
Abstract (German Translation)

Besteuerung des Konsums im digitalen Zeitalter – Herausforderungen für die europäische Umsatzsteuer


Der Begriff des Verbrauchs im Rahmen der EU-Mehrwertsteuer wurde vom EuGH als eine Übertragung von Vorteilen auf eine identifizierbare Person skizziert. Diese Rechtsprechung kann auf den Verbrauch von

entsprechenden Regelungen in der EU-Mehrwertsteuersystemrichtlinie unterliegen kostenlose Lieferungen von Gegenständen einem breiteren Anwendungsbereich als die kostenlose Erbringung von Dienstleistungen. 


Insgesamt lässt sich festhalten, dass das EU-Mehrwertsteuersystem den Herausforderungen der Digitalisierung gerecht werden kann. Es besteht keine Notwendigkeit, das Konzept der EU-Mehrwertsteuer als allgemeine Verbrauchsteuer grundsätzlich auf den Prüfstand zu stellen oder ein völlig neues Konzept einzuführen. Es ist jedoch notwendig, digitale Geschäftsmodelle und die damit verbundenen Transaktionen aus einer
Table of Contents

Acknowledgements 7

Abstract 9

Abstract (German Translation) 13

Figures 21

Abbreviations 23

Introduction 27

I. Multi-Sided Online Business Models and the European VAT System 27

II. The Concept of EU VAT Consumption Suitable for Digitalization: Definitions, Literature Overview and Research Objective 38

III. Overview 48

Chapter 1: Theoretical Concepts of Consumption 50

I. Economics 51

1. Macroeconomics: An Aggregated Notion of Consumption 51

2. Microeconomics: Satisfaction as Consumption 57

II. Marketing: Consumers’ Needs and Wants 64

III. Taxation other than Value Added Taxation 70

1. Taxing Consumption and Direct Taxation 70

2. Excise Taxes: Selective Taxation of Consumption 79

IV. Summary: Important Findings on Theoretical Concepts of Consumption 92

Chapter 2: The Concept of EU VAT as a General Consumption Tax 96

I. EU VAT as a General Consumption Tax 107

1. Consumption of Services: Benefits for Identifiable Individuals 111
2. Equal Treatment of Consumption of Goods 116

II. Transactions: Proxies for Consumption 120
1. Business Transactions Instead of Actual Consumption 120
   a. Transactions as Proxies 121
   b. Transactions by Taxable Persons 133
2. Further ECJ Requirements for Transactions 148
   a. Direct Link Requirement 149
   b. Legal Relationship 151

III. Additional Adjustments to the Concept of EU VAT as a General Consumption Tax 153
1. Illegal Transactions 156
2. Anticipated Consumption 159
3. Free Supplies of Goods and Services 167
   a. Free Supplies as Deemed Transactions 167
   b. A Broad Base of Taxable Free Transactions of Goods 171

IV. Summary: The Concept of EU VAT as a General Consumption Tax 176

Chapter 3: Digital Challenges to the Concept of EU VAT as a General Consumption Tax 182

I. Digital Changes of Supply and Demand Structures and their Market Exchange 182
1. Increased Importance of Digital Services 183
2. Increased Digital Market Interaction of Private Consumers 189
   a. Transactions of the Sharing Economy 190
   b. Private Consumers as Taxable Persons (“Prosumers”) 195
3. Digital Kinds of Consideration 201
   a. Bidirectional Virtual Currencies: Money in an Economic Sense 202
   b. Personal Data: No Money According to the EU VAT Directive 212

II. The Concept of EU VAT as a General Consumption Tax Suitable for Multi-Sided Online Business Models 214
1. Supplies in the Context of Multi-Sided Online Business Models 215
   a. Electronically Supplied Services by Online Businesses 215
   b. Transfers of the Right to Exploit Personal Data by Users 217
      aa. Ancillary Services 218
**Table of Contents**

bb. Independent Services: Exploitation Rights on Personal Data 219

2. Privately Acting Users: A B2C Relationship 224
   a. Private Consumers as Non-Taxable Persons 224
   b. Private Consumers as Non-Employed Persons 232

3. Barter Transactions versus Non-Taxable Exchanges 234

4. Equal Treatment of Goods and Services: No Extension of the Definition of Deemed Transactions of Services 246

5. A Cost Approach for the Taxable Amount of Barter Transactions 248
   a. The Taxable Amount According to Suppliers’ Costs 249
   b. A Cost Approach for Bartering “Free” Online Services 260
      aa. Unsuitable External Accounting Information According to IAS/IFRS 261
      bb. The Taxable Amount for Barter Transactions According to Internal Accounting Information 264

III. Summary: The Concept of EU VAT as a General Consumption Tax Suitable for Digitalization 276

Conclusion 284

References 295
Figures

Figure 1: (Simplified) Multi-Sided Online Business Model 30

Figure 2: GDP Calculations According to the Production and Expenditure Approach 52

Figure 3: Taxable Amount of Barter Transactions 251
Abbreviations

§ (§§) Section(s)
ABC Activity-based costs/costing
AG Advocate General
AMBI Arbejdsmarkedsbidrag (an employment market contribution)
AML Anti-money laundering
app(s) (Mobile) application(s)
ASEAN Association of Southeast Asian Nations
B2B Business-to-Business
B2C Business-to-Consumer
BEPS Base Erosion and Profit Shifting
BFH Bundesfinanzhof (German Federal Fiscal Court)
BGBl Bundesgesetzblatt (Federal Law Gazette)
BMF Bundesministerium der Finanzen (German Federal Ministry of Finance)
BStBl Bundessteuerblatt (Federal Tax Gazette)
BTT Business Transfer Tax
BVerfG Bundesverfassungsgericht (German Federal Constitutional Court)
C Consumer spending
C- Court case number
C2B Consumer-to-Business
C2C Consumer-to-Consumer
CD Compact Disc
CFT Countering the financing of terrorism
CJEU Court of Justice of the European Union
COM Document of the Commission of the EU
DBCFT Destination-Based Cash Flow Tax
DST Digital Service(s) Tax
DStJG Deutsche Steuerjuristische Gesellschaft e.V.
DStR Deutsches Steuerrecht (German tax law journal)
DVD Digital Versatile Disc (Digital Video Disc)
Abbreviations

e-  Electronic

e.g.  Exempli gratia (for example)

e.V.  eingetragener Verein (registered association)

ed (eds)  Edition(s)

ed (eds)  Editor(s)

EC  European Community

ECB  European Central Bank

ECJ  European Court of Justice

ECLI  European Case Law Identifier

EEC  European Economic Community

ERPS  Enterprise Resource Planning System(s)

et al  Et alii/ et aliae/ et alia (and others)

et seq(q)  And the following page(s)

Euratom  European Atomic Energy Community


EU  European Union


G  Government spending

G20  Group of Twenty

GATT  General Agreement on Tariffs and Trade

GCC  Gulf Cooperation Council

GDP (Y)  Gross Domestic Product

GPS  Global Positioning System

GST  Goods and Services Tax

GVBl  Gesetz- und Verordnungsblatt (Law and Ordinance Gazette)

HST  Harmonized Sales Tax (Canada)

http  Hypertext transfer protocol

I  Investment

i.e.  Id est (that is to say)

IAS  International Accounting Standard(s)

IASB  International Accounting Standards Board

ICO  Initial Coin Offering

ibfd  International Bureau of Fiscal Documentation

IFRS  International Financial Reporting Standard(s)

IMF  International Monetary Fund
Abbreviations

IP  Internet Protocol
IRAP  Imposta Regionale Sulle Attività Produttive (a regional production tax)
IT  Information Technology
lit  Litera
JRC  Joint Research Centre
M  Imports
m-  Mobile
MOSS  Mini-One-Stop-Shop
n  (Foot)note
No  Number
Nr  Nummer (Number)
NX  Net exports
LG  Landgericht (District Court)
OECD  Organisation for Economic Co-operation and Development
OECD-MC  OECD- Model Convention
OJ  Official Journal of the European Union
p (pp)  Page(s)
para(s)  Paragraph(s)
pdf  Portable document format
RST  Retail Sales Tax
SWD  Staff Working Document
TFEU  Treaty on the Functioning of the European Union
TV  Television
TVA  La taxe sur la valeur ajoutée (VAT)
UK  United Kingdom
US(A)  United States (of America)
USB  Universal Serial Bus
USD  US-Dollar
UStG  German VAT Act
v  Versus
VAT  Value Added Tax
### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>vol</td>
<td>Volume</td>
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<tr>
<td>VEG</td>
<td>VAT Expert Group</td>
</tr>
<tr>
<td>VwGH</td>
<td>Österreichischer Verwaltungsgerichtshof (Austrian Administrative Court)</td>
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<tr>
<td>WP</td>
<td>Working Paper</td>
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<tr>
<td>WTO</td>
<td>World Trade Organization</td>
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<tr>
<td>www</td>
<td>World wide web</td>
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<td>X</td>
<td>Exports</td>
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<td>Y (GDP)</td>
<td>Gross Domestic Product</td>
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Introduction

I. Multi-Sided Online Business Models and the European VAT System

The megatrend *digitalization* challenges established notions of value-added taxation (VAT)\(^1\) as it changes business structures. In particular, VATs (and other taxes such as income and wealth taxes\(^2\)) are facing a development that fundamentally changes the way in which business is conducted: Conventional business models are incrementally supplemented by digital ones, which become only possible due to the development of the internet.\(^3\) In the past, domestic supplies of goods to a well-known (limited) number of customers have affected commercial markets and trade relationships. Now, businesses operate in changing market structures and can sell their goods and services to a broader and more anonymous global customer base which in turn basically increases sales volumes and tax income.\(^4\) Furthermore, global trade relations and the worldwide spread of VAT systems require companies dealing with different taxing rights on their outputs.\(^5\)

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\(^{1}\) Please note that no uniform vocabulary is used worldwide: David Williams, *Value Added Tax*, in *Tax Law Design and Drafting* (Victor Thuronyi ed, 1996) pp 167–168 with further references.


\(^{4}\) Sayan Basak (n 3) (846); concerning increased trade in services see e.g.: OECD (2015a), *BEPS Action 1 – Final Report* (n 2) para 62; tax income is only generated when the tax collectors are compliant, but digital services are associated with non-compliance and a lack of tax revenues: Martin Kemper, *Das Internet als „Steueroase“ bei digitalen Dienstleistungen?*, (66)(5) *Umsatzsteuer-Rundschau* (2017) 169–174 with further references.

New digital multi-sided online business models\(^6\) in particular pose challenges for the EU VAT system. These business models have some features that may be relevant to taxation: These characteristics include increased mobility and volatility, data dependency and network effects.\(^7\) Moreover, the traditional concept of the market economy which assumes that companies offer nothing for free because they want to make money,\(^8\) seems obsolete at first glance. Multi-sided online business structures underlying e.g. facebook\(^9\) or google\(^10\) provide services that seem to be free. Free services are not subject to VAT.\(^11\) Customers such online and mobile services without paying money,\(^12\) but the companies check out personal data and information from the users. This information is analyzed and used to confront users with targeted advertisements.\(^13\) The traditional supply chain is characterized by a linear production. A consumer acquires final goods and ser-

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7 OECD (2015a), BEPS Action 1 – Final Report (n 2) p 11.


9 See: https://www.facebook.com/ (last accessed: 01.02.2020).

10 See: https://www.google.com/ (last accessed: 01.02.2020).

11 For a discussion of free supplies see pp 167 et seqq.

12 Technical developments may facilitate so-called micro-payments. Then, “free” services may be paid with amounts of fractionate cents. The services would then be rendered for consideration (and may replace the barter transactions): Joachim Englisch, ‘Kostenlose’ Online-Dienstleistungen: tauschähnlicher Umsatz?, (66)(22) Umsatzsteuer-Rundschau (2017) 875 (883); micro-payments have already been associated with Bitcoins: Reimar Pinkernell, Ertrag- und umsatzsteuerliche Behandlung von Bitcoin-Transaktionen, (1) Unternehmensbesteuerung (2015) 19 (19).

13 Concerning targeted ads see e.g.: Philip Kotler and Gary Armstrong, Principles of Marketing (17th ed, 2018) pp 137–138; in a more general context concerning the role of internet content see: OECD (2015a), BEPS Action 1 – Final Report (n 2) paras 74–76.
vices and consumes these without being notably involved in the production process. By contrast, multi-sided online business models are characterized by an interaction of the customers in the value chain. The private consumer is not just the beneficiary of the supply chain anymore, but rather part of it. From an economic point of view, this implies that an online service provider operates within a mix of resource and consumer markets. The internet user provides his personal data as resources for the online business and simultaneously he\textsuperscript{14} is the recipient of the online services. In terms of value creation in a digital world, a single user, therefore, contributes to value by sharing his own preferences and other personal information. Marketing experts call the interaction of customers and the provision of information \textit{user-generated content}.\textsuperscript{15} These data are collected, analyzed, sold and used by the online companies to make money, for instance, through targeted advertising.\textsuperscript{16} In the early age of the multi-sided online business models, these business models were not always commercially aligned. \textit{Facebook}, for example, initially had a pure social background.\textsuperscript{17} In the last decade, however, this has changed and many multi-sided online businesses were bit by bit commercialized. These interrelations between the production and consumption side has not been sufficiently transferred to VAT law.

\begin{footnotesize}

\begin{enumerate}
    \item Please note: For reasons of better readability, only the male gender is addressed below, although the female sex is always meant as well.
    \item Philip Kotler and Kevin Keller, \textit{Marketing Management} (15th ed, 2016) p 290; for an overview of different kinds of services (especially social media) that use \textit{user-generated content}: Werner Pepels, \textit{Die 4 P im Marketing} (2017) pp 144–151; concerning \textit{user-generated content} and its importance for (social media) networks: OECD (2015a), \textit{BEPS Action 1 – Final Report} (n 2) paras 149–150; it seems to be that \textit{user-generated content} is the underlying issue of value creation and the data economy which causes tax problems, see on a discussion e.g.: Piergiorgio Valente, \textit{The Data Economy: On Evaluation and Taxation}, (59)(5) \textit{European Taxation} (2019) 251–256.
    \item Philip Kotler and Kevin Keller (n 15) p 107; OECD (2015a), \textit{BEPS Action 1 – Final Report} (n 2) para 77.
    \item For a short overview of the historical development of \textit{facebook} see: Philip Kotler and Kevin Keller (n 15) pp 653–654 with further references; concerning \textit{facebook}'s potential for marketing see: Philip Kotler and Gary Armstrong (n 13) p 474.
\end{enumerate}
\end{footnotesize}
The (simplified) multi-sided online business model is based on two relationships. Firstly, an online company offers services like social media, dating, gaming or fitness via an online platform or mobile application (app) to private consumers (see Figure 1, relationship (1)). At first glance, the services are free which means that the users do not have to pay money. Especially the registration for the services or the download of an app are often free of charge. However, by registering or using the service, a customer frequently agrees to the collection and exploitation of his personal data by the online businesses or even third parties. Sometimes it is actual-
ly mentioned that the user “pays” with his data\textsuperscript{22} respectively the consumer himself is the product.\textsuperscript{23} Consent to the transfer of personal data is often mandatory.\textsuperscript{24} In cases where this is not the case, consumers feel they have no choice but to provide the data. Other users just do not care.\textsuperscript{25} However, the data exchange is, for example, part of the definition of “social media” that includes sharing of personal details with each other (other users) but also with companies.\textsuperscript{26} The majority of consumers co-operates and welcomes customized information which is based on personal data. Other consumers are hesitant to provide personal data and try to limit the provision of these to a minimum.\textsuperscript{27} Security and privacy concerns rise.\textsuperscript{28} It is to note that the applicable data protection rules must be adhered to by the online companies.\textsuperscript{29}

\textsuperscript{22} See e.g.: Claudia Neugebauer, Digitalisierung – Old Economy im neuen Outfit?, (69) (3) Umsatzsteuer-Rundschau (2020) 104 (104); Sebastian Pfeiffer, VAT on “Free“ Electronic Services?, (27)(3) International VAT Monitor (2016) 158 (161); in connection with CJEU case law concerning Bitcoins: CJEU of 22.10.2015 – C-264/14, Hedqvist, ECLI:EU:C:2015:718; this statement cannot be supported as data do not fulfil the economic functions of money, see pp 212 et seqq.


\textsuperscript{24} Patric Schwarz (n 20) (783).

\textsuperscript{25} Philip Kotler and Kevin Keller (n 15) p 107 with further references.

\textsuperscript{26} “[S]ocial media: a means for consumers to share text, images, audio, and video information with each other and with companies and vice versa”: Philip Kotler and Kevin Keller (n 15) Glossary: social media.

\textsuperscript{27} Philip Kotler and Kevin Keller (n 15) p 107 with further references; Werner Pepeels (n 15) pp 146–147.


The collection, storage and analysis of personal data for commercial purposes is not a new phenomenon; businesses have done this for years. For example, companies traditionally collect data and employ it for their customer loyalty programmes or place laptop ads at university campuses as a measure of outdoor promotion. All these activities involve a certain (restricted) kind of targeting. In terms of online advertising, companies process personal data for their own purposes, too. This is the inherent consequence of promotional measures as these have to convince customers to buy goods and services. With customers online these days, communication needs to be online, too. However, promotional measures of such kind mostly lack in a reciprocal performance and thus cause no further VAT consequences.

New digital technologies enable an intensified collection and analysis of personal data. In particular, comprehensive data collection is enabled by

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Concerning an overview of online marketing tools see: Philip Kotler and Kevin Keller (n 15) pp 637–642; see also: OECD (2015a), *BEPS Action 1 – Final Report* (n 2) paras 136–139.

Philip Kotler and Kevin Keller (n 15) p 638.


OECD (2015b), *Data-Driven Innovation* (n 6) p 20; concerning the question who collects data: Philip Kotler and Kevin Keller (n 15) p 107 with further references; Claudia Neugebauer (n 22) (105).
cookies (i.e., special tracking programmes). Cookies can, for example, recognize whether a user updates a profile. Thus, extensive user targeting becomes possible. Collected personal information includes, for instance, personal details like e-mail-addresses and other contact information, users’ online and purchase behaviour or GPS data. From this information, an individual and detailed consumer profile can be compiled and analyzed in detail. What is new in this context is the extent of data collection and its targeted analysis. Additionally, social media networks tend to replace traditional intermediaries (like newspapers) in order to enable targeted customer contact. The collection of data by social networks and the respective provision by the users must be seen as a change that leads to ambiguity in the context of EU VAT legislation.

Online businesses themselves benefit from network effects of the digital economy. The development of the software tools (the so-called first copy), on which the online services are based, is quite expensive. By contrast, re-

35 For a discussion of different technologies that are being used for tracking see e.g.: Omer Tene and Jules Polonetsky, To Track or “Do Not Track”: Advancing Transparency and Individual Control in Online Behavioral Advertising, (13)(1) Minnesota Journal of Law, Science and Technology (2012) 281–358; collection of personal data is sometimes limited due to diverse technological conditions: Werner Pepels (n 15) p 138 and Philip Kotler and Gary Armstrong (n 13) pp 50 and 525.
36 Many consumers do not care about cookies, do not delete them and welcome customized marketing: Philip Kotler and Kevin Keller (n 15) pp 91 and 650.
37 For further collected data see e.g.: Philip Kotler and Kevin Keller (n 15) p 107 with further references; Adam Thimmesch, Transacting in Data. Tax, Privacy, and the New Economy, (94)(1) Denver Law Review (2016) 145 (152) with reference to Ryan Calo, Digital Market Manipulation, (82)(4) George Washington Law Review (2014) 995 (1003–1004) who provides a list of information which websites can collect; data are provided deliberately or are collected by observation: Tina Ehrke-Rabel, Aspekte grenzüberschreitenden digitalen Wirtschaftens in der Umsatzsteuer, in Digitalisierung im Steuerrecht (Johanna Hey ed, DStJG vol 42, 2019) p 395; see for a definition of personal data: Article 4 No 1 of the Regulation (EU) 2016/679; processing of the data (in order to get information about consumer behaviour) is defined in Article 4 No 2 of the Regulation (EU) 2016/679.
38 This is enabled by database marketing techniques: Philip Kotler and Kevin Keller (n 15) pp 597 and 662–664; Philip Kotler and Gary Armstrong (n 13) p 127; Wayne Hoyer, Deborah MacInnis and Rik Pieters (n 28) p 33.
39 See e.g.: OECD (2015a), BEPS Action 1 – Final Report (n 2) paras 165–166.
41 Hans-Martin Grambeck (n 8) (2029).
production is rather cheap. The marginal costs per additional user are almost negligible. Such low costs are the prerequisite to provide free services.\textsuperscript{42} Furthermore, so-called \textit{network effects} have a positive influence on the success of online businesses. \textit{Network effects} increase the value of goods and services for a single user. This happens as other people consume the same. In other words, the bigger a network, the better for each individual user. For the online businesses, this also means that the value of the software respectively the social media network increases with the number of users.\textsuperscript{43}

Multi-sided online business models are categorized by a further relationship between the online companies and another company for the purpose of online marketing services (see \textit{Figure 1}, relationship (2)). Such online advertising deals are very popular in Europe\textsuperscript{44} and are clearly subject to VAT.\textsuperscript{45} They are not connected to the aforementioned relationship between the online business and the private user.\textsuperscript{46} The marketing partners do not pay for the free services which are provided to private users. From an economic point of view,\textsuperscript{47} the marketing partners are only keen to employ targeted marketing.\textsuperscript{48} Depending on the contractual conditions, online companies either provide the business partners with the collected per-

\textsuperscript{42} Helena Wenninger et al (n 28) (12–13) with further references.
\textsuperscript{45} The contracts are based on reciprocal performances (services for money) and are categorized as B2B services according to Article 24 of the EU VAT Directive.
\textsuperscript{46} Joachim Englisch (n 12) (881); by contrast: Florian Zawodsky, \textit{Value Added Taxation in the Digital Economy}, (33)(5) \textit{British Tax Review} (2018) 606–627 who points out that from an economic point of view, the business advertising pays the consideration for the free services (third-party-consideration).
\textsuperscript{48} Joachim Englisch (n 12) (881).
sonal data (e.g., anonymous or pseudonymous data⁴⁹) or the online companies themselves broadcast the advertising on the online platforms.⁵⁰ This further use of data represents a separate transaction and must therefore be valued independently.⁵¹ For example, Facebook selects keywords or details such as customer location, relationship status, favourite music, books or employment and subsequently turns on advertising among the selected target group.⁵² Data mining of the collected personal information allows for personalized, proactive and targeted advertisements.⁵³ This kind of online marketing therefore works in a similar way to traditional offline marketing techniques: The process involves companies which want to advertise and companies which provide advertising media (offline or online). However, by using possibilities of digital advertising, a higher degree of personalization is achieved. This trend is not least supported by the proliferation of smartphones. These are taken by consumers almost everywhere (what makes geotracking possible) and are therefore tightly linked to the life of their owners.⁵⁴

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⁴⁹ Concerning a brief explanation what anonymous and pseudonymous data are: Werner Pepels (n 15) pp 135–136.
⁵⁰ Tina Ehrke-Rabel (n 37) p 395; Nicole Looks and Benjamin Bergau (n 18) (865); Sebastian Pfeiffer (n 22) (158).
⁵¹ Data may also be sold, purchased or used in other ways: Philip Kotler and Kevin Keller (n 15) p 106; the data are used for own purposes or are sold to others: Werner Pepels (n 15) p 135; whether the data is used for own purposes or it is resold to a third party is a separate process and must be assessed independently for VAT purposes: Stefanie Baur-Rückert, Die Einheitlichkeit des Umsatzes im Mehrwertsteuerrecht (2018) p 149.
⁵² Facebook sells ad space by auction for the highest bid: Helena Wenninger et al (n 28) (14).
⁵³ Nicole Looks and Benjamin Bergau (n 18) (865); Nevada Melan and Sebastian Pfeiffer (n 33) (1072); Helena Wenninger et al (n 28) (14); data mining is defined as “the extracting of useful information about individuals, trends, and segments from the mass of data.”; Philip Kotler and Kevin Keller (n 15) Glossary: data mining, see also pp 39–40, 590, 597 and 663; Wayne Hoyer, Deborah MacInnis and Rik Pieters (n 28) p 33 and Glossary: data mining; the information can be used for internal performance measurement, too: Thomas Fischer, Klaus Möller and Wolfgang Schultze, Controlling: Grundlagen, Instrumente und Entwicklungsperspektiven (2nd ed, 2015) pp 632–633.
⁵⁴ Concerning mobile marketing: Philip Kotler and Kevin Keller (n 15) pp 538–540, 597 and 650–652 with further references; Werner Pepels (n 15) pp 156–162 with further references; concerning more information on mobile marketing in connection with social media see e.g.: Andreas Kaplan, If you love something, let it go mobile: Mobile Marketing and mobile social media 4x4, (55)(2) Business Horizons (2012) 129–139.
B2B marketing contracts cross-finance the free services for users of the online and mobile applications. The described business relationships between online businesses and marketing firms are based on monetary consideration. The sale of ad space is the main source of income, e.g. for Facebook.\textsuperscript{55} Other sources of income are made accessible via third party application contracts.\textsuperscript{56} Sometimes, like in the case of Wikipedia,\textsuperscript{57} online businesses are financed by donations. In addition, companies of all kinds can, for example, use Facebook as a platform for direct marketing by connecting with customers via their own Facebook page (B2C and B2B marketing).\textsuperscript{58} This possibility of social media marketing is used by a majority of businesses.\textsuperscript{59} Facebook and other online companies sometimes also charge these companies a fee.\textsuperscript{60} These kinds of revenue models can be categorized as indirect ones which are not dependent on direct payments from the users.\textsuperscript{61} The revenues cover the costs for programming, distributing and providing.

\textsuperscript{55} Werner Pepels (n 15) p 135; Patric Schwarz (n 20) (783); third-party contracts finance their affairs: Dietmar Aigner et al (n 30) (349).
\textsuperscript{56} David Dietsch (n 21) (869); third-party applications are e.g. games: Stefan Rogge, Online-Games und Umsatzsteuer, (70)(18) BetriebsBerater (2015) 1045 (1046) (the games themselves are sometimes financed via ad contracts what is called “in-game-advertising”); besides the sale of ad space, businesses may also rely on freemium models or cooperations with other businesses in form of sponsoring: Helena Wenninger et al (n 28) (13–14).
\textsuperscript{57} See: https://www.wikipedia.org/ (last accessed: 01.02.2020); ad-free and financed by donations: Werner Pepels (n 15) pp 150–151.
\textsuperscript{58} Concerning direct and digital marketing see e.g.: Philip Kotler and Gary Armstrong (n 13) pp 512–516.
\textsuperscript{59} For some numbers see e.g.: A. Guttmann, Social media marketing – Statistics & Facts (19.07.2018) (https://www.statista.com/topics/1538/social-media-marketing/, last accessed: 01.02.2020); see for an overview of social media marketing: Philip Kotler and Gary Armstrong (n 13) pp 521–525 or Philip Kotler and Kevin Keller (n 15) pp 642–644; see also e.g.: Glynn Mangold and David Faulds, Social media: The new hybrid element of the promotion mix, (52)(4) Business Horizons (2009) 357–365.
\textsuperscript{60} Philip Kotler and Kevin Keller (n 15) pp 653–654 with further references; Facebook restricted the possibilities for non-paying businesses to interact through their brand Facebook pages with customers: Marshall Manson, Facebook Zero: Considering Life After the Demise of Organic Reach, (05.03.2014) (https://de.slideshare.net/socialogilvy/facebook-zero-white-paper-31934430, last accessed: 01.02.2020); John McDermott, Facebook is not making friends on Madison Avenue (28.02.2014) (https://digiday.com/media/facebook-agencies/, last accessed: 01.02.2020); Will Oremus, Facebook’s Like Affair With Brands Is Over (24.03.2014) (https://slate.com/technology/2014/03/facebook-brands-and-organic-reach-why-no-one-likes-your-self-promoting-posts-anymore.html, last accessed: 01.02.2020).
\textsuperscript{61} Thomas Fischer, Klaus Möller and Wolfgang Schultze (n 53) pp 627–628.
the free services to private users. However, the users’ personal data ensure that marketing deals are signed. Therefore, data is attributed a certain value which may be the “price” for the free services.\textsuperscript{62}

In a nutshell, consumers enjoy online and mobile services. The VAT treatment of these services is uncertain. It is questionable whether the targeted advertising measures provide additional benefits or whether they are associated with the online and mobile services. Some of the online ads are seen as a mere entertainment rather than a mere selling tool.\textsuperscript{63} However, the agreement on the exploitation rights of personal data is not based on the idea of serving advertising benefits to users. Rather, online companies use the data to enter into contracts with third parties for marketing purposes and thereby make money.\textsuperscript{64} Without clear guidance on how to deal with these different services, the collection costs\textsuperscript{65} of EU VAT will increase. In particular, both multi-sided online businesses and tax authorities need to look more closely at “free” online and mobile services and the question whether these are subject to VAT. Since the VAT treatment of the B2B relationship between online companies and marketing businesses (or others) is clear, the focus of the further discussion must lie on free services to users.

\textsuperscript{62} Kuuya Chibanguza and Zacharias-Alexis Schneider, \textit{Zivil- und Steuerrecht in der Industrie 4.0}, (27) NWB Steuer- und Wirtschaftsrecht (2017) 2052 (2054) with further references; David Dietsch (n 21) (869) with further references; Joachim Englisch (n 12) (875); Hans-Martin Grambeck (n 8) (2026); Sebastian Pfeiffer (n 22) (161): data is considered as the oil of the 21st century (see e.g.: https://www.wired.com/insights/2014/07/data-new-oil-digital-economy/, last accessed: 01.02.2020); World Economic Forum, \textit{Is data the new currency?} (2015) (https://www.weforum.org/agenda/2015/08/is-data-the-new-currency/, last accessed: 01.02.2020).

\textsuperscript{63} Philip Kotler and Kevin Keller (n 15) pp 646–648.

\textsuperscript{64} Joachim Englisch (n 12) (881).

\textsuperscript{65} Collection costs are split into administrative (expenses incurred on the level of the tax authorities, see e.g.: Liam Ebrill et al (n 5) p 52) and compliance costs (expenditures incurred on the level of businesses – different elements of compliance costs are defined in: Ine Lejeune, Wim De Clercq and Mathieu Van De Putte, \textit{Compliance Costs and Costs of Collection}, in \textit{Improving VAT/GST: Designing a Simple and Trust-Proof Tax System} (Michael Lang and Ine Lejeune eds, 2014) pp 636–637 with further references.).
II. The Concept of EU VAT Consumption Suitable for Digitalization: Definitions, Literature Overview and Research Objective

The digital age challenges EU VAT laws. The digital economy has been made possible by a transformation of information and communication technologies. Today's technologies are cheaper, more standardized and more powerful than before. Business processes can be optimized and innovations in all business areas become possible. The digital (r)evolution cannot be seen as a rigid pattern, as it is a very agile and rapidly evolving trend. Future technological developments are hardly predictable. However, people are familiar with this megatrend and one could say that they can recognize the digital economy when they encounter it.

Two pillars of the digital development are distinguished: digitization and digitalization. Digitization may be described by changing something from analogue to digital. This also includes the often mentioned indirect or offline e-commerce, which uses the internet as an intermediary and communication instrument. The goods and services sold are “traditional” ones but accompanying services (like payment or shipping) are carried out in a traditional way. By contrast, digitalization or direct/online e-commerce describes the use of digital technologies to change a business model (e.g., multi-sided online business models or the sharing economy) and its respective products (e.g., the internet of things). The complete exchange of digital products for payment takes place via electronic systems.

The digital economy is becoming increasingly important. It is therefore not advisable to separate it from the rest of the economy for tax purposes. In particular, the taxation of the digital economy should not take place by means of a newly created tax or as part of a complete reorganisation of sales taxes. Solutions for the problems (e.g., arising from multi-sided on-

67 Liam Ebrill et al (n 5) p 186; similar: Claudia Neugebauer (n 22) (104).
72 See e.g.: OECD (2015a), BEPS Action 1 – Final Report (n 2) para 117.
line business models) must therefore be found within the framework of established EU VAT legislation, otherwise the established VAT structures could become obsolete in the future. In the past, some countries operated with tax systems that could not keep pace with economic developments. They introduced a VAT that was better suited to economic reality. The digital economy poses a similar challenge: The current EU VAT system seems not to be sufficiently adapted to the digital evolution. While marketing, for example, is able to provide location-based services and therefore knows exactly where customers are, VAT protagonists often mention a trend towards anonymization. It seems that for EU VAT purposes, the diffusion of mobile devices causes problems as it is hardly manageable to always know where the customer is (according to the used proxies for the place of taxation). This can be a problem as long as effective data protec-

75 In a more general context: the EU VAT system appears to be outdated: Ian Crawford, Michael Keen and Stephan Smith, Value Added Tax and Excises (chapter 4), in Dimensions of Tax Design: The Mirrlees Review (Stuart Adam et al eds, 2010) p 277; see for example: Niall Campell, The European Court of Justice – VAT friend or foe?, in ECJ – Recent Developments in Value Added Tax (Michael Lang et al eds, 2014) pp 361–363 who points out that EU VAT laws have not kept pace with business developments in recent years and should therefore be reformed; similar: Michael Lang and Ine Lejeune, Preface, in VAT/GST in a Global Digital Economy (Michael Lang and Ine Lejeune eds, 2015) p xxi; this trend can also be observed in relation to deciding where consumption should be taxed as digitalization increasingly separates substantive and enforcement jurisdiction: Walter Hellerstein (n 68); see also: Walter Hellerstein, Exploring the Potential Linkages Between Income Taxes and VAT in A Digital Global Economy, in VAT/GST in a Global Digital Economy (Michael Lang and Ine Lejeune eds, 2015) pp 83–117; for a more extensive discussion of the concepts: Walter Hellerstein, Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective, (38)(1) Georgia Law Review (2003) 1–70; sometimes also the unanimity clause in Article 115 of the TFEU is made responsible for the slow adaption of EU VAT laws: Alan Schenk, Victor Thuronyi and Wei Cui, Value Added Tax: A Comparative Approach (2nd ed, 2015) p 48.
76 Werner Pepels (n 15) p 160.
78 Concerning proxies for the place of supply see: Articles 31–61 of the EU VAT Directive; similar: Ian Crawford, Michael Keen and Stephan Smith (n 75) p 345;
tion is not compatible with effective taxation. In any case, the current status quo, with almost global coverage of similar sales taxes, should not be carelessly jeopardised which is why a replacement with another kind of tax is certainly undesirable. Furthermore, initiatives to introduce new taxes for the digital economy must be seen as contradictory to the integration of the digital economy into established tax laws. In this context, the proposal for a specific but interim digital services tax (DST) within the EU itself or concerning problems of determining the place of taxation of B2C electronically supplied services: Martijn Veltrop, Identification of Customers of E-Services under EU VAT, (25)(5) International VAT Monitor (2014) 264 (266–267); however, the proposed DST (EU Commission (2018d), Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final, p 12 (hereafter: EU Commission (2018d), Proposal for a digital services tax)) intended to apply geolocation – thus, the issues concerning the place of taxation should be no fundamental problem also for EU VAT.


within individual Member States is to be criticized.\textsuperscript{80} The only viable solution is to readjust VAT to the (digitalized) economy.\textsuperscript{81}

The Organisation for Economic Co-operation and Development (OECD) seeks to adapt the established tax systems to the digital age. The OECD focuses mainly on income and wealth taxes\textsuperscript{82} but is also involved in the discussion on value-added taxation. First and foremost, the Action Plan 1 of the Base Erosion and Profit Shifting (BEPS) project\textsuperscript{83} analyzes not only the challenges of the digital economy in terms of direct taxes, but also refers to indirect taxes. Furthermore, the formulation of the \textit{OECD International VAT/GST Guidelines}\textsuperscript{84} is in line with early OECD taxation frameworks concerning neutrality, efficiency, certainty, simplicity, effectiveness, fairness and flexibility which mark the OECD’s first steps towards answering questions on indirect taxation.\textsuperscript{85} In this regard, Marie Lamensch attests a mixed picture on the implementation of OECD recommendations into EU VAT laws and criticizes a different treatment of online and offline supplies.\textsuperscript{86} The overall intention of the OECD, however, is to integrate the digital economy into the established tax legislation with neutral taxation between the online and offline world.
Not knowing whether certain digital supplies are covered by the EU VAT Directive\textsuperscript{87} leads to uncertainties in tax collection by taxable persons (and perhaps even by the tax authorities themselves). The VAT gap may therefore also rise. The VAT gap is defined as the difference between the theoretical tax liability under EU VAT legislation and the actual amount of VAT collected.\textsuperscript{88} The lack of knowledge by tax collectors as to whether certain digital supplies constitute taxable transactions is only one element of the VAT gap. Moreover, VAT fraud, made possible for example by digital business models, contributes significantly to the VAT gap.\textsuperscript{89} Proposals to reduce the VAT gap using internet technologies (e.g., the blockchain technology) were recently made by scholars.\textsuperscript{90}

The scholarly literature has already recognized that some of the challenges arising for the scope of the EU VAT system can be met under established EU VAT laws. Some scholars even claim that the digital economy is


\textsuperscript{89} Institute for Advanced Studies (n 88) p 9.

not fundamentally new. This statement is substantiated for three groups of challenges, i.e. (1) an increasing importance of services, (2) the emergence of the sharing economy and (3) virtual currency schemes. At the latest since the introduction of the category of electronically supplied services in Article 58 paragraph 1 lit c) of the EU VAT Directive, it has become clear that the digital economy must be taken into account within this new category of services or other established categories under the directive. This applies to all cases of digital services, whether or not they were defined as goods before the technical digital revolution. The sharing economy can also be integrated into the established structures. This is represented by both the scholarly literature and the EU. This was mainly due to the fact that the increased market interaction of private individuals no longer turns out to be a genuine peer-to-peer element, but rather an additional link in the supply chain. Last but not least, the CJEU clarified that Bitcoins, as one representative of bidirectional virtual currency schemes, must be treated like money. The scholarly literature is not sure whether Bitcoins meet the economic definition of money (as they certainly do not meet the legal definition). The case law, however, has improved the equal treatment of traditional and digital means of payment.

95 CJEU of 22.10.2015 – C-264/14, Hedqvist, ECLI:EU:C:2015:718; With the entry into force of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, 17.12.2007, pp 1–271), the European Court of Justice was renamed as of 01.12.2009. This means that the court’s judgments before this date were rendered by the ECJ, but afterwards by the CJEU (Court of Justice of the European Union).
96 See e.g.: Aleksandra Bal, Taxation of virtual currency (2014); Oskar Henkow, VAT and Virtual Reality: How Should Cryptocurrencies Be Treated for VAT Purposes?, in
Concerning taxation of “free” online services, which are part of multi-sided online business models, the scholarly literature does not have a consistent line of argumentation. Currently, such services are not taxed. In fact, it is above all German and Austrian writers who discuss the taxability of electronic services against consideration in kind, namely personal data. Nevada Melan and Bertram Wecke, Sebastian Pfeiffer, Tina Ehrke-Rabel, and David Dietsch affirm a taxable supply for consideration in kind. Hans-Martin Grambeck, Nicole Looks and Benjamin Bergau, Dietmar Aigner, Peter Bräumann, Georg Kofler and Michael Tumpel, Heidi VAT/GST in a Global Digital Economy (Michael Lang and Ine Lejeune eds, 2015) pp 45–57.

97 Raoul Riedlinger, Umsatzsteuer im Wandel: Umgang mit „kostenlosen“ digitalen Dienstleistungen, in 100 Jahre Umsatzsteuer in Deutschland 1918–2018 Festschrift (UmsatzsteuerForum e.V. and Bundesministerium der Finanzen eds, 2018) p 703 (Raoul Riedlinger summarizes some of the scholarly contributions and is himself of the opinion that taxation is theoretically possible but practically not enforceable).

98 In Australia, Singapore, South Africa and China, the topic is not discussed: Rebecca Millar et al, Beyond the EU VAT: Global Perspectives on VAT/GST in the Traditional and Global Economies, in CJEU: Recent Developments in Value Added Tax 2017 (Michael Lang et al eds, 2018) pp 182–185.


100 Sebastian Pfeiffer (n 22); Sebastian Pfeiffer, Comment on “Free” Internet services, in CJEU: Recent Developments in Value Added Tax 2017 (Michael Lang et al eds, 2018) pp 133–140; Nevada Melan and Sebastian Pfeiffer (n 33).


102 David Dietsch (n 21).


104 Nicole Looks and Benjamin Bergau (n 18).

105 Dietmar Aigner et al (n 30); please note: Dietmar Aigner et al, Ausgewählte Aspekte zur Erfassung digitaler Leistungen im geltenden Verbrauch- und Verkehrsteuerrecht, in Digitale Transformation im Wirtschafts- & Steuerrecht (Elias Felten et al eds, 2019) pp 337–351 and Michael Tumpel, Umsatzsteuer bei „unent-
Friedrich-Vache\textsuperscript{106} and Reimar Pinkernell,\textsuperscript{107} on the other hand, have a negative view on taxation of these online services. Marie Lamensch\textsuperscript{108} analyzes free online services with regard to the scope of the tax without making a final statement and Joachim Englisch\textsuperscript{109} calls for a legislative measure to solve the issues.

At present, “free” internet services are not taxed. In the context of BEPS, the OECD supports the taxation of “free” online services \textit{de lege lata} when these services are exchanged for non-monetary consideration.\textsuperscript{110} From a tax point of view, the EU Commission has only marginally addressed the issue, while it supports a link between “free” online services and exploitation rights in a non-tax matter.\textsuperscript{111} In order to subject the (free) services of multi-sided online business models to taxation in Europe, the tax on digital services was proposed but not implemented at EU level.\textsuperscript{112} Such specific taxes would tax the online and offline world differently.\textsuperscript{113} These would


\textsuperscript{107} Reimar Pinkernell (n 33).


\textsuperscript{109} He also rejects taxation because of an absent possibility to value the barter transactions, see e.g.: Joachim Englisch (n 12); Joachim Englisch, \textit{Entwicklungslinien und Zukunftsfragen des Rechts der indirekten Steuern}, in \textit{100 Jahre Steuerrechtsprechung in Deutschland 1918–2018 Festschrift für den Bundesfinanzhof}, Band II (Klaus-Dieter Drüen, Johanna Hey and Rudolf Mellinghoff eds, 2018) p 1516.

\textsuperscript{110} OECD (2015a), \textit{BEPS Action 1 – Final Report} (n 2) Annex B p 175.


\textsuperscript{112} See the discussion above and in particular footnote 80.

\textsuperscript{113} Specific taxes (and as such a ring-fencing of the digital economy) is discussed now and then – see e.g.: Pierre Collin and Nicolas Colin, \textit{Report to the Minister for the Economy and Finance, the Minister for Industrial Recovery, the Minister Delegate for the Budget and the Minister Delegate for Small and Medium-Sized Enterprises, Innovation and the Digital Economy}, Task Force on Taxation of the Digital
not be necessary if it was possible to integrate the “free” online services into the established (indirect) EU VAT system.\textsuperscript{114}

Disruptive business models of the digital economy undoubtedly pose problems for the EU VAT system. The question arises whether online activities for which it is currently not clear whether they fall within the scope of the EU VAT system (e.g., “free” services provided by multi-sided online businesses) can be taxed under the EU VAT Directive.\textsuperscript{115} If these challenges cannot be adequately addressed, a possible fundamental reform of the VAT system could also be considered.\textsuperscript{116} The present work will show that all the challenges discussed for the scope of the EU VAT Directive – i.e., the emergence of new kinds of services, the sharing economy, virtual currency schemes and “free” online services supplied by multi-sided online businesses – can be subsumed under the traditional concept of consumption which underlies the EU VAT Directive. The question whether the VAT system covers the supplies of these business models can therefore be answered positively. A fundamental reform is not necessary. The laws, however, must be interpreted from an economic perspective which has consider especially “free” online services provided by multi-sided online businesses. Such businesses can only be taxed when it is accepted that suppliers’ costs represent the subjective value of B2C barter transactions. This interpretation makes it possible to also include “free” online services into the concept of EU VAT as a general tax on consumption.

The traditional concept of EU VAT as a general tax on consumption is based on the use of proxies for consumption. Proxies (“approximations”) are “something used to represent something else that you want to measure”.\textsuperscript{117} In other words, proxies are representatives respectively substitutes for something else. The basic idea of EU value-added taxation is to absorb the financial capability of consumers indicated by consumption. Thus, when finan-

\textsuperscript{114} Joachim Englisch (n 12) (876); Joachim Englisch (n 109) p 1518.
\textsuperscript{115} Joachim Englisch (n 109) p 1514; Heidi Friedrich-Vache (n 106) pp 330–331; Marie Lamensch (n 108) p 119; by contrast, it is not questionable whether the “free” supplies can be subsumed under the current rules, but whether this is desirable – it is not desirable as the collection costs would be too high: Wolfram Scheffler (n 6) (1788).
\textsuperscript{116} Dietmar Aigner et al (n 3) para 12/2 with further reference to OECD (2018c), Tax Challenges Arising from Digitalisation – Interim report 2018 (n 83) para 372.
cial resources are used for private consumption, the tax is to be levied. This academic work therefore argues that transactions – the exchange of goods and services for (monetary) consideration – are used as a proxy for consumption. This interpretation is distinct from the one of Ad van Doesum and Gert-Jan van Norden who briefly outline that the taxable events referred to in Article 2 paragraph 1 of the EU VAT Directive are used as proxies for consumption.\textsuperscript{118} The use of proxies for consumption is also common with other theoretical concepts of consumption (i.e., macroeconomics, microeconomics, marketing, direct taxation and excise taxation). However, there is no common concept of consumption that underlies the different disciplines and could therefore be used for the taxation of consumption under the EU VAT Directive.

With regard to the concept of EU VAT as a general tax on consumption, the present academic work outlines not only digital but also traditional challenges. The latter are similar to the ones identified by Marie Lamensch (e.g., public bodies, the direct link requirement or illegal activities).\textsuperscript{119} She also briefly discusses the sharing economy and Bitcoins as new digital challenges, which can however be dealt within the current EU VAT system. By contrast, with regard to “free” internet services, she is in favour of discussing taxation outside EU VAT laws, which would not be necessary following the proposals in this academic work. These questions are not only limited to EU VAT law, but also lead to (more or less) challenges for international VAT systems, e.g., in Australia, Singapore, South Africa or China.\textsuperscript{120} The academic work at hand goes into more detail and shows possible solutions for all these digital challenges. Nadine Kollmann\textsuperscript{121} also focuses on supplies for consideration in the digital economy. She discusses crypto currencies, the shared economy (with a certain focus on the role of marketplaces) and personal data as consideration for supplies and argues that “free” online supplies are not bartered for exploitation rights of personal


\textsuperscript{119} Marie Lamensch (n 108) pp 105–131.

\textsuperscript{120} Rebecca Millar et al (n 98) pp 141–191.

data. Nadine Kollmann concludes that taxation of “free” online supplies of services should not be considered at all. According to her analysis, no substantive amendment of the EU VAT Directive is therefore necessary. Her final conclusion will be confirmed at the end of this academic work, even if it will be argued that “free” online services can be taxed without a major change of EU VAT laws, but rather with the requirement of a more economic interpretation.\(^\text{122}\) This contention results from the focus on the concept of VAT as a general consumption tax.

In order to be able to concentrate the following discussion on the scope-related issues addressed, questions of the subsequent levels of taxation are not dealt with here. This also includes questions such as where consumption should be taxed, how tax collection works and how high the tax rate should be. These questions are addressed in other scholarly publications.\(^\text{123}\) As far as the scope-related discussion of challenges caused by the digital age is concerned, the focus lies on B2C transactions as only the consumption of private individuals is to be taxed. Excluded are in particular “free” online supplies of multi-sided online businesses to business customers and mixtures of monetary and non-monetary considerations.\(^\text{124}\) Such issues are to be discussed in further scholarly work. The analysis of multi-sided online business models is based on the assumption that exploitation rights of personal data are granted directly to the respective online companies and not to third parties.\(^\text{125}\)

III. Overview

In order to answer the research questions which were posed above, the remainder is divided into three chapters and a subsequent conclusion.

The first chapter clarifies that there is no uniform definition of the term or use of ”consumption”. Instead, different theoretical concepts use similar

122 Concerning an economic interpretation see also: Tina Ehrke-Rabel (n 37) p 420.
124 See for a short analysis e.g.: Nevada Melan and Bertram Wecke (2015b) (n 99) (2815).
125 Concerning an analysis of third-party constellations see e.g.: Nevada Melan and Bertram Wecke (2015b) (n 99) (2813–2815) with further references; see also: Joachim Englisch (n 12) (877 and 880–881) with further references.
concepts of consumption which cannot be transferred to EU VAT law because of their differentiations. EU VAT law is partly similar designed as the theoretical consumption concepts presented, but also often distinguishes from them. It is argued that economics stresses the production of goods and services for consumption and its exchange for money. Instead, marketing focuses on the consumer and the question why consumption takes place. This stands in contrast to EU VAT which does not answer the question why people consume. Finally, also direct taxation and other indirect taxes levied on consumption, namely excise duties, are influenced by considerations about consumption. It turns out that mostly technical details cause the difference to a broad-based EU value-added taxation. Where appropriate, digital developments are briefly addressed for pointing out challenges for the concepts.

In the second chapter, the concept of consumption under European VAT is developed. The tax is a general consumption tax. It aims at taxing benefits that are transferred to identifiable persons for mostly monetary consideration. B2B and B2C transactions by taxable persons are used as proxies for consumption in order to avoid direct and immediate taxation of the various human actions relating to consumption. Transactions express an exchange of goods and services for a (usually monetary) consideration. These expenditures reflect the financial capacity of individuals used for consumption. Due to the taxation of transactions, the concept of consumption under EU VAT laws is anticipatory, as actual consumption is not a factor influencing the collection of VAT. However, free goods and services are sometimes taxed under certain conditions. These are also covered by the consumption concept of EU VAT.

The third chapter deals with the area of conflict between digital developments and the EU VAT concept of general consumption which was developed in the second chapter. A first focus is set on digital trends which have already been brought into line with the paradigm of a general consumption tax and therefore do not cause any problems at this level. In a second step, multi-sided online business models are considered which are obviously contradictory to the developed concept of the tax as a general consumption. However, it is shown that these business models and the caused problems can also be categorized into the established logic of EU VAT laws. A fundamental reform of the consumption concept is therefore not necessary due to digital developments.

A short summary of the results concludes this academic work. It also provides indications of further research and a short outlook.
Chapter 1: Theoretical Concepts of Consumption

The European VAT is a tax on consumption.\textsuperscript{126} The focus of this academic work is on clarifying the basic concept of consumption that underlies the European VAT system and continues to explore how the digital economy challenges this concept.\textsuperscript{127} The following first chapter provides an outline of different other theoretical concepts of consumption. It is shown that there exists no uniform concept of consumption. The different theoretical concepts are based on similar approaches but cannot be used for EU VAT due to their disparities.

The \textit{Longman Dictionary of Contemporary English} defines consumption in different ways. One example for a definition of consumption is "the act of buying and using products".\textsuperscript{128} In a similar manner, \textit{Adam Smith} coined that "[c]onsumption is the sole end and purpose of all production".\textsuperscript{129} Describing consumption through the employment of production and the purchase of goods and services is also the basic idea of the theoretical concepts of consumption discussed. By applying this simplified approach, it is not required to define consumption precisely. Nevertheless, the different theoretical concepts of consumption appear to reflect actual consumption as accurately as possible.

Like EU VAT, economics focuses on the exchange of goods and services for money. However, the exact parameters are different (I.). Moreover, marketing studies raise the question of why people consume, a question that is completely ignored by EU VAT. Furthermore, marketing is based on a multi-phase understanding of consumption and not a single-level concept (II.). Finally, the technical details under which direct taxes (these which are influenced by consumption aspects) and excise duties are shaped, differ from the general consumption concept of EU VAT (III.).


\textsuperscript{127} On this see the second (pp 96 et seqq) and third chapter (pp 182 et seqq).


\textsuperscript{129} \textit{Adam Smith}, \textit{An Inquiry into the Nature and Causes of the Wealth of Nations} (1776), book IV, chapter 8, p 660.
short summary of the most important findings concludes this chapter (IV.).

I. Economics

Economics – divided into macroeconomics and microeconomics – approaches consumption by exchanging goods and services for money. This approach is similar to EU VAT but cannot be used to define the concept of EU VAT consumption. The comparison between macroeconomics (i.e., the calculation of Gross Domestic Product (GDP)) and EU VAT shows that the main differences between the two disciplines are to be seen in terms of the reference object and timing aspects. While GDP calculations concentrate on the consumption of a nation, the EU VAT refers to individual consumption. Furthermore, the GDP captures the production of consumption possibilities and EU VAT requires the transition to the consumer sphere (1.). Furthermore, microeconomics is mainly based on the convergence of supply and demand and the value of consumption is expressed by the monetary units which are exchanged. The interchange of goods and services at consumer markets against consideration is also consulted for EU VAT purposes, even if the latter does not recognize, inter alia, the influence of behavioural theories. VAT is only concerned with the exchange of consumption possibilities and consideration, without questioning the behavioural background of the consumers (2.).

1. Macroeconomics: An Aggregated Notion of Consumption

Macroeconomists analyze phenomena of whole economies. Hence, the focus lies on aggregated indicators like the commonly recognized GDP.

The GDP is a measure of economic well-being of a state and reflects the aggregated economic performance of a state over a certain period.\textsuperscript{133} The underlying idea is to convey information about the overall value of an economy’s output which results in demand. This value is measured at current market price levels.\textsuperscript{134} It is possible to calculate the GDP according to three different methods: The evaluation can be determined pursuant to output measures (production approach), on the basis of expenditures (expenditure approach) or on the basis of income (income approach).\textsuperscript{135}

<table>
<thead>
<tr>
<th>Production Approach of GDP:</th>
<th>Expenditure Approach of GDP:</th>
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<tr>
<td>Value of Outputs</td>
<td></td>
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<tr>
<td>- Intermediate Consumption</td>
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<tr>
<td>= Gross Value Added</td>
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<tr>
<td>+ Indirect Taxes (less Subsidies)</td>
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<tr>
<td>= GDP</td>
<td>Consumption (C)</td>
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<td></td>
<td>+ Investments (I)</td>
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<td>+ Government Purchases (G)</td>
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<td>+ Exports (X)</td>
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<td></td>
<td>- Imports (M)</td>
</tr>
<tr>
<td></td>
<td>= GDP (Y)</td>
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</tbody>
</table>

\textbf{Figure 2: GDP Calculations According to the Production and Expenditure Approach}

The output approach of GDP calculations and EU VAT both concentrate on the value added of an identified reference object. As referred to in Fig-

\textsuperscript{133} Gregory Mankiw, \textit{Macroeconomics} (10th ed, 2019) p 21 defines GDP as follows: “\textit{G}ross domestic product (GDP) is the market value of all final goods and services \textit{produced within an economy in a given period of time}.”; in order to measure the economic well-being of a country and to facilitate international comparison, the GDP is calculated per capita: Gregory Mankiw and Mark Taylor (n 130) p 9; Gregory Mankiw (n 131) p 476.

\textsuperscript{134} Regulation (EU) No 549/2013 Annex A para 1.133; Gregory Mankiw (n 131) p 476; Gregory Mankiw (n 133) p 21; Gregory Mankiw and Mark Taylor (n 130) p 418.

\textsuperscript{135} Regulation (EU) No 549/2013 Annex A para 1.133: the income approach is defined as “\textit{the total of all incomes earned in the process of producing goods and services plus taxes on production and imports less subsidies}”. A discussion of this third approach of calculation is rather related to income and wealth taxation than to VAT and consumption taxes. Thus, it is not further analyzed here.
ure 2, the output approach cumulates the values added of all domestic producers. The values added are determined as the difference between the value of goods and services produced (output values) and the input values for production (intermediate consumption). A similar approach is taken by the EU VAT system. By taxing all B2B and B2C supplies of taxable persons, the outputs of the producers are taxed. By further allowing input tax deductions for the tax collectors, the values added at each stage of the supply chain are recorded. In an overall contemplation, GDP and EU VAT measure consumption possibilities of final consumers. The objective of both disciplines is to consider the value added of a certain country or taxable person only once by avoiding double counting of businesses’ intermediate consumption. After the cumulation of the values added, GDP calculations continue by adding taxes on goods and services – namely excises and VAT – and deducting product related subsidies. Factor costs are thereby transferred into market prices. The basis for VAT calculations are, on the other hand, net selling prices which include subsidies but excludes the tax itself.

A second way of calculating the GDP \((\text{Y})\) rests upon demand or expenditures and is often expressed by the following formula (see Figure 2):

\[
\text{Y} \equiv \text{C} + \text{I} + \text{G} + \text{NX}.
\]

The GDP is estimated according to a sum of expenditures for private consumption of final products (\(\text{C}\)), investments (\(\text{I}\)), government spending (\(\text{G}\)) and net exports (exports less imports, \(\text{NX} = \text{X} - \text{M}\)). In other words, all kinds of expenditures, whether they are made for consuming the out-

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136 This follows from: Regulation (EU) No 549/2013 Annex A para 1.133.
137 See pp 96 et seqq.
138 Gregory Mankiw (n 133) p 22; Gregory Mankiw and Mark Taylor (n 130) p 418.
139 This follows from: Regulation (EU) No 549/2013 Annex A para 1.133.
140 See Articles 73 and 78 of the EU VAT Directive.
141 Gregory Mankiw (n 133) p 18.
142 Investments in capital and investments which increase future consumption possibilities (e.g., inventory or new housing): Gregory Mankiw and Mark Taylor (n 130) p 421; Gregory Mankiw (n 131) p 479; under EU VAT law, the purchase of new houses by private households is categorized as consumption expenditures and mostly taxable but tax exempt.
143 Gregory Mankiw (n 133) p 27; Gregory Mankiw and Mark Taylor (n 130) pp 420–422; this GDP definition is used in the VAT literature, too – see for example: Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 26–28.
puts or adding wealth, are aggregated.\textsuperscript{144} According to the expenditure framework, final products are tangible goods (durables and non-durables) and intangible services which are both consumed and not further used in an additional production process.\textsuperscript{145} The categories of goods and services are known in VAT law, too. While the precise definitions may differ, the categories of consumption are in principle the same in order to ensure a broad basis of consumption.

Concerning the treatment of investments, a substantial difference between GDP and EU VAT consumption is disclosed. Macroeconomists assume that an increase in inventory stock has already raised the production output of a state which is why the value of inventory has to be added for GDP calculations.\textsuperscript{146} Instead, EU VAT law requires a market transaction, which marks the transition to the private sphere.\textsuperscript{147} Consequently, no final VAT consumption is captured when inventories are enlarged. This implies that the value added actually produced by a taxable person within a reporting period is often not the same as the release of goods and services for further production or private consumption. The reasons for such an asymmetry are manifold,\textsuperscript{148} but the fact that already produced goods have not yet been sold is one important factor. However, it is not the periodical value added which is important for VAT. The value added between birth and death of a business should be taxed\textsuperscript{149} and at the very end, the full value of private consumption constitutes the basis for taxation. Thus, the point of

\begin{thebibliography}{99}
\bibitem{144} Regulation (EU) No 549/2013 Annex A para 1.133; thus, (private and government) consumption is the same as GDP less investment and net exports: Ian Roxan, \textit{The nature of VAT supplies of services in the twenty-first century}, (15)(6) \textit{British Tax Review} (2000) 603 (609).
\bibitem{145} Gregory Mankiw (n 131) pp 476–477 and 479; Gregory Mankiw and Mark Taylor (n 130) pp 419 and 421.
\bibitem{146} Gregory Mankiw (n 133) pp 21–22; Gregory Mankiw and Mark Taylor (n 130) p 421; Gregory Mankiw (n 131) pp 477 and 479–480: when selling the goods, inventory is subtracted from GDP.
\bibitem{147} See pp 120 et seqq.
\end{thebibliography}
recording consumption is different between EU VAT and GDP calculations.

The reference point of expenditures is applied under GDP calculations and EU VAT. As aforementioned, GDP measures the output over a certain period. By applying the expenditure approach, some corrections are necessary to balance the calculated numbers of output produced and output sold (see for example the increase in inventory stock). Private expenditures are a component of the proxy which is employed for consumption under EU VAT law, too. As it is not possible to tax consumption in a literal meaning or instantaneously, expenditures for consumption are consulted. Furthermore, business investments are not part of the value added under EU VAT. Due to (full) input tax credits for taxable persons, their investments and interim consumption are not burdened with VAT. However, on the basis of the expenditure approach a GDP VAT is conceivable. Following such a method, both components of the GDP (consumption and investment) are taxed as it does not allow any adjustments for the input tax on capital goods. VAT would be a tax on private consumption and investments in capital goods.

Besides these discrepancies between GDP calculations and the concept of EU VAT, there exist further differences. This applies to the treatment of re-sales, calculated values and the underground economy. Depending on the single aspects, differences in the scope of the two concepts are identified. As raised by the discussion about the different treatment of inventory, the GDP seeks to measure the values of currently produced goods and services. As a consequence, used and re-sold goods are not captured since they have already contributed to the produced value of the economy and have raised the GDP at the time of production. As long as the re-sale takes

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Terra and Julie Kajus (n 126) p 281; this principle is also reflected in the treatment of unsuccessful entrepreneurs which are allowed to deduct their input VAT for preparatory and ceasing activities, see e.g.: ECJ of 14.02.1985 – C-268/83, Rompelman, ECLI:EU:C:1985:74 paras 22–23; of 29.02.1996 – C-110/94, Inzo, ECLI:EU:C:1996:67 paras 15–17; of 15.01.1998 – C-37/95, Ghent Coal Terminal, ECLI:EU:C:1998:1 para 19; of 21.03.2000, C-110/98 – C-147/98, Gabalfisa and Others, ECLI:EU:C:2000:145 para 45; of 08.06.2000 – C-400/98, Breitsohl, ECLI:EU:C:2000:304 paras 34 and 37; of 03.03.2005 – C-32/03, Fini, ECLI:EU:C:2005128 paras 20–23.

150 See pp 121 et seqq.

151 Ian Roxan (n 144) (612).

152 Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 15 (Glossary of VAT Terms) and 26.

153 Gregory Mankiw (n 131) p 477; Gregory Mankiw (n 133) p 21.
place within a C2C relationship, the scope of the GDP and EU VAT consumption is identical. However, in certain situations when second-hand goods are re-sold in a C2B relationship, the EU VAT Directive includes the second-hand goods. It is assumed that the goods re-enter the production cycle and thus enable further private consumption by a subsequent B2C transaction. Concerning this aspect, the scope of EU VAT consumption is broader than the one of GDP. By contrast, GDP includes imputed values which are not known under EU VAT law; the latter concept of consumption is more limited in this respect. For example, the GDP contains calculated rents of houseowners, which are “paid to themselves” and fictitious sums for governmental services like police or firefighter services which are not paid by the recipients. However, other calculated values for inter alia imputed rents for other goods like cars as well as home cooked meals and other self-made goods are not considered. All these kinds of self-supplies are not considered under EU VAT. Circumstances in which a missing market transaction is compensated by special EU VAT rules are so-called “deemed supplies” according to e.g. Articles 16 and 26 of the EU VAT Directive. Deemed supplies comprise primarily of situations in which taxable persons supply goods or services to themselves, related or other persons without any consideration. A further discrepancy between GDP and EU VAT is identified with regard to the underground economy and illegal transactions. The GDP does not include calculative values for production which is hidden from the government to evade taxes or for illegal activities. By contrast, supplies of the underground economy are (theoretically) contained in the concept of EU VAT consumption. The ECJ has determined some rules under which circumstances illegal activities are included. Illegal activities therefore broaden the scope of EU VAT consumption in comparison to the one of GDP.

The GDP measures consumption by calculating the output of an economy. By contrast, the EU VAT system assumes that consumption only occurs after a market transaction. The basis of both approaches is the convergence of supply and demand, the point of views, however, are different. According to the production approach, GDP is calculated with the help of

\[154\] See pp 133 et seqq.
\[155\] Gregory Mankiw (n 131) p 476; Gregory Mankiw (n 133) pp 22–23.
\[157\] See pp 167 et seqq.
\[158\] Gregory Mankiw (n 133) p 23.
\[159\] See pp 156 et seqq.
the values added at the production stages. This is the same method like under EU VAT. The critical divergence is the reference object: GDP sets the focus on a whole economy whereas VAT calculations are mainly based on one taxable person. Furthermore, both disciplines know the connection to expenditures even if the point in time of consideration is different. GDP calculations add an increase in inventory stock. Theoretically, consumption by private people is possible but the goods have not been acquired yet. By contrast, EU VAT laws ignore inventory, as this has not been exchanged for consideration yet. An exchange for consideration tags the transition from the production stage to the private sphere and lead to EU VAT consumption. Further differences exist with regard to imputed values, second-hand goods, the underground economy and illegal transactions. These differences cause concepts of consumption which are extended in different directions.

2. Microeconomics: Satisfaction as Consumption

Microeconomics analyzes consumer decisions and aims to explain individual behaviour. Microeconomic theory is defined as the “study of how households and firms make decisions and how they interact in specific markets.”

The standard microeconomic model explains consumer behaviour under the assumption that a rational human individual makes optimal economic decisions about the choice of consumption. In general, consumers make trade-off decisions between one good and another, between work and leisure (which also influences the amount of the available budget for consumption) and last but not least between consumption and saving (respectively the decision between consuming now or later). Consumers are assumed to be rational, selfish and to prefer more to less consumption.
Microeconomics follows the image of a completely rational human being. This concept is widely known as *Homo Oeconomicus* which is a fictitious person, an ideal type, which does not really exist in the real world. A similar notion is identified in EU VAT law. It is namely the prototype of an *average consumer* which has been developed by the ECJ. The *average consumer* serves as a reference point for VAT purposes to ensure neutrality between different transactions. Like the *Homo Oeconomicus*, it represents a model which has been developed to ease the reality. The court, however, decided in its initial judgment concerning e-books that every EU Member State may decide which characteristics are inherent to their own *aver-


165 CJEU of 11.09.2014 – C-219/13, *K Oy*, ECLI:EU:C:2014:2207 paras 25 and 30–33; this is in line with Opinion of Advocate General Paolo Mengozzi of 14.05.2014 – C-219/13, *K Oy*, ECLI:EU:C:2014:321 paras 54 and 62; the question whether reduced rates are allowed to be applied on e-books was further discussed in CJEU of 05.03.2015 – C-479/13, *Commission v France*, ECLI:EU:C:2015:141; of 05.03.2015 – C-502/13, *Commission v Luxembourg*, ECLI:EU:C:2015:143 and of 07.03.2017 – C-390/15, *RPO*, ECLI:EU:C:2017:174; meanwhile, the underlying problem has been solved and reduced rates can also be applied to e-books: see Article 98 paragraph 2 subparagraph 2 of the EU VAT Directive in connection with Annex III Number 6 (introduced by: Council Directive (EU) 2018/1713 of 6 November 2018 amending Directive 2006/112/EC as regards rates of value added tax applied to books, newspapers and periodicals (OJ L 286, 14.11.2018, pp 20–21) (hereafter: Council Directive (EU) 2018/1713); the topic was of great interest and was intensively discussed in the scholarly literature; see e.g.: Francesco Cannas, *Reduced Rates and the Digital Economy: The Treatment of...*
age consumer. This may lead to a split of the internal market into various different concepts of an average consumer. Assuming that average consumers are seen as the target of EU VAT (as a representative of each single consumer), this decision has to be regarded with certain suspicion. If the preferences, the derived levels of enjoyment or the existence of a benefit were interpreted differently for domestic average consumers, this would lead to a heterogenous concept of consumption under EU VAT law instead of a harmonized one.

The microeconomic starting point for the analysis of demand is consumer preferences. Microeconomic theory is based on the hypothesis that a consumer prefers one bundle of goods to another. In order to be able to predict the outcome of a consumer’s choice, it is first of all necessary to assess a consumer’s preferences. In microeconomics, preferences are a technical concept and describe relationships between bundles of goods. In the event that an individual is indifferent between certain bundles of goods, microeconomics describes these bundles graphically with the help of indifference curves.\textsuperscript{167} All goods on the same indifference curve produce the same utility for one individual. Utility is “the satisfaction derived from the consumption of a certain quantity of a product.”\textsuperscript{168} The utility function assigns a number to each consumption bundle. The higher the number, the more utility is associated with the goods. Thus, the discipline of microeco-
nomics establishes a link between consumer preferences and a level of satisfaction. This link has been reinforced by recent research which indicates that consumption choices depend on subjectively perceived product characteristics. Consequently, consumption is associated with a certain pleasure or happiness of an individual who will always choose the bundles of products that best suit his taste or desires. EU VAT law is based on a similar idea: a transaction is only taxable as long as an identifiable customer receives a benefit. Receiving a benefit may be equated with satisfaction through consumption.

The degree of satisfaction is limited by the available budget. A consumer is thus restricted in his choice because he cannot afford an infinite number of products. Fluctuations in income correspond to a parallel shift of the budget line and lead to changes in the optimal choice of consumers. Additionally, changes in price levels – which may be caused, inter alia, by the introduction of VAT or different tax rates – cause reductions of consumer budgets. Consumers therefore demand the best bundle of products they can afford by taking into account their preferences, the market prices of all goods and their budget constraints. By contrast, VAT is levied when goods and services are exchanged for an available budget. This occurs independently, for example, of other factor prices or customer preferences.

Microeconomics analyzes the total consumption of individuals and its dependence from the budget constraint. This is not relevant for EU VAT laws which only concentrate on the fact that consideration is exchanged in a single transaction. Microeconomic theory assumes that consumption is

171 Gregory Mankiw and Mark Taylor (n 130) pp 80 and 85; Hal Varian (n 167) pp 54–72.
172 Gregory Mankiw (n 131) p 428; Gregory Mankiw and Mark Taylor (n 130) p 85.
173 See pp 107 et seqq.
174 Gregory Mankiw (n 131) pp 426–427; Gregory Mankiw and Mark Taylor (n 130) pp 81–82; Hal Varian (n 167) pp 20–21.
175 Gregory Mankiw (n 131) pp 434–435; Gregory Mankiw and Mark Taylor (n 130) p 83.
177 Gregory Mankiw and Mark Taylor (n 130) p 98; Hal Varian (n 167) p 78.
composed of basic consumption and consumption dependent on income.\textsuperscript{178} Furthermore, consumers take intertemporal choices on consuming today or tomorrow.\textsuperscript{179} A correlation between the budget constraint and satisfaction (benefit) is (theoretically) also known in EU VAT law. However, the reference point of the EU VAT law is a single transaction and not a cumulative one. Each transaction against consideration is valued and taxed separately. The spending of income is one of the proxies which are used for the taxation of consumption. No exchange is possible without consideration.\textsuperscript{180} If a consumer has no income or assets (and cannot borrow), he will hardly be able to buy goods or services. VAT is not levied. This applies to the moment respectively to a single transaction as well as to an overall view. However, the level of total satisfaction which a consumer can afford is not taken into account under EU VAT law. Likewise, the factors influencing income or its composition are ignored. However, as EU VAT does not tax savings, the choice of consumers whether to consume today or tomorrow is not distorted.\textsuperscript{181}

Like any model, the \textit{Homo Oeconomicus} is a simple representation of reality.\textsuperscript{182} This concept as well as the standard economic model are often criticized and the characteristics have been disproved, as they do not reflect the way in which humans actually decide.\textsuperscript{183} Apart from the fact that \textit{John Maynard Keynes} described the consumption function as a “\textit{fundamental psychological law}”,\textsuperscript{184} psychology has only played a subordinate role in the ana-

\textsuperscript{178} Regarding these and other variables (like future expected income or wealth) see e.g.: Gregory Mankiw (n 133) pp 546–559 with further reference to John Maynard Keynes, \textit{The General Theory of Employment, Interest, and Money} (1936).

\textsuperscript{179} Concerning intertemporal choices see e.g.: Hal Varian (n 167) pp 182–202; see also \textit{Angus Deaton} on intertemporal choices and smooth consumption: Angus Deaton, \textit{Understanding Consumption} (1992); see also: Peter Schmidt (n 149) pp 16–20 who analyzes basic microeconomic assumptions from a VAT. He concludes that only the expenditures for consumption can assign a benefit to a consumer. The previous act of saving does not attribute any benefits to consumers.

\textsuperscript{180} Concerning the conditions underlying a taxable transaction see in particular the discussion on pp 120 et seqq.

\textsuperscript{181} Ian Roxan (n 144) (610).

\textsuperscript{182} Concerning the use of models see: Gregory Mankiw (n 131) p 22 and Hal Varian (n 167) pp 1–2.

\textsuperscript{183} Exemplary: \textit{Herbert Simon} points out, for instance, that humans are not rational maximizers but are satisfied with decisions which are “good enough”: Herbert Simon, \textit{Theories of decision making in economics and behavioural science} (49)(3) \textit{American Economic Review} (1959) 253–283; instead of fully rational, a human may act bounded rational: Gregory Mankiw and Mark Taylor (n 130) pp 104–107.

\textsuperscript{184} \textit{John Maynard Keynes} (n 178) p 96; Gregory Mankiw (n 133) p 559.
ysis of consumption to date. An influence of psychology on consumer choice has recently been investigated and poses further challenges for *Homo Oeconomicus*. This branch of economic research is called *Behavioural Economics* and it has fundamentally changed the perspective on rational human behaviour. As an example, the standard theory of microeconomics is based on the assumption of already existing preferences. According to psychological findings, preferences are constructed, can change depending on context or even become inconsistent over time. Moreover, an individual’s (consumption) decisions are affected by peer groups. All these psychological influences are not inherent in VAT considerations. In this context, only the question of whether a benefit is gained is relevant. The quality of such a benefit or whether the consumer is seeking the same kind of benefit in the future are not taken into account. It is impossible for tax authorities to research this kind of information as they have to rely on the *average consumer* model. There are no observable trends which could include psychological influences in EU VAT legislation.

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185 The origins of *Behavioural Economics* can be traced back to: Herbert Simon (n 183); see for an overview e.g.: Hal Varian (n 167) pp 585–600.

186 To this day, the “Prospect Theory” is one of the most important research works in the field of *Behavioural Economics*; see e.g.: Daniel Kahneman and Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, (47)(2) *Econometrica* (1979) 263–291; further prominent work, for example, was provided, by Richard Thaler, *The Winner’s Curse: Paradoxes and Anomalies of Economic Life* (1994) or Amos Tversky and Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, (211)(4481) *Science* (1981) 453–458.


The way in which microeconomists explain consumer demand suggests that demand is the benefit or satisfaction a consumer derives from consumption. In this context, the concept of consumer surplus helps to understand the relationship between paid prices for the goods and services and the value of benefits (utility) which is received from consumption.\textsuperscript{191} The concept of consumer surplus represents the difference between the price which a consumer was willing to pay and the actual price of a good. The price which the consumer was willing to pay is an indicator of the actual value of the good for a consumer.\textsuperscript{192} This can be tantamount to the satisfaction respectively benefit that consumers actually derive from their demand.\textsuperscript{193} However, the price which consumers are willing to pay cannot be reliably determined; especially not for a third party (such as the tax administration). It is rather an intrinsic value which cannot be the tax base for a consumption tax. Thus, the price actually paid for a good is not only an applied proxy in microeconomics but also in VAT law. It is a proxy for the satisfaction derived from consumption which should be, from a microeconomist’s point of view, maximized. For EU VAT reasons, the actual (subjective) price of the transaction reflects the benefits arising from consumption.\textsuperscript{194} It is the value which is determinable and, thus, verifiable for taxation.

In conclusion, it can be said that standard microeconomic theory tries to explain why individuals demand products. The optimal consumer choice depends on consumer preferences, their budget constraints and market prices. The market prices of goods and services express the satisfaction which a consumer achieves by purchasing certain goods or services. In the same way, the (subjective) price of a VAT transaction expresses an exchanged benefit. In this context, especially the digital economy poses new problems. Online businesses promote “free” supplies which satisfy consumers. Thus, no monetary consideration is agreed which expresses the value of satisfaction or benefit. Discussions focus on the question whether to tax such products under EU VAT law or not.\textsuperscript{195} The further debate in this academic work therefore aims at analysing whether it is necessary to intro-

\textsuperscript{191} Gregory Mankiw (n 131) p 135; Gregory Mankiw and Mark Taylor (n 130) pp 80–81.
\textsuperscript{192} Gregory Mankiw (n 131) p 134; Gregory Mankiw and Mark Taylor (n 130) pp 146–147; Hal Varian (n 167) pp 254 and 251–269.
\textsuperscript{193} Gregory Mankiw (n 131) pp 137–138.
\textsuperscript{194} Peter Schmidt (n 149) pp 16 and 20 with references to additional non-financial but non-determinative influences to VAT law.
\textsuperscript{195} See the discussion on pp 214 et seqq.
duce new parameters into the basic understanding of consumption for VAT, to reinterpret the concept or whether the classical framework helps to find a solution to current VAT problems.

II. Marketing: Consumers’ Needs and Wants

Marketing seeks to explore how to encourage potential customers to buy goods and services and, in the last resort, to consume the output of supply chains. Similar to microeconomics, which assume that preferences represent the starting point of consumption, marketing experts derive the demand for goods and services from consumer needs and wants. Marketing theory contains various approaches of how to market products. Yet all aim in the sale of goods and services and being profitable. Traditionally, the term *marketing* followed the image of an entrepreneur who went to a physical marketplace for selling goods. Back then, goods and services were produced according to predefined (mainly monetary) business objectives and marketing experts tried to convince consumers that they need and want the products. Nowadays, one of the memorable definitions centers the aim of “meeting [human and social] needs profitably”. Corporate marketing takes responsibility for customer value creation and sets the focus on the customer. The concept of EU VAT as a general consumption tax also focuses on the customer and his consumption rather than on the businesses which produce and sell goods and services. Nevertheless, the basic idea of an exchange of supply and demand is inherent to both marketing and EU VAT law.

It is common sense that a business’ endeavor is to realize profits. This is possible as long as there exist markets where (profitable) products are of-

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196 An overview of company philosophies that can be used to make products available is presented by: Philip Kotler and Kevin Keller (n 15) pp 42–47.
197 Philip Kotler and Kevin Keller (n 15) p 29.
198 Philip Kotler and Kevin Keller (n 15) pp 42–43.
199 Philip Kotler and Kevin Keller (n 15) p 27; for other definitions see e.g.: American Marketing Association, *Definition of Marketing* (https://www.ama.org/the-definition-of-marketing/, last accessed: 01.02.2020); Wayne Hoyer, Deborah MacInnis and Rik Pieters (n 28) p 15; Philip Kotler and Gary Armstrong (n 13) pp 28–29; Werner Pepels (n 15) p XVII.
200 Philip Kotler and Kevin Keller (n 15) pp 57–58; in this context see the work of Michael Porter who has developed a tool called the value chain: Michael Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* (1985).
ffered by suppliers and demanded by customers. From a marketing perspective, however, consumers will buy a product only if they are of the opinion that a specific good or service satisfies their needs by a higher degree than competitive ones.\textsuperscript{201} Furthermore, it is possible that not all demand can be met as supply of the respective goods or services is short.\textsuperscript{202} Hence, people are forced to make choices. In other words, consumers maximize their value – a combination of quality, service and price. This process depends \textit{inter alia} on search costs, imperfect information, product availability, restricted mobility and a budget constraint. Marketing experts aim at identifying, creating, communicating, delivering and monitoring such customer value.\textsuperscript{203} In a nutshell, marketing does not just seek to converge supply and demand in a way which promotes the own output but also intends to satisfy consumers.

Under the lens of marketing, consumption is a multi-phase process while EU VAT assigns it a single-level notion. Marketing experts aim at explaining consumer behaviour\textsuperscript{204} for being able to understand how marketing stimuli affect the consumers’ consciousness and in which way these lead to buying decisions. The questions of how consumers choose, acquire, use and dispose different offerings to satisfy their needs and wants should be answered.\textsuperscript{205} It appears that marketing attests consumption a dynamic, process-related and multi-phase nature which is not limited to the actual purchase. By contrast, EU VAT reduces the notion of consumption to a

\begin{footnotesize}
\textsuperscript{201} This thought can be derived from the definition of marketing: Philip Kotler and Kevin Keller (n 15) p 27.
\textsuperscript{202} Economics argue that supply is limited and that a market cannot meet demand of any household: Gregory Mankiw and Mark Taylor (n 130) p 2.
\textsuperscript{203} Philip Kotler and Kevin Keller (n 15) pp 33 and 150–151.
\textsuperscript{204} Concerning consumer behaviour see for example: Abraham Maslow, \textit{Motivation and Personality} (1954); consumer behaviour is affected by psychological deliberations and the consumer’s culture: Wayne Hoyer, Deborah Maclnnis and Rik Pieters (n 28) pp 11–15; for key psychological processes see: Philip Kotler and Kevin Keller (n 15) p 187–194; concerning a model of consumer behaviour and its characteristics: Philip Kotler and Gary Armstrong (n 13) pp 158–173; see also e.g.: Edmund McCarthy, \textit{Basic marketing: A managerial approach} (5th ed, 1975) pp 147–167.
\textsuperscript{205} Wayne Hoyer, Deborah Maclnnis and Rik Pieters (n 28) pp 5–10; Philip Kotler and Kevin Keller (n 15) p 179 with further references; for a five-stage model of the buying decision process: Philip Kotler and Kevin Keller (n 15) pp 194–202 or Philip Kotler and Gary Armstrong (n 13) pp 175–178; it is a process of problem-solving: Edmund McCarthy (n 204) pp 149–151 who adapts his definition from James Myers and William Reynolds, \textit{Consumer Behaviour and Marketing Management} (1967) p 49.
\end{footnotesize}
transaction and the transmitted benefit. Pre-purchase considerations or post-purchase factors are not respected. Just in special cases a transaction is withdrawn and consumption is not recognized. This, in turn, implies a static and single-level notion of consumption which does not even include the common understanding of “use” as a synonym for consumption.

Marketing assumes that consumers satisfy their needs whereas VAT experts reason that consumers receive benefits. Every individual is provided with a lot of needs. For instance, hunger, thirst or discomfort are an expression of a lack of physiological comfort (so-called biogenic needs). Other needs are psychogenic as they are based on psychological conditions of tension and result in a need for recognition, esteem or belonging. The higher the level of intensity, the higher the motivation to overcome the need. Needs will change into wants when they get focused on a specific item which may satisfy a specific need. Wants are affected inter alia by cultural and social (peer-group) influences. Consequently, marketers cannot create needs; they already exist. Marketing experts rather try to convince customers that a specific product meets their intrinsic needs. Finally, people who are equipped with an ability to pay, potentially transfer their wants into economic demand. Hence, it is not merely critical who requests goods and services, but also who can afford them. After realising economic demand, consumers enjoy certain levels of satisfaction. The level of satisfaction depends on the perceived performance outcome when consuming the products compared to the respective customer’s preceding expectations. As already pointed out, EU VAT law requires the transfer of a ben-

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206 See pp 159 et seqq.
207 Wayne Hoyer, Deborah MacInnis and Rik Pieters (n 28) pp 48–52; Philip Kotler and Gary Armstrong (n 13) p 30; Philip Kotler and Kevin Keller (n 15) pp 31 and 187; Edmund McCarthy (n 204) p 152.
208 Wayne Hoyer, Deborah MacInnis and Rik Pieters (n 28) pp 13–14 and chapters 11–14; Philip Kotler and Gary Armstrong (n 13) p 30; Philip Kotler and Kevin Keller (n 15) pp 179–187; Edmund McCarthy (n 204) pp 149 and 156–162; see e.g. the bandwagon-effect (people buy certain products because these are bought by others) or the snob effect (people do not buy certain products because these are bought by groups they would not belong to): Werner Pepels (n 15) p 47.
209 Philip Kotler and Kevin Keller (n 15) p 31.
210 Philip Kotler and Gary Armstrong (n 13) p 30; Philip Kotler and Kevin Keller (n 13) p 31.
211 The range is defined from dissatisfaction to satisfaction and enthusiasm: Philip Kotler and Kevin Keller (n 15) pp 33, 153–155 and Glossary: satisfaction with further references; Wayne Hoyer, Deborah MacInnis and Rik Pieters (n 28) pp 264–272; Philip Kotler and Gary Armstrong (n 13) p 31.
Synonymously to satisfaction, the enjoyed benefits may be derived from economic demand respectively taxable market transactions. For marketing, it is necessary that the sold goods and services satisfy consumers positively to achieve further sales. Concerning EU VAT law, the quality of the benefit is irrelevant. Products which provoke undesirable consequences are also taxed. This may be interpreted as the transfer of a negative benefit.

Marketing and sales taxes are both target to catch economic demand. While marketers actively try to raise consumer demand, VAT laws profit from its appearance. According to the described process above, consumers must be motivated to transform their needs into wants and economic demand. Motivation is defined as “an inner state of activation”. However, consumer behaviour is not always easily predictable. It is sometimes irrational and the context in which a decision is made matters. In any case, it is influenced by psychological factors. Depending on the level of motivation, a consumer decides which needs he likes to serve and ranks the chosen ones according to the order in which they should be compensated. Different theories about how such an order of priority is created, exist. According to the Two-factor Theory which was coined by Frederick Herzberg, dissatisfiers which cause dissatisfaction and satisfiers which cause satisfaction exist. While satisfiers are necessary for motivation, dissatisfiers do not motivate people to make purchases. Abraham Maslow examined the question why people satisfy specific needs at a certain time. His basic find-

212 See pp 107 et seqq.
213 Wayne Hoyer, Deborah MacInnis and Rik Pieters (n 28) p 45.
214 For an overview of the influence of behavioural decision theory on marketing see: Philip Kotler and Kevin Keller (n 15) pp 202–205 with further references; concerning framing effects: Wayne Hoyer, Deborah MacInnis and Rik Pieters (n 28) p 213 with further references; Daniel Kahneman and Amos Tversky (n 186).
215 Psychological factors which highly affect consumer behaviour are motivation, ability and opportunity, exposure, attention, perception and comprehension memory, knowledge and attitudes about an offering: Wayne Hoyer, Deborah MacInnis and Rik Pieters (n 28) pp 11–12 and chapters 2–6; Philip Kotler and Kevin Keller (n 15) pp 187–194.
216 Different theories on motivation are coined by Sigmund Freud, Frederick Herzberg and Abraham Maslow: Philip Kotler and Kevin Keller (n 15) pp 187–189.
ings are based on a hierarchy of human needs which are ordered from most to least imperatively. The most basic needs are physiological ones, followed by safety, social, esteem (status, recognition and self-respect) and self-actualization needs (a desire for self-fulfillment). Only when the most pressing need at a lower stage of the hierarchy is satisfied, another one will be motivating. Under Maslow’s theory, all needs therefore emanate motivation at one or another time.\(^{218}\) EU VAT law does not ask why a consumer consumes. But it is important that a benefit is transferred to the consumer. Such benefit can be the satisfaction derived from demand.

To realize economic demand, consumers must be equipped with the ability to pay the products of desire.\(^{219}\) This basic assumption is inherent to both marketing science and the EU VAT law. The concept of EU VAT as a general consumption tax rests on the assumption that received income is used to acquire consumption possibilities.\(^{220}\) The price of a good or service determines whether it is affordable or not and it influences the consumer’s choice.\(^{221}\) Numerous marketing pricing strategies exist.\(^{222}\) For example, goods are also given away to attract other sales.\(^{223}\) Due to digital technologies, price setting becomes more transparent. This development increases price pressure, especially on vendors of undifferentiated products.\(^{224}\) On

\(^{218}\) Abraham Maslow (n 204); Wayne Hoyer, Deborah MacInnis and Rik Pieters (n 28) p 49; Philip Kotler and Gary Armstrong (n 13) pp 171–172; Philip Kotler and Kevin Keller (n 15) p 188; Edmund McCarthy (n 204) p 154.

\(^{219}\) Philip Kotler and Kevin Keller (n 15) p 31.

\(^{220}\) See pp 120 et seqq.

\(^{221}\) Within the framework of the 4 A’s, the aspect of affordability is not just driven by an economic dimension whether a product is affordable, but also from a psychologic dimension whether consumers are willing to pay a certain price: Philip Kotler and Kevin Keller (n 15) p 48; concerning the concept of 4 A’s see e.g.: Jagdish Sheth and Rajendra Sisodia, *The 4 A’s of Marketing: Creating Value for Customer, Company and Society* (2012).


\(^{223}\) Concerning free samples, premium (gifts) and free trials see: Philip Kotler and Kevin Keller (n 15) pp 485 and 624 with further references; see also: Koen Pauwels and Allen Weiss, *Moving from Free to Fee: How Online Firms Market to Change Their Business Model Successfully*, (72)(3) *Journal of Marketing* (2008) 14–31.

\(^{224}\) Philip Kotler and Kevin Keller (n 15) p 537.
the other hand, the internet offers businesses more possibilities for discriminating single customers in terms of pricing. Data mining promotes personalized, relationship- and response-oriented selling.\textsuperscript{225} Personal data enables marketers to draw conclusions about each customer’s individual spending power and to adjust offers and prices by taking into account the actual buying behaviour of a customer. Moreover, individualized pricing is promoted by online auctions at which vendors and customers can negotiate prices for every single transaction.\textsuperscript{226} These are only a few examples of how modern technologies influence pricing strategies. VAT can cope with individual price setting very well as the actual negotiated net price is the basis for VAT calculations. Only in rare cases, an objective price has to be set by the tax collectors.\textsuperscript{227} Concerning the give away of goods or services, the rules for deemed supplies must be applied.\textsuperscript{228} In marketing, the price of a product is closely linked to the perceived benefit.\textsuperscript{229} Such consumer benefits are not considered under EU VAT determination of the tax base. The tax is an \textit{ad valorem} tax which is calculated solely on the basis of the net sales prices of goods and services.

Generally, the marketing function seeks to promote business products. In order to attract consumer demand, the consumers must be motivated to overcome their needs and feelings of a deficit. It is a process which EU VAT does not take into account. Taxation harnesses the observable outcome of consumer behaviour as it applies market transactions as a proxy. However, by requesting the transfer of a benefit, the consumer perspective is emphasized, too. Only if the recipient of a transaction receives a benefit (respectively derives satisfaction), VAT will be charged. Both disciplines are based on the requirement that consumers must be equipped with the ability to afford the goods or services. In both disciplines, sales prices are an important measure of consumption. However, the underlying concepts are different.

\begin{itemize}
\item \textsuperscript{225} Philip Kotler and Kevin Keller (n 15) p 597.
\item \textsuperscript{226} Philip Kotler and Kevin Keller (n 15) p 484.
\item \textsuperscript{227} See e.g. Article 80 of the EU VAT Directive.
\item \textsuperscript{228} See pp 167 et seqq.
\item \textsuperscript{229} Philip Kotler and Gary Armstrong (n 13) p 308; Hermann Simon, \textit{Preismangement} (1992) p 3.
\end{itemize}
III. Taxation other than Value Added Taxation

The previous concepts of consumption are derived from research fields beyond from taxation. In order to provide a holistic overview on taxation of consumption, the following considerations deal with taxes other than EU VAT which are also influenced by some consumption deliberations. Concerning direct taxes, ideas with regard to the integration of consumption aspects are not unknown. In contrast to their general endeavors to tax realized income (and wealth), different ideas to integrate mechanisms which normally categorize a consumption tax into direct taxes are presented. By contrast, it is also possible to design VAT laws in a way which fulfils the ideas of direct taxation (1.). In addition, certain consumption taxes are designed as specific excises and are distinct from EU VAT concerning their scope of taxation. Excises tax quite certain and definable objects. Nevertheless, their understanding of consumption is similar to the one which underlies EU VAT (2.).

1. Taxing Consumption and Direct Taxation

Commonly, tax law is characterized by a split into direct and indirect taxes.\(^{230}\) Direct taxes are typically levied on earned income of individuals, partnerships, corporations or on holding wealth.\(^{231}\) The definition of income is broad and includes “anything which contributes to the ability to command goods and services for personal use”.\(^{232}\) By contrast, indirect taxes establish a link to the use of income or wealth for consumption. This leads to the need to differentiate between taxation at the source of income and taxation of transactions. However, sometimes it is not possible to say exactly whether a tax is a burden on the use of income or the source of income. Especially such hybrid forms of taxation, i.e. taxes that deviate from or mix up the known categories of direct

\(^{230}\) The distinction between direct and indirect taxes is sometimes criticized: Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 5; Ben Terra and Julie Kajus (n 126) p 253 with further references; Victor Thuronyi, *Comparative Tax Law* (2003) pp 54–55 with further references.

\(^{231}\) Such taxes are usually levied directly, with a few exceptions such as withholding taxes.

and indirect taxes, make it difficult to make a clear distinction.\textsuperscript{233} Hybrid taxes are often called consumption-based income taxes or cash flow taxes and depict mostly direct taxes which include some consumption elements and which seek to tax income or an economic rent.\textsuperscript{234} The hybridization of income and consumption taxes is not a new phenomenon,\textsuperscript{235} but since the OECD’s BEPS initiative, the global introduction of new taxes combining income taxes on profit with consumption elements can be observed. These taxes, for example, question the application of double tax treaties, which clearly focus on typical income taxes.\textsuperscript{236}

\begin{thebibliography}{99}
\bibitem{233} Roland Ismer and Christoph Jescheck, \textit{The Substantive Scope of Tax Treaties in a Post-BEPS World: Article 2 OECD MC (Taxes Covered) and the Rise of New Taxes}, \textit{InterTax} (2017) 382 (383); Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 7; at least, the differences between the two kinds of taxes are not as clear as they are commonly supposed to be: Ian Crawford, Michael Keen and Stephan Smith (n 75) p 276.


\bibitem{235} Wolfram Reiß, in Wolfram Reiß, Jörg Kraeusel and Michael Langer, \textit{UStG} (loose leaf 153rd August 2019) Einführung UStG para 10.1 with further references; see also: Peter Schmidt (n 149) p 1 with further references.

\bibitem{236} See Article 2 of the OECD Model Tax Convention; Roland Ismer and Christoph Jescheck (n 233) (385 and 388); problems occur, for example, concerning the In-

\end{thebibliography}
Depending on the *modus operandi* of collecting taxes, it is possible to tax consumption which is based on the budget of a person (indirect calculation) or by directly calculating the expenditures for consumption.\textsuperscript{237} For example, the British economist Nicolas Kaldor suggested a consumption-based income tax which should be calculated on the basis of annual personal consumption expenditures.\textsuperscript{238} According to Nicolas Kaldor, gradual tax rates should be applied instead of constant tax rates which are known from VAT. As known from direct income taxes, the taxpayers should be forced to declare their expenditures annually and to pay the tax directly to the government. Each taxpayer would be directed to declare all received income and to collect all receipts for consumption expenditures. Carefully defined investments should be deductible. The remaining difference would then be consumption, which should be the tax base.\textsuperscript{239}

Hybrid forms of taxation are often distinct from traditional income taxes with regard to the taxation of capital gains, periodic recording and depreciations. These differences lead to an alignment to EU VAT laws. Concerning cash flow taxes, one distinction covers periodical adjustments and valuations which have not to be included as such taxes record only realized cash flows. The principle of legal certainty is emphasized by this kind of taxes.\textsuperscript{240} This procedure is reminiscent of EU VAT and its link to transac-
A further difference of hybrid taxation to traditional income taxes lies in the irrelevance of returns on capital. Like under EU VAT law, interest income, dividends or other capital gains are not taxed according to hybrid taxes since no opportunity for consumption is transferred. That is why taxation has no influence on the decision of consuming today or in another tax period. Furthermore, suggested consumption-based income taxes regularly allow full deductibility of capital assets without the necessity of depreciations. In other words, consumption-based income taxes treat investments neutrally. By contrast, income taxes mostly allow deductions only through depreciation. Full deduction of investment expenditures is comparable to full input tax deduction under EU VAT. In either case, the expenses are deducted instantly without any positive or negative time effects.

Recently, a debate about the introduction of a consumption-based corporate income tax occurred in the United States of America (USA). In addition to previous proposals which recommended to introduce such a tax, the recent reform approach has been pursued but not adopted (yet) by the Trump administration. The “new” tax should be a destination-based

241 Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 7 with further references; Peter Schmidt (n 149) p 50.
242 Wolfram Scheffler (n 240) pp 104 and 115; Peter Schmidt (n 149) pp 22–25 and 51 with further references.
243 Wolfram Scheffler (n 240) p 104.
244 Wolfram Scheffler (n 240) pp 105–106.
245 Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 22 with further references to the reform proposals; see also: Robert van Brederode, An American Perspective on European VAT and the Role of the CJEU, in CJEU – Recent Developments in Value Added Tax 2014 (Michael Lang et al eds, 2015) pp 36–37 with further references.
246 Applying border tax adjustments implies a shift from common income taxation according to the source-principle to a consumption base with territorial effects like the destination country principle: Roland Ismer and Christoph Jescheck (n 233) (385); in contrast to ordinary cash flow taxes, the DBCFT should apply border tax adjustments which work exactly like under many VAT systems applying the destination country principle: Alan Auerbach and Douglas Holtz-Eakin, The Role of Border Adjustments in International Taxation (2016a) (https://eml.berkeley.edu/~auerbach/The%20Role%20of%20Border%20Adjustments%20in%20International%20Taxation%202012–2–16–1.pdf, last accessed: 01.02.2020) (6); border tax adjustments of the two taxes would not be identical: Peter Barnes and David Rosenbloom, The Destination-Based Cash Flow Tax Is a VAT?, (71)(6a) Bulletin for International Taxation (2017) 20–21; concerning a discussion of border taxes and the GATT in a more general context see e.g.: Milton Leontiades, The Logic of Border Taxes (19)(2) National Tax Journal (1966) 173–183.
cash flow tax with border tax adjustments\(^{246}\) (DBCFT\(^{247}\)) that charges consumption, but not in the same way as VAT is levied. Currently, all member

states of the OECD – with the notable exception of the USA248 – have introduced a VAT. Despite the idea of introducing border tax adjustments,
the Trump administration’s proposal was based more on the introduction of a different kind of a hybrid tax than on a commonly known VAT. The basic idea was similar to cash accounting.\textsuperscript{249} The DBCFT should tax the difference between incoming and outgoing payments. By contrast to a VAT, the tax base of the DBCFT was suggested to be narrower as wages should be deductible.\textsuperscript{250} Like VAT, investment costs should be fully and immediately deductible instead of calculating any depreciation. Furthermore, no taxation of interests was planned.\textsuperscript{251} Because of these characteristics, some scholars consider the DBCFT a VAT of the subtraction type with a tax relief for wages.\textsuperscript{252}

So far, the hybridization of direct and indirect taxes was discussed from the standpoint that the paradigm of taxing consumption instead of income or wealth was inherent to a direct tax system. However, VAT laws may conversely include elements of “classic” direct taxes. Such kind of deliberations are especially contained in the ideas of levying VAT on income or on a gross-domestic-product basis instead on consumption.\textsuperscript{253} In principle, consumption-based VATs are categorized by immediate deduction of all input tax.\textsuperscript{254} Thus, a discount for capital goods, inventory and intermediated goods and services has to be always granted as long as these are used for production of a goods and services tax in Australia, (22)(3) British Tax Review (2007) 320–348.

\textsuperscript{249} Johannes Becker and Joachim Englisch (n 234) (3); Werner Engelen (n 247) (201).

\textsuperscript{250} Alan Auerbach and Douglas Holtz-Eakin (n 246) (6); Johannes Becker and Joachim Englisch (n 234) (3).

\textsuperscript{251} Alan Auerbach and Douglas Holtz-Eakin (n 246) (6); Roland Ismer and Christoph Jescheck (n 233) (385).

\textsuperscript{252} Johannes Becker and Joachim Englisch (n 234) (7); Werner Engelen (n 247) (202); Joachim Englisch and Johannes Becker (n 236) (35); furthermore, it is pointed out that an introduction of the DBCFT at EU level would be an opportunity to eliminate the co-existence of corporate taxation and VAT: Johannes Becker and Joachim Englisch (n 234) (19–24); a similar idea in connection with cash flow taxes is presented by Peter Schmidt (n 149) p 57 with further references; concerning the relationship between personal income taxes and VAT in connection to a DBCFT see: Ian Crawford, Michael Keen and Stephan Smith (n 75) p 294; however, EU harmonization of direct corporate taxes is based on a loose footing – see e.g.: Lucia Hrehorovska, \textit{Tax Harmonization in the European Union}, (34)(3) Intertax (2016) 158–166.

\textsuperscript{253} Kathryn James (n 234) p 36 with further references; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 14 (Glossary of VAT Terms); Peter Schmidt (n 149) p 43.

\textsuperscript{254} Liam Ebrill et al (n 5) pp 17–18; Ben Terra (n 149) p 44; Ben Terra and Julie Kajus (n 126) p 269; internationally not all countries allow for full or immediate
economic activities.\textsuperscript{255} This ensures neutrality of VAT with regard to labour and production.\textsuperscript{256} The main difference between a commonly known VAT on consumption and a VAT on an income or GDP basis is the different treatment of capital goods.\textsuperscript{257}

Firstly, a VAT system which is designed according to income tax guidelines does not provide the possibility for an immediate deduction of input tax on capital goods which is a clear contrast to the EU VAT system (a so-called \textit{“income style”} VAT). The deductions of input tax under an income style VAT are calculated according to depreciation guidelines which are known from common direct income tax law.\textsuperscript{258} Such an approach promotes the tendency to classify spending as current expenditures rather than as an investment in capital goods.\textsuperscript{259} In general, a consumption-based
VAT allows for immediate deduction of input tax. Just in a few cases, namely when the use of investments changes after certain periods, some tools which remind of depreciations are applied:260 these are special rules concerning adjustments of initial input tax deductions.261 The ideas about an income style VAT have largely disappeared262 and like most VATs worldwide, the European VAT is a consumption-type VAT rather than an income-based VAT.263

Secondly, a gross-domestic-product VAT (a so-called “product type” VAT) would allow no deductions of input VAT for capital goods at any time.264 Consequently, under such a sales tax, investments in capital goods are taxed twice: for the first time when they are bought and for the second time when the outputs of businesses are sold.265 A strong incentive to classify capital goods as current expenditures or to invest in self-constructions in order to deduct input tax, is given. In the scholarly literature, the discrimination of capital-intensive production is labelled as a curiosity which should not be considered seriously.266

In a nutshell, some hybrid forms of direct and indirect taxes blur the line between the two kinds of taxation. Besides other disparities, one crucial differentiator between consumption-based income taxes, cash flow tax-
es (at an individual or corporate level), the DBCFT and current applied income taxes depicts the taxation of returns on capital. Resulting from the comparison of the DBCFT with border tax adjustments and common VAT systems, it can be asserted that the deduction of wages depicts an important further distinction. On the other hand, income-type VATs or GDP VATs have characteristics of income taxes due to a different handling of input tax deduction for capital goods. Thus, there exist two possible starting points for hybridization: an inclusion of consumption aspects in income tax laws and a possible adjustment of VATs with the target of pursuing income tax objectives. It seems possible to change the character of a tax by only altering single components of a tax base. Nevertheless, the tax bases of such hybrid taxes are not identical to the broad concept of consumption which is pursued under EU VAT law. The notion of consumption under EU VAT is strictly aligned to the underlying idea of a private person who consumes goods and services. The products are taxed in proportion to their final selling prices.

2. Excise Taxes: Selective Taxation of Consumption

EU excise duties and EU VAT are all taxes on consumption but they are not identical in their technical design or their concept of consumption. EU excises taxes are mostly levied in an indirect way. Whereas EU VAT is an all-stage but non-cumulative tax, excise duties are just single-stage taxes. The greatest difference, however, is based on the scope of taxation: Excises only tax specific products whereas EU VAT applies a top-down approach to cover a very broad concept of private consumption.

Excise duties are levied on selected goods and services. They constitute one of the oldest forms of taxation which is applied worldwide. More-

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267 Two categories of consumption taxes are distinguished: general and specific taxes on consumption: OECD (2015a), BEPS Action 1 – Final Report (n 2) para 42.

268 Sijbren Cnossen (n 232) p 1 with further references; concerning the origin of the term “excise” see for example: Ben Terra, Excises, in Tax Law Design and Drafting (Victor Thuronyi ed, 1996) pp 247–248; concerning a short historic overview since the antiquity: Ferdinand Kirchhof, Umsatzsteuer und Besondere Verbrauchsteuern, in 100 Jahre Umsatzsteuer in Deutschland 1918–2018 Festschrift (UmsatzsteuerForum e.V. and Bundesministerium der Finanzen eds, 2018) pp 61–62 with further references or Reimer Voß, Strukturelemente der Verbrauchsteuern, in Zölle, Verbrauchsteuern, europäisches Marktdordinungsrecht (Heinrich Kruse ed, DStJG vol 11, 1988) pp 263–265 with further references; for a German
over, they are categorized as consumption taxes like most VAT systems.\textsuperscript{269} Sijbren Cnossen refers to excises very generally as “all selective taxes on tobacco products, alcoholic beverages, petroleum products, motor vehicles, pollutants, luxury items and other goods and services selected for specific taxation – whether imported or produced domestically.”\textsuperscript{270} In a similar manner, the OECD outlines excises as “taxes levied as a product specific unit tax on a predefined limited range of goods. Excises are usually levied at differentiated rates on nonessential or luxury goods, alcoholic beverages, tobacco, and energy. Excises may be imposed at any stage of production or distribution and are usually assessed as a specific charge per unit based on characteristics by reference to the value, weight, strength, or quantity of the product. Included are [...] taxes levied on tobacco goods, alcoholic drinks, motor fuels, and hydrocarbon oils. [...] Excises exclude those taxes that are levied as general taxes on goods and services [...].”\textsuperscript{271} Especially the last part of this definition highlights a major difference to value added taxation: both taxes are levied on consumption of goods or services, but their scopes are different. EU VAT is a broad consumption tax whereas excises are selective.

\begin{itemize}
\item Historic overview see: Matthias Bongartz and Sabine Schröer-Schallenberg, \textit{Verbrauchsteuerrecht} (2nd ed, 2011) paras A4-A6 with further references; concerning international examples see e.g.: Sijbren Cnossen, \textit{The Role and Rationale of Excise Taxes in the ASEAN Countries}, (59)(12) \textit{Bulletin for International Taxation} (2005) 503–513 or Hugo Kaplan (n 254) (346–348); however, while a general shift from direct taxation of income and wealth to indirect taxation of consumption can be observed, specific excise taxes lose importance compared to general consumption taxes: Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 12–14.
\item Further characteristics of excise taxes are e.g., progressivity in nature, efficiency, revenue sufficiency, flexibility, simplicity, certainty, selectivity: Sijbren Cnossen (n 232) pp 1–4 and 7; see also: Sijbren Cnossen (n 268) (503); Ben Terra and Julie Kajus (n 126) p 248; see also: ECJ of 24.02.2000 – C-434/97, \textit{Commission v France}, ECLI:EU:C:2000:98.
\end{itemize}

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At EU level, excises as well as VAT are harmonized under Article 113 TFEU. Current Community legislation of excises is based on the Council Directive 2008/118/EC of 16 December 2008. The level of harmonization is not as advanced as it is for the EU VAT system. The common features just include the scope and structure of excises on energy products and electricity, alcohol and alcoholic beverages as well as

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manufactured tobacco. In accordance with this list of excise goods, Article 2 paragraph 3 of the EU VAT Directive refers to “products subject to excise duty” as “energy products, alcohol and alcoholic beverages and manufactured tobacco, as defined by current Community legislation”. Thus, a common definition and understanding of excise duties between the two Council Directives is established. The two kinds of taxes are mutually exclusive.

The EU Member States are allowed to levy additional and non-harmonized selective taxes on consumption. Hence, consumption is sometimes taxed twice or even several times. The historically established variety of excises within the EU Member States could not be replaced by a fully unional consistent system. Article 1 paragraphs 2 and 3 of the Council Directive 2008/118/EC allow EU Member States to levy excises on other goods which are not enumerated above. This concession leads to a boost of ex-


277 ECJ of 24.02.2000 – C-434/97, Commission v France, ECLI:EU:C:2000:98 para 24; sales taxes are the successor of excises: Sijbren Cnossen (n 232) p 114; a parallel taxation (VAT and (non-harmonized) excise taxes) should be interpreted liberally: Rainer Wernsmann, Möglichkeiten und Grenzen der gemeindlichen Steuerautonomie: Steuerfindungsrechte sowie örtliche Aufwand- und Verbrauchsteuern, in Kommunalsteuern und -abgaben (Joachim Wieland ed, DStJG vol 35, 2012) p 103 with further references; in this context see also Article 401 of the EU VAT Directive and the remarks on pp 96 et seqq; Article 401 of the EU VAT Directive is a very high barrier which allows many excise taxes: Ferdinand Kirchhof (n 268) pp 74–75.

278 Matthias Bongartz and Sabine Schröer-Schallenberg (n 268) para C25; Joachim Englisch (n 273) para 123; Ferdinand Kirchhof (n 268) pp 63–64.

279 E.g., excises on services are allowed according to Article 1 paragraph 3 lit b) of the Council Directive 2008/118/EC; see: Harald Jatzke (n 269) pp 51–53 with further references; excises on services are seldom: Ben Terra (n 268) p 247; Matthias Bongartz and Sabine Schröer-Schallenberg (n 268) paras B11-B12; Karina Sopp, Verbrauchbesteuerung beim grenzüberschreitenden EU-weiten Warenhandel nach der Novellierung des Verbrauchsteuerrechts und deren Verhältnis zur Umsatzsteuerung, (59)(18) Umsatzsteuer-Rundschau (2010) 677 (678); concerning the differences between paragraph 2 and 3 see: Joachim Englisch (n 273) para 107 with further references to ECJ of 10.06.1999 – C-346/97, Braathens, ECLI:EU:C:1999:291; of 09.03.2000 – C-437/97, EKW and Wein & Co, ECLI:EU:
cise taxes within the EU.  

While EU VAT is levied at state level, EU excises are levied at federal state and local level, too; for example, Germany introduced excise taxes at state level, federal state level and also local consumption taxes. Consequently, consumption is taxed in an unbalanced way. The parallelism of harmonized and non-harmonized excises and EU VAT leads to the issue of multiple taxation of consumption. Consumption, consumers, producers, vendors and competing or substitutable goods and services are treated unequally in different EU countries. Scholars therefore demand the abolition of excise duties. They argue that tax revenue should be derived only from the broad and neutral VAT on consumption.

Like VAT, excises are mostly designed as indirect taxes. Indirect taxes are characterized by the fact that they are not collected by people who
should be actually burdened with the charge. In other words, an indirect collection method leads to a divergence between the person who pays the tax to the authorities and the person who suffers a reduction of his income.  

288 Excises, for example, are collected by producers and importers which should not be burdened.  

289 On the other hand, a direct tax collection mechanism is often too impractical. Under an indirect tax scheme, businesses pass on the taxes which they had already paid along the supply

ventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges”.

288 John Mill, *Principles of political economy with some of their applications to social philosophy* (William Ashley ed, 1909) book V, chapter III, p 823; Robert van Brederode (n 258) pp 26–27; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 5; Ben Terra (n 149) p 12; Ben Terra and Julie Kajus (n 126) pp 252–253.


290 Article 1 paragraph 1 of the Council Directive 2008/118/EC does not prohibit a direct collection mechanism; see e.g.: Harald Schaumburg, *Das Leistungsfähigkeitsprinzip im Verkehr- und Verbrauchsteuerrecht*, in Festschrift für Wolfram Reiss zum 65. Geburtstag (Paul Kirchhof and Hans Nieskens eds, 2008) p 37; concerning examples of (non-harmonized) direct excise taxes in Germany see: Joachim Englisch (n 273) paras 109 and 120–121; see also: Matthias Bongartz and Sabine Schröer-Schallenberg (n 268) para C11; direct and indirect excise systems are in line with the historic development: Reimer Voß (n 268) p 263 (with a few examples and further references); also within the context of a general sales tax, direct collection mechanisms exist – the Canadian GST, for instance, is called a direct tax: Ben Terra and Julie Kajus (n 126) p 47 at footnote 265; this may be the case because of GST/HST credits within the personal income tax: Pierre-Pascal Gendron, *Canada’s GST at 21: a tax expenditure view of reform*, (1) (2) *World Journal of VAT/GST Law* (2012) 125 (138); for interprovincial transactions, customers must often self assess the tax: Robert van Brederode and Pierre-Pascal Gendron, *The taxation of cross-border interstate sales in federal or common markets*, (2)(1) *World Journal of VAT/GST Law* (2013) 1 (18–19), direct collection is also sometimes the case in the US – compliance seems to be low (page 22 of the paper); see also: Carsten Farr, *Umsatzsteuer in der Islamischen Republik Iran*, (52)(12) *Umsatzsteuer-Rundschau* (2003) 573 (575) who notes that self-assessment for cross-border taxation at business and private level seems not to be a work-
chain to the private consumers which should actually bear the duties. One way to realize this is that the businesses can rise their sales prices to achieve the shifting. Consumers may be unaware of the tax amount which is contained in the final B2C purchase price as no identification of the tax is necessary under excise duties. However, EU VAT laws require the identification of the indirect tax burden on the invoice. There is a controversy whether the tax shifting is a main feature of excises or just the consequence of the indirect collection mechanism. Businesses are not forced to hand on the tax by rising their sales prices or by including the tax amount in their cost calculations. However, economic reasons may drive them to do so. The legislators are not obliged to guarantee a shifting in any case. They just have to guarantee that the tax design enables it; non-shifting in individual cases is harmless. By contrast, if the tax designers did not enable tax shifting, the consumption tax character would have to be negated. Commonly, the shifting of the tax along the supply chain may be difficult,
inter alia due to competitive reasons. Nonetheless, whether the tax shift succeeds or fails in a particular case does not matter for categorizing excises as consumption taxes.

An evident difference between the EU VAT and EU excise systems lies in the supply chain collection mechanism. The EU VAT system is designed as an all-stage process with input tax deduction. By contrast, excises are often characterised by a one-stage collection process, even if there are known single-stage general sales tax systems, too. Excises are levied at the retail stage or at a manufacturer stage. Retail stage collection is recommended because of the proximity to the actual consumer. This kind of excise duties (e.g. retail sales taxes) are levied without any corrections as the

297 Albert Beermann (n 294) p 283; see for further reasons e.g.: Matthias Bongartz and Sabine Schröer-Schallenberg (n 268) para C14.
299 See pp 96 et seqq.
300 Sijbren Cnossen (n 268) (505); Ian Crawford, Michael Keen and Stephan Smith (n 75) p 316 at footnote 49.
products are directly made available for consumption. Another kind of excises contains the benefit of a low number of actual tax collectors which enables lean administration. However, if the tax shift did not work well, an indirect one-stage collection procedure at a manufacturer’s level would comprise the problem that the production stages are burdened (instead of the final consumer).

EU excise taxes and EU VAT further differ in the extend of their tax bases. The EU excise system is a limited excise system. The excise duties tax selective goods whereas EU VAT is a broad-based consumption tax. Since the EU harmonization, mostly consumptive products (not semifinished products or raw materials) have been the tax object of the different excise duties. This is in line with the target to tax private consumption and not productive use, irrespective at which stage of the supply chain the taxes are levied. Due to the narrowness of its scopes, a consumer can avoid the indirect payment of excise duties by not buying the burdened products and opting for non-taxed substitutes. Avoiding VAT is a more difficult task, as it is very broad today which means that an almost complete renunciation of consumption would be necessary in order to avoid taxation.

The difference between specific excises and broad-based consumption taxes can be illustrated by the definition of their scopes. Excises list the specific products which they intend to tax. By contrast, sales taxes (like the EU VAT) use a top-down approach as they determine the scope of consump-

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302 Ben Terra (n 149) p 130; Ben Terra (n 268) pp 250–251 with further references.
303 Ben Terra (n 268) p 251.
304 Limited excise systems cover traditional excise goods (approximately 10–15 product groups) like tobacco products, alcoholic beverages, petroleum products or motor vehicles – see also for intermediate and extended systems: Sijbren Cnossen (n 232) p 13; Ben Terra (n 268) p 248 only deals with limited excise systems and advises to abolish minor excise taxes for the advantage of a general sales tax (see pp 251 and 263).
305 Ben Terra (n 149) p 130; Ben Terra (n 268) p 247; Ben Terra and Julie Kajus (n 126) p 248; Reimer Voß (n 268) pp 262 and 266–267; in a more general context: a specific tax is of a similar kind like a VAT and thus should be abolished: Klaus Tipke (n 269) p 1107; Dieter Dziadkowski, Betensteuer eine neue Umsatzsteuer?, (61)(21) Umsatzsteuer-Rundschau (2012) 821 (825); see below on pp 96 et seqq.
306 Matthias Bongartz and Sabine Schröer-Schallenberg (n 268) paras C11 and C68.
308 Concerning the broad nature of EU VAT see on pp 107 et seqq.
tion and exclude only particular goods or services which should not be taxed. Consequently, it is very important to define the products that should be subject to excise duties, otherwise there would occur classification issues. For avoiding these difficulties, the EU excise duties are designed in accordance with the common standard of the customs tariff. This specific approach also enables a separation of the excise duty rates for each product. Such a diversification of tax rates would hardly be possible under VAT law due to the sheer number of different goods and services.

By linking excise duties (and VAT) with the consumption of goods and services, the use of income or wealth is taxed. The imposition of specific taxes on non-essential products nowadays even expresses an increased financial taxpaying capacity of private customers. EU excise duties use private expenditures as proxies for consumption as specific products are bur-

309 Sijbren Cnossen (n 232) pp 7–8 with further references; see pp 107 et seqq.
310 Sijbren Cnossen (n 232) pp 102–104 with further references; Ben Terra (n 268) p 247.
311 Matthias Bongartz and Sabine Schröer-Schallenberg (n 268) para C69; Ben Terra (n 268) p 253.
312 Excise duties may be calculated according to specific or ad valorem rates. On the question which basis is better see: Ben Terra (n 268) pp 249–250 with further references; concerning tax rates see also: Matthias Bongartz and Sabine Schröer-Schallenberg (n 268) paras C75-C81 with further references or Michael Keen, The Balance between Specific and Ad Valorem Taxation, (1998) Fiscal Studies (1998) 1–37; at EU level, no excise duties are based on ad valorem rates (only the tax on cigarettes combines both methods) – in Germany, a few direct excises are calculated with the help of ad valorem rates, see for example: Joachim Englisch (n 273) paras 133–134; concerning the EU rate scheme see also: Harald Jatzke (n 269) pp 99–100; concerning specific rates, ad valorem rates or combinations therefrom and the question which should be choosen see: Ian Crawford, Michael Keen and Stephan Smith (n 75) pp 329–330 with further references.
313 Under VAT law, the proportional tax is calculated solely by a simple multiplication of the tax base with the tax rate. This is possible due to the fact that B2B transactions are not taxed because of input tax deductions. Only the price of the final B2C transaction determines the final collected tax amount.
314 Excises concern the use of income and wealth: Reimer Voß (n 268) pp 266–267 (with references to German case law); see also: Matthias Bongartz and Sabine Schröer-Schallenberg (n 268) paras C20 and C22; Hans-Günter Henneke (n 307) p 141 with further references; Johanna Hey (n 234) para 70; Harald Jatzke (n 269) pp 58–61 with further references; Ferdinand Kirchhof (n 268) p 71; Roman Seer, § 2 Finanzverfassungsrechtliche Grundlagen der Steuerrechtsordnung, in Steuerrecht (Klaus Tipke and Joachim Lang eds, 23rd ed, 2018) para 47; Holger Stadie (n 254) para 770 with further references; Klaus Tipse (n 269) pp 1046 and 1048–1049 with further references (the EU Commission did not spent any
dened and the tax is shifted to the final consumers.\textsuperscript{315} The same applies for the EU VAT system.\textsuperscript{316} The assessment of an individual’s economic tax paying capacity (ability-to-pay principle) is often emphasized in direct tax law.\textsuperscript{317} Direct taxes make it possible to burden individual economic capacity. Despite the appearance of excise duties as indirect taxes, the assessment of individual economic capacity is important as well. Indirect taxes must deal with the anonymity of the market. Therefore, the economic capacity is estimated by taking the available financial resources which are spent on consumption into account.\textsuperscript{318} Some scholars doubt whether this indirect measure is sufficient to monitor individual economic capacity.\textsuperscript{319} However, the general intent to shift the tax burden from businesses to private consumers rests upon this customer anonymity. Regarding the single-stage specific excise duties, the anonymity of customers has even more weight than within the concept of the all-phase VAT: Since the collecting business is sometimes no retailer – as it is the case for the final B2C VAT transaction – the respective end user is not yet known.\textsuperscript{320}

\textsuperscript{315} Hans-Günter Henneke (n 307) pp 140–141; critical: Ferdinand Kirchhof (n 268) pp 65–67 with further references.

\textsuperscript{316} See pp 121 et seqq.

\textsuperscript{317} See e.g. Klaus Tipke, \textit{Die Steuerrechtsordnung, Band I: Wissenschaftsorganisatorische, systematische und grundrechtlich-rechtsstaatliche Grundlagen} (2nd ed, 2003) pp 479–530; see for a short discussion also: Joachim Englisch, \textit{VAT/GST and Direct Taxes: Different Purposes}, in \textit{Value Added Tax and Direct Taxation: Similarities and Differences} (Michael Lang, Peter Melz and Eleonor Kristoffersson eds, 2009) pp 9–12 with further references; income, wealth and consumption are indicators for the ability to pay: Johanna Hey (n 234) paras 55–56 with further references.

\textsuperscript{318} Matthias Bongartz and Sabine Schröer-Schallenberg (n 268) para C21; Dieter Dziadkowski (n 305) (829); Harald Jatzke (n 269) pp 58–61 with further references; Rainer Wernsmann (n 277) pp 108–109 with further references.

\textsuperscript{319} See e.g. Ferdinand Kirchhof (n 268) p 66 with further references.

The underlying intention of EU excises and VAT laws is the taxation of consumption of goods and services. EU excise law incorporates this objective in Article 1 paragraph 1 of the Council Directive 2008/118/EC.\textsuperscript{321} This passage clearly states that the consumption of the listed goods is the envisioned object of taxation. After the harmonization process, mostly (but not yet exclusively) private and not productive consumption is burdened.\textsuperscript{322} However, the term “consumption” is not well-defined in the (excise and VAT) laws and the common understanding of the concept of “consumption” in daily life is not decisive.\textsuperscript{323} The taxable event of excise duties typically occurs either on the production or the importation stage.\textsuperscript{324} Even if excise taxes are tied to such situations, especially the latter cannot be necessarily equated with actual consumption. Consequently, the products themselves (not their actual consumption) might be the decisive factor for taxation. In other words, like the EU VAT system, taxation under EU excise duty law is predictive.\textsuperscript{325}

Both EU excise and EU VAT laws do not tax literal consumption and tie taxation to products in order to absorb the consumer’s economic capability. Excise duties become chargeable at the time of release for consumption.\textsuperscript{326} Thus, the proxies for consumption differ between the two kinds of taxes. Consumption in the sense of excise duty law is rather the manipulation of taxable products in a way that makes it impossible to define it as a taxable product. Such a transformation can happen in three ways:\textsuperscript{327} Firstly, the

\textsuperscript{321} Article 1 paragraph 1 of the Council Directive 2008/118/EC postulates that the directive “lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods […]” (emphasis added).

\textsuperscript{322} BVerfG (Beschluss) of 13.04.2017 – 2 BVL 6/13, Kernbrennstoffsteuer, ECLI:DE:BVerfG:2017:ls20170413.2bvl000613 paras 128–130 and 149 with further references; Matthias Bongartz and Sabine Schröer-Schallenberg (n 268) paras C6-C7 with further references; Harald Jatzke (n 269) pp 87–91.

\textsuperscript{323} Matthias Bongartz and Sabine Schröer-Schallenberg (n 268) para C4; the same accounts to EU VAT law, see the discussion on pp 120 et seqq.

\textsuperscript{324} See Article 2 of the Council Directive 2008/118/EC; Ben Terra (n 268) p 253; Ben Terra and Peter Wattel (n 272) pp 269 and 275: production is not further defined; Klaus Tipke (n 269) p 1037; Reimer Voß (n 268) p 262.

\textsuperscript{325} See the discussion on pp 121 et seqq.

\textsuperscript{326} Article 7 of the Council Directive 2008/118/EC; see also: Joachim Englisch (n 273) para 135 or Ben Terra and Peter Wattel (n 272) pp 271–275; similar: Holger Stadie (n 254) para 92.

\textsuperscript{327} Matthias Bongartz and Sabine Schröer-Schallenberg (n 268) paras C3 and C5 with further references; BVerfG (Beschluss) of 13.04.2017 – 2 BVL 6/13, Kernbrennstoffsteuer, ECLI:DE:BVerfG:2017:ls20170413.2bvl000613 paras 131–134.
substance of a product is changed or eliminated from which follows that the taxable object will not longer exist. Secondly, the substance of the object can be preserved. However, if it is mixed with other products, it will be no longer taxable because the newly created product is not taxable. The consumption act, therefore, consists of the mixing with other substances or in the addition of other components. Thirdly, the original taxable item may be substantially and individually preserved but it may also lose its legal classification. This contrasts with EU VAT consumption. The EU VAT is tied to legal transactions. The final B2C transaction marks private consumption, regardless whether the goods or services are manipulated or actually consumed.

The destruction of goods is not considered as consumption in the sense of EU excise law. When tobacco is burned, for instance, this does not certify consumption and therefore taxation of the tobacco, even if the substance of the product is lost. EU VAT law taxes the destruction of a good after a legal transaction. However, the ECJ case law in Mohr and Landboden-Agrardienste demands the requirement of a transfer of a benefit to an identifiable individual. The cases concerned the provision of services to a public authority. In this regard, a British court did not adopt this idea to the transfer of goods. The mentioned British case concerned the delivery of weapons to a public authority, which destroyed the weapons immediately afterwards. The concept of consumption of EU excise law differs here from the one of EU VAT law even if – as it is argued below – the destruction of goods could probably not be taxed under EU VAT law under certain circumstances.

The understanding of consumption in EU excise law and EU VAT law is similar, but not identical. On the one hand, the technical design is different. On the other hand, only EU VAT legislation is committed to legal transactions, not EU excise laws. Regarding the latter, the benchmark for consumption is rather the release for consumption and the fact that the

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328 For example: drinking alcoholic beverages.
329 For example: use coffee to manufacture caffeinated products.
330 For example: use petrol or liquid gas for lighters.
331 See pp 120 et seqq; Sijbren Cnossen (n 268) (505).
335 See pp 116 et seqq.
taxable product does not longer exist after that. If a taxable good is destroyed, EU VAT but no excise duty will be charged.

IV. Summary: Important Findings on Theoretical Concepts of Consumption

The discussed concepts of consumption in this chapter are similar but not identical to the EU VAT concept. Thus, they cannot be used for EU VAT purposes. None of the above discussed theoretical frameworks applies a literal interpretation of consumption. The dominant similarity of the different understandings of consumption is based on the transition of goods and services from the business to the private sphere. It is the convergence of supply and demand which is commonly associated with consumption. The focus of interest is therefore set on the possibility for consumption which should be strongly correlated with consumption in the literal sense. Especially microeconomics and marketing research pose the question why customers consume. This is different to EU VAT law. When taxing EU VAT transactions, the question whether consumers receive a benefit or not is to be answered. At least, such a benefit can be interpreted as the satisfaction derived to meet needs and wants and customer preferences. However, as the concepts differ particularly in the details, there is no homogeneous consumption concept.

The macroeconomic understanding of consumption differs in several ways from EU VAT legislation. Both disciplines seek to consider the value added by a reference object but EU VAT intends to capture current consumption whereas GDP measures current production. The reference object of GDP is the whole economy; the one of VAT laws is a single taxable person. Both concepts concentrate on the consumption of goods and services. Concerning GDP calculations, only currently produced products are considered. Instead, EU VAT ties consumption not to production but to market transactions. Thus, re-selling activities are ignored for GDP purposes. EU VAT laws take some of the re-selling activities into account. Simultaneously, the increase of inventory stock – already produced but not yet sold – is considered under GDP calculations. It is ignored under EU VAT laws as final demand is not yet met. A further discrepancy can be observed with regard to the dealing with the underground economy. This is ignored for GDP purposes whereas VAT laws do not exclude illegal activities com-

336 See pp 51 et seqq.
pletely and tax some illegal transactions from a conceptual perspective. On the other hand, GDP numbers contain some imputed values for renting own real estate or calculated sums for the provision of some governmental services. In this vein, EU VAT does only know deemed supplies which should indicate B2B or B2C relationships which in turn are not following common market conditions. Deemed supplies cannot necessarily be equalized with imputed values under GDP calculations. In a nutshell, both concepts of consumption apply a different scope. However, a final statement about which concept is broader cannot be made as effects of the differences can hardly be measured.

Microeconomic studies\textsuperscript{337} attempt to explain individual human behaviour and consumption choices which lead to market demand and can be met by supply. The standard theory of consumer choice and the concept of the \textit{Homo Oeconomicus} are based on the assumption of a fully rational human being. A customer role model is also underlying EU VAT law and is referred to as average consumer. A first step of microeconomic considerations is to assess a consumer’s preferences for products. The preferences are assigned a certain level of utility which is interpreted as satisfaction. EU VAT law does not know such intrinsic motivation for demand and concentrates on the result of purchase decisions. EU VAT transactions must just involve the transfer of benefits. Microeconomists further study a consumer’s budget constraint which limits his consumption choices. EU VAT is not concerned by such a kind of dependency. As the focus is set on single transactions, only the exchange of products for consideration is of interest. The dependencies between overall consumption and the available budget are not decisive. This accounts also for psychological influences, which are examined under Behavioural Economics. In the same context, the concept of consumer surplus can hardly be applied under EU VAT laws as the prices which a consumer is willing to pay cannot be assessed. The only decisive factor for VAT purposes is the actual price of a transaction. It is a proxy for the benefit of a transaction which is shifted to the consumer.

A similar conception as under microeconomics is applied by the “standard” marketing function of a business.\textsuperscript{338} In general, the starting points of considerations are not consumers’ preferences but rather their needs and wants. In the end, consumers should be satisfied by the outputs of the respective business. Marketing experts are eager to market products in a profitable manner by meeting the customers’ demand. This point of view is

\textsuperscript{337} See pp 57 et seqq.
\textsuperscript{338} See pp 64 et seqq.
partly adopted by EU VAT laws which question whether the customer derives a benefit from the market transaction. However, marketing applies a dynamic and multi-phase understanding of consumption which is not limited to the pure act of purchasing. Instead, EU VAT consumption is rather a static and single-level notion as it is limited by its tie to market transactions. For marketing objectives, it is important whether consumers are satisfied in a positive way. EU VAT laws ignore the quality of satisfaction – the transfer of a (positive or negative) benefit to consumers is enough. This is further substantiated by the fact that marketing experts try to motivate people to demand the products. EU VAT are tied to the result of marketing endeavors – the transaction. However, both disciplines rely on the agreed prices of the transactions. Especially digital trends influence pricing strategies. Individual price setting is compatible with EU VAT laws. By contrast, emerging gratious online services challenge EU VAT laws. “Free” online supplies have not been taxed so far but it is questionable whether the transactions are effectively rendered without any consideration for VAT purposes.\textsuperscript{339}

Within taxation, there are known direct and indirect taxes respectively taxes on income and on wealth as well as taxes on consumption. A clear categorization lacks with regard to hybrid taxes. Hybridization can be achieved through the inclusion of consumption elements into an income tax (so-called consumption-based income taxes or cash flow taxes) or through the application of income tax elements to consumption taxes (known as income VAT or GDP VAT). For example, a difference exists in the treatment of capital goods: Concerning the deduction of investment costs, income taxes normally apply depreciations. Under hybrid income taxes, these costs are immediately deductible. Under an income VAT, calculations of depreciations would be necessary instead of a full immediate deduction and a GDP VAT allows no deduction of this kind of costs at all. These minor changes in the scope of taxation can make a difference between taxes on income and on consumption.\textsuperscript{340}

In addition to VAT, excise duties further tax consumption.\textsuperscript{341} Both kinds of taxes are consumption taxes. EU VAT is a broad-based tax which applies a top-down approach and EU excise duties list the specific goods and services which should be burdened. The EU has harmonized the two kinds of taxes. However, the harmonization process concerning excises is not as so-

\textsuperscript{339} This question is analyzed on pp 214 et seqq.
\textsuperscript{340} See pp 70 et seqq.
\textsuperscript{341} See pp 79 et seqq.
phisticated as it is for EU VAT. In addition to harmonized excise duties, the EU Member States impose non-harmonized excise taxes. Technically, EU VAT as well as excise duties are indirect taxes. The tax burden needs to be shifted to the final consumers. Whereas EU VAT is applied as an all-stage but non-cumulative tax with input tax deduction, excise taxes are one-stage taxes. The most important common feature of the two taxes is their general intention to tax the financial capacity of private customers by assessing their use of income or wealth. Like in the other mentioned research fields, the taxes do not apply a literal definition of consumption. However, the proxies of the two kinds of taxes differ. EU VAT is tied to market transactions, whereas excise duties focus on consumption as the manipulation of taxable products in a way that makes it impossible to define the products as taxable anymore. Hence, the destruction of taxable products is not burdened with excise duties. The treatment of the same situation under EU VAT law has not yet been decided by the CJEU but destruction following a market transaction is foreseen for taxation.\textsuperscript{342}

\footnote{\textsuperscript{342} See pp 116 et seqq for a detailed discussion.}
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 Escalano, 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-

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\textsuperscript{348} 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).

\textsuperscript{349} 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).

\textsuperscript{350} 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.
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}

\begin{itemize}
\item Richard Bird and Pierre-Pascal Gendron (n 254) (287).
\item 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.
\end{itemize}
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

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{356} Similar: Lars Dobratz, \textit{Leistung und Entgelt im Europäischen Umsatzsteuerrecht} (2005) p 28: consumption is not substantiated even after the two ECJ in \textit{Mohr} and \textit{Landboden-Agrardienste} (see the discussion on pp 111 et seqq).
\item\textsuperscript{357} Alfons Simons (n 345) (88); Alan Schenk, \textit{What Is a Supply for VAT Purposes? Reflections on Quantas Airways Ltd}, (26)(2) \textit{International VAT Monitor} (2015) 84; concerning the importance of the concept of consumption see also: Rita de la Feria and Richard Krever, \textit{Ending VAT Exemptions: Towards a Post-Modern VAT}, in \textit{VAT Exemptions: Consequences and Design Alternatives} (Rita de la Feria ed, 2013) p 35.
\item\textsuperscript{358} OECD (2017a), \textit{International VAT/GST Guidelines} (n 84) paras 1.2 – 1.15; concerning the destination country principle as the principle which implements neutrality in cross-border trade see e.g.: OECD (2015a), \textit{BEPS Action 1 – Final Report} (n 2) paras 49–63.
\item\textsuperscript{359} See for example the definitions in: Liam Ebrill et al (n 5) p 2; Kathryn James (n 234) pp 20 and 143; OECD (2018a), \textit{Consumption Tax Trends 2018} (n 248) pp 22–24; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 17 (Glossary of VAT Terms).
\end{itemize}
\end{footnotesize}
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) Mehrwertsteuer-
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-

368 Paul Farmer and Richard Lyal (n 273) p 86; Wolfram Reiß (n 235) para 23; Ben Terra (n 149) pp 9, 16 and 19 with further references; Ben Terra and Julie Kajus (n 126) p 249 (it is only a proportional tax when no tax exemptions are applied within the supply chain: p 286); similar: Holger Stadie (n 254) paras 254 and 256.


370 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.\textsuperscript{373} These doubts were often based on the technical form in which the tax is levied.\textsuperscript{374} Nonetheless, a tax must be categorized according to its economic objec-


\textsuperscript{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,\textit{ Commissioner of Taxation v Reliance Carpet Co Pty Limited}, [2008] HCA 22 (22.05.2008).

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

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.
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-

and 494–498; only the Danish tax AMBI (called an employment levy) was prohibited: ECJ of 31.03.1992 – C-200/90, Dansk Denkavit and Poulson Trading, ECLI:EU:C:1992:152; of 01.12.1993 – C-234/91, Commission v Denmark, ECLI: EU:C:1993:910; see also: CJEU of 06.09.2011 – C-398/09, Lady & Kid and Others, ECLI:EU:C:2011:540 (concerning the repayment of the tax); for a short discussion of the AMBI see: Ben Terra and Julie Kajus (n 126) p 247; in the recent past, the discussed introduction of the indirect DST within the EU raised questions concerning its concept, on this matter see e.g.: Roland Ismer and Christoph Jescheck (n 80) (577); Georg Kofler, Gunter Mayr and Christoph Schlager, Taxation of the Digital Economy: “Quick Fixes” or Long-Term Solution?, (57)(12) European Taxation (2017) 523 (531); Marie Lamensch, Digital Services Tax: A Critical Analysis and Comparison with the VAT System, (59)(6) European Taxation (2019) published online 17.05.2019.

385 Robert van Brederode (n 258) p 27; Ben Terra and Julie Kajus (n 126) p 298; by contrast, excises are levied on specific items: Ben Terra (n 149) pp 8–9; concerning the specific character of excises see pp 79 et seqq; the necessity of a broad consumption tax is derived from the indirect character by: Ad van Doesum and Gert-Jan van Norden (n 118) p 708; border tax adjustments and place of taxation rules which mostly implement the destination country principle settle where

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cape broad-based consumption taxes if they do not consume. 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. 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.

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. 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 that would allow the reader to immediately deduce the scope of the directive. Rather, the directive enumerates the taxable events in Article 2 para-

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387 Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 23; Ben Terra (n 149) p 8; neutrality of the tax system would be lost: Alan Tait (n 74) p 220–221 with further references; most VATs do not apply such a broad base, which implies that not all consumption is taxed: Kathryn James (n 234) pp 99–104.

388 Sijbren Cnossen, *Global Trends and Issues in Value Added Taxation*, (5)(3) *International Tax and Public Finance* (1998) 399 (403–404); Ian Roxan (n 144) (622); Ben Terra and Julie Kajus (n 126) pp 248–249; Ben Terra (n 149) pp 8–9: *Terra* briefly describes three main reasons why states hesitate to levy sales taxes on services. The arguments are not convincing: due to the intangible nature of services, taxation of cross-border services cause challenges: Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 112; see, for example, the 1970 introduced VAT system in Norway which has included services since 2001: Eivind Bryne, *Value Added Taxation in Norway*, (56)(8) *Bulletin for International Taxation* (2002) 384 (384); arguments pro taxation of services are presented by e.g.: Alan Tait (n 74) pp 387–389.

389 Robert van Brederode (n 258) p 27; Ben Terra (n 149) p 8; Ben Terra and Julie Kajus (n 126) pp 248–249: the substitution effect causes higher difficulties than taxation of services.

390 Tina Ehrke-Rabel (n 289) p 1532.
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 24–29, 30a-30b of the EU VAT Directive) and “the importation of goods” (lit d), Article 30 of the EU VAT Directive) should be taxed.393

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.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.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.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.398 A residual definition of services can be only used on the basis of a concept of EU VAT con-

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 \textit{Mohr}\(^{400}\) and \textit{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

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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, \textit{Simons} sets the borderlines of the tax within the residual definition of supplies of services: Alfons Simons (n 345) (88).


401 ECJ of 18.12.1997 – C-384/95, \textit{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, \textit{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); \textit{Simons} has already claimed a precision of the scope of VAT in times previous to the ECJ \textit{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, \textit{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). In the second case, the company Landboden-Agrardienste got compensation from the Food, Agriculture and Forestry Office of the Calau local authority in Germany. For the ECJ, it was irrelevant from which authority the payment came. Mr Mohr did not declare the lump-sum payment in his VAT return. 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. In both cases, the tax authorities imposed VAT on the compensation payments. According to the opinion of the tax authority, Mr Mohr received a taxable service which it called “discontinuation of milk production”. 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-
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-Agrardiensste. By referring to the Mohr case, the ECJ emphasized that neither the Community nor any other national authority got goods or services for its

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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.
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 some-
how 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 con-
sumption 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 ren-
dered by Mohr and Landboden-Agrar- dienste 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 con-
cept 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 gen-
eral 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) ser-
vice 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’ satisfac-
tion. Lauré also favoured the idea of a non-distortive tax which should
lead to “the greatest possible amount of human satisfaction”. Beiser goes one

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 con-
sumption, consisting mainly of goods and services acquired by individuals for their per-
sonal 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 refer-
ences to the ideas of Lauré.
2. Equal Treatment of Consumption of Goods

The two ECJ cases described above, Mohr and Landboden-Agrardienste, concerned the question whether supplies of services are provided. 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 consumption principle to supplies of goods. According to Advocate General Jacobs’ opinion in Landboden-Agrardienste an equal treatment must be rejected. However, in the Mohr and 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. Claims in the scholarly literature to extend the case law of Mohr and 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. Parker Hale, 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 Large-Calibre Handgun Compensation Scheme. The Commissioners of Customs and Excise categorized

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427 Beiser enumerates, for example, food, clothing, habitation, game, hobbies, amusement, vacation, sports, affections and passions but excludes, for example, compensation payments: Reinhold Beiser, Allgemeine Konsumsteuer, (65) (7) Umsatzsteuer-Rundschau (2016) 267 (Section 1 paragraphs 3 and 4 of the suggestion).

428 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 Stadie (n 347) (915).

429 Deborah Butler (n 400) (549).


432 See e.g.: Deborah Butler (n 400) (549–552).

the transfer as a taxable supply of goods.\textsuperscript{434} \textit{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 \textit{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 “\textit{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.\textsuperscript{439}

In the pertinent literature, Deborah Butler calls for equality between supplies of services and goods and the application of the \textit{consumption principle} to both kinds of supplies.\textsuperscript{440} She challenges the opinion of Advocate General \textit{Jacobs} in \textit{Landboden-Agrardienste} and the judgment in \textit{Parker Hale}. Whereas \textit{Jacobs} opted for an application of the \textit{consumption principle} just for supplies of services in \textit{Landboden-Agrardienste}, he did not point out any difference between the application of the principle to supplies of goods and services in the \textit{Mohr} case.\textsuperscript{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.\textsuperscript{442} In the case of \textit{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 \textit{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 \textit{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 \textit{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 \textit{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 \textit{Mohr, Landboden-Agrardienste} or \textit{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

\textsuperscript{439} Opinion of Advocate General \textit{Jacobs} of 25.09.1997 – C-384/95, \textit{Landboden-Agrardienste}, ECLI:EU:C:1997:433 para 22; Ian Roxan (n 144) (607) confirms taxation of goods in such constellations, too.

\textsuperscript{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 VAT444 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 connote 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-

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.
vices, 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.\(^{449}\) 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{452} This point of view, however, is not advisable for a general consumption tax.\textsuperscript{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.\textsuperscript{454} The transfer from the business to the private sphere is also the foundation on which the efforts of marketers are based.\textsuperscript{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.\textsuperscript{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.\footnote{457} Furthermore, excise duties are also consumption taxes. Excises are not necessarily levied on the basis of transactions but the fabrication of the products.\footnote{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).\footnote{459} More precisely, VAT is intended to tax the final customers’ capability of income or wealth utilization for consuming goods

\footnote{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, \textit{Bundessteuergesetzbuch – Ein Reformerwurf zur Erneuerung des Steuerrechts} (2011), Buch 4, p 35; Roman Seer (n 314) para 47; Clara Sullivan, \textit{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 \textit{Christian Tenzel} in the 16th century, see the short discussion in: Onno Ydenna, \textit{The Gold Mine of Netherlands Consumption Taxes in Two Historical International Treaties}, in \textit{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, \textit{Der verfassungsrechtliche Auftrag zur Besteuerung nach der finanziellen Leistungsfähigkeit}, (62)(4) \textit{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, \textit{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 \textit{Value Added Tax and Direct Taxation: Similarities and Differences} (Michael Lang, Peter Melz and Eleonor 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 \textit{Colomer} of 23.11.2004 – C-412/03, \textit{Hotel Scandic Gäsabäck}, ECLI:EU:C:2004:746.
and services. 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. Yet the use of money does not include savings which is why they are not taxed. 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. In a nutshell, consumption is another indicator for the ability to pay alongside income and wealth.

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) paras 3–5; 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.

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

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).

463 Klaus Tipke (n 269) p 981.

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: Gabrielle Burmeister, Begriff und Funktion des Steuergutes im Steuerrecht: Zur Bedeutung der Steuergüter 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.\textsuperscript{465} By contrast, private consumers should bear the tax\textsuperscript{466} 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.\textsuperscript{467} 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.\textsuperscript{468} Because of this shifting, the tax only indirectly absorb the personal financial capability of individuals. The financial circumstances of each consumer remain unknown.\textsuperscript{469} Thus, sometimes it is doubted whether EU VAT can justify the aim of capturing the financial capacity of a single consumer.\textsuperscript{470} The fact, however, that goods are purchased and services are inquired, implies a certain financial

\textsuperscript{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 25; 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).

\textsuperscript{466} See e.g. ECJ of 24.10.1996 – C-317/94, Elida Gibbs, ECLI:EU:C:1996:400 para 19; CJEU of 07.11.2013 – C-249/12 and C-250/12, Tulică und Plavošin, ECLI:EU:C:2013:722 para 34.

\textsuperscript{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.

\textsuperscript{468} Roland Ismer (n 460) (688): shifting by increased prices; the EU legislator allows the transfer of VAT to private consumers, \textit{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.

\textsuperscript{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.

\textsuperscript{470} See e.g.: Ferdinand Kirchhof (n 268) p 66; Ferdinand Kirchhof, \textit{Das Leistungs-fähigkeitsprinzip 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-

the tax has only a limited capacity to take into account the subjective financial capability (ability-to-pay); concerning other critical voices see the references in: Joachim Englisch (n 370) p 566; the link is of less quality than under direct taxes but does exist: Harald Schaumburg (n 290) p 32 with further references; doubts concerning excise duties expresses: Albert Beermann (n 294) pp 284–285.

471 See e.g.: Paul Kirchhof (n 345) (1); Paul Kirchhof (n 459) p 33; Wolfram Reiß (n 235) para 46; Wolfram Reiß (n 373) p 20; Klaus Tipke (n 269) p 981 with further references; Rainer Wernsmann (n 277) pp 108–109 with further references; similar: Joachim Englisch (n 370) p 565 with further reference.

472 Joachim Englisch (n 370) pp 567–568 with further references; similar: Klaus Tipke (n 269) p 985; by contrast: Holger Stadie (n 254) para 145.

473 Similar: Joachim Englisch (n 370) p 591.

474 Thomas Ecker (n 372) p 95; Paul Farmer and Richard Lyal (n 273) p 85: VAT is a tax on consumer expenditures; Joachim Englisch (n 317) pp 22 and 28–29 with further references; Kathryn James (n 234) p 41 with further references; Paul Kirchhof (n 345) (3); Peter Schmidt (n 149) pp 39–40 and 165; Ben Terra (n 149) p 10; Ben Terra and Julie Kajus (n 126) pp 246 and 250; similar: “[General taxes on consumption] seek to tax all private consumptive expenditure”: Robert van Brederode (n 258) p 27 respectively p 165: „the monetary value of consumption, reflected by the expenditure made to purchase”.


476 The same accounts for proxies in terms of place of taxation rules: Marie Lämmensch (n 77) p 47 with further references.

477 Harald Schaumburg (n 290) p 33; Ben Terra and Julie Kajus (n 126) pp 246 and 250; see the remarks concerning the subjective value below.
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 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.

\begin{itemize}
\item[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 \textit{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.
\item[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.
\item[480] Without consideration no taxation takes place: David Williams (n 1) p 200.
\item[481] Kathryn James (n 234) pp 41–42; partly also: Holger Stadie (n 254) para 90.
\item[482] Peter Schmidt (n 149) pp 137–138 with further references.
\item[483] Holger Stadie (n 254) paras 141 and 143; by contrast: Marie Lamensch (n 77) pp 11–12.
\item[484] Holger Stadie (n 254) paras 143–144 with further references.
\end{itemize}
Imports of goods (including imports by private individuals) 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. 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. This reflects the destination country principle. Consequently, a change of residence between a third country and a EU Member State also gives the tax administration an opportunity to levy VAT. Then, the initial purchase of the goods in the third country as well as the importation to a EU Member State may be taxed. 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-

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 (OJ 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.
consumption tax character, since without import taxation untaxed consumption opportunities can be transferred to a country.\textsuperscript{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.\textsuperscript{492} By taxing expenditure, VAT systems are predictive and tax consumption before it actually occurs.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{496}

The anticipation of consumption further implies a reduction of consumption to an immediate point in time. This moment occurs when a con-
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...
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}\text{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 Agrárkülkereskedelmi, 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); Jasmín Kollmann (n 121) pp 65–83.}

\[^{504}\text{Ben Terra and Peter Wattel (n 272) p 202.}

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

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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 Lamenisch (n 108) p 113; see e.g.: CJEU of 26.04.2012 – C-621/10 and C-129/11, Balkan and Sea Properties and Providinwest, 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.\(^{515}\) Payments without receiving benefits, on the other hand, are irrelevant for VAT purposes.\(^{516}\)

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.\(^{517}\) 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.\(^{518}\) 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.\(^{519}\) 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.\(^{520}\) As the EU VAT system is of indirect nature, a link to the business sphere exists. Furthermore, the technical design of EU

\(^{515}\) Holger Stadie (n 254) para 162.


\(^{517}\) Admittedly, problems also arise by defining transactions.

\(^{518}\) 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.

\(^{519}\) Peter Schmidt (n 149) p 261.

\(^{520}\) 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 and not just a one-stage system. It covers the entire supply chain – from production to retail. Thus, while sales between suppliers (B2B) appear at first sight to be irrelevant as VAT is intended to tax private consumption, they are important for the levy of a multi-stage tax. Furthermore, taxation at the retail stage is essential as it ensures that private consumption is fully captured. 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.

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, 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. From the point of view of a single taxable person, the VAT collection technique mirrors his economic contribu-

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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), 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, Online Platforms: A Marketplace for Tax Fraud?, (47)(4) Intertax (2019) 391 (392) and OECD (2015a), 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.
On the other hand, when a trader carries out transactions apart from his economic activity (e.g., the private sale of his childrens’ used toys on an online platform), these are outside the scope of the directive.\textsuperscript{535} 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.\textsuperscript{536} The decision whether input tax deduction is permissible lies with the taxable persons.\textsuperscript{537} While the definition of an “eco-

\begin{itemize}
\item \textsuperscript{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).
\item \textsuperscript{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.
\item \textsuperscript{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 Kühn and Georg von Streit, Zuordnung und Verwendung von Eingangsleistungen – Auswirkungen auf den Vorsteuerabzug unter Berücksichtigung des Unternehmensbegriffs: Eine Zusammenfassung vor dem Hintergrund der jüngeren 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 –
\end{itemize}
"economic activity" is quite broad, employees are explicitly excluded in Article 10 of the EU VAT Directive. A broad definition is important for capturing as many transactions as possible and for extensively taxing private


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.
consumption. 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 Kraeusel 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 unlosbare) 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-
II. Transactions: Proxies for Consumption

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.\textsuperscript{547} The scholarly literature, therefore, often argues that the public hand should be fully taxed.\textsuperscript{548} Taxation of government spending would be in line with, for example, the Australian GST law then.\textsuperscript{549} Foremost, this would include taxation of private consumption.

\textsuperscript{547} Thomas Wiesch (n 543) pp 310–313.
\textsuperscript{548} E.g.: Michael Aujean, Peter Jenkins and Satya Poddar, \textit{A new approach to public sector bodies}, (10)(4) \textit{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, \textit{Value Added Tax Treatment of Public Sector Bodies and Non-Profit Organizations: A Developing Country Perspective}, (59)(12) \textit{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, \textit{Towards a Simpler, More Robust and Efficient VAT System by Levying VAT at EU Level}, (22)(4) \textit{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.

Concerning the Australian GST law on public bodies see e.g.: Michael Evans, \textit{Horton’s lesson: Australia’s struggle with ‘truth in drafting’}, (1)(1) \textit{World Journal of VAT/GST Law} (2012) 21 (25); Rebecca Millar and Loreenna Moon, \textit{Australia}, in \textit{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, \textit{The Move to VAT}, (24)(2) \textit{Intertax} (1996) 45 (49–51) or David White and Eugen Trombitas, \textit{New Zealand}, in \textit{Improving VAT/GST: Designing a Simple and Fraud-Proof Tax System} (Michael Lang and Ine Lejeune eds, 2014) p 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, \textit{VAT Treatment of Public-Sector Bodies: The Canadian Model}, in \textit{VAT Exemptions: Consequences and Design Alternatives} (Rita de la Feria ed, 2013) pp 103–133.
(Non-)taxation of holding companies\textsuperscript{550} 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\textsuperscript{551} as holding companies are often attested a non-economic activity. This accounts especially for the mere acquisition, the holding and the sale of shares.\textsuperscript{552} A company which only renders non-economic activities\textsuperscript{553} is no taxable person according to Article 9 of the EU VAT Directive. Consequently, the holdings are burdened with (input) tax.\textsuperscript{554} When, however, the holdings are directly or indirectly involved in

\textsuperscript{550} For an overview concerning taxation of shares and dividends/holdings see e.g.: Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 167–172; Ben Terra and Julie Kajus (n 126) pp 996–1011 and 1342–1376.

\textsuperscript{551} Ine Lejeune and Jeanine Daou, VAT Neutrality from an EU Perspective, in Improving VAT/GST: Designing a Simple and Fraud-Proof Tax System (Michael Lang and Ine Lejeune eds, 2014) pp 470–471.

\textsuperscript{552} Concerning the purchase and holding of shares see e.g.: ECJ of 20.06.1991 – C-60/90, Polysar Investments Netherlands, ECLI:EU:C:1991:268 para 13; of 22.06.1993 – C-333/91, Sofitam, ECLI:EU:C:1993:261 para 12 (see also para 13: dividends are out of scope); the sale of shares is out of scope: ECJ of 20.06.1996 – C-155/94, Welcome Trust, ECLI:EU:C:1996:243 (with two exceptions: commercial share dealing activities and sales in order to secure a direct or indirect involvement in the management, para 35; see for a third exception: ECJ of 11.07.1996 – C-306/94, Régie dauphinoise, ECLI:EU:C:1996:290: direct, permanent and necessary extension of a taxable activity, para 18); see also: ECJ of 29.04.2004 – C-77/01, EDM, ECLI:EU:C:2004:243; CJEU of 30.05.2013 – C-651/11, X, ECLI:EU:C:2013:346 (sale of shares and transfer of a going concern); of 08.11.2018 – C-502/17, Co&D Foods Acquisition, ECLI:EU:C:2018:888 (concerning a planned sale of shares and related input tax deduction); the emission of shares is not a taxable transaction: ECJ of 26.05.2005 – C-465/03, Kretztechnik, ECLI:EU:C:2005:320 (input tax deduction was allowed for general costs); this accounts also for bondholding (ECJ of 06.02.1997 – C-80/95, Harnas & Helm, ECLI:EU:C:1997:56) and admitting a new partner within a partnership (ECJ of 26.06.2003 – C-442/01, KapHag, ECLI:EU:C:2003:381); Ben Terra and Peter Wattel (n 272) pp 177–178; Christoph Wäger, Tätigkeitssphären und Vorsteuerabzug der Holding beim Beteiligungserwerb, in Festschrift für Wolfram Reiss zum 65. Geburtstag (Paul Kirchhof and Hans Nieskens eds, 2008) pp 229–243; see also: Ben Terra and Julie Kajus (n 126) pp 317–320.

\textsuperscript{553} It is important to distinguish between non-economic activities and non-taxable transactions: Ad van Doesum and Gert-Jan van Norden (n 118) p 709.

\textsuperscript{554} ECJ of 20.06.1991 – C-60/90, Polysar Investments Netherlands, ECLI:EU:C:1991:268 para 17; of 22.06.1993 – C-333/91, Sofitam, ECLI:EU:C:1993:261 para 12; see also: the sale of shares is tax exempt and consequently, input tax deduction is not allowed: ECJ of 06.04.1995 – C-4/94, BLP Group, ECLI:EU:C:1995:107; no input tax deduction for services connected to the sale of shares within the general costs (application of a narrow interpretation): ECJ of 08.02.2007 – C-435/05, Investrand, ECLI:EU:C:2007:87; concerning expenditures
the management of the company in which they hold shares, they fulfil the requirements as taxable persons in this respect. 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. Concerning the consumption tax character, every transaction which does not lead to final consumption

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

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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.\textsuperscript{557} As regards the B2C stage, the threshold exemption for small enterprises is another example of non-taxation of parts of final consumption.\textsuperscript{558} Practically, it is hard to capture every single (business) seller of any good or service. Administration and compliance costs would be too high.\textsuperscript{559} 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.\textsuperscript{560} The inclusion of the retail stage expands the tax base and ensures to fully capture the consumable outputs of the production chain.\textsuperscript{561} However, the EU Member States

\textsuperscript{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.

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

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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{itemize}
  \item Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 38.
  \item The same applies to B2C tax exemptions for other companies, which cannot deduct their input tax.
  \item See pp 195 et seqq.
  \item 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 This seems to be similar to small and medium-sized businesses: Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 37–38.
  \item Not all expenditures for private consumption are taxed: Wolfram Reiß (n 235) para 45 at footnote 18.
\end{itemize}
example, “shpock”. 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. However, the CJEU certified, *inter alia*, private operators of photovoltaics as taxable persons, 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 oldtimers 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-taxed 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-

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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).582

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.583 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.584 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.585 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.586

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

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.587 In this context, C2C constellations – which are normally out of scope – are captured, too.588 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.589 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 a intra-Community resale,590 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.

587 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.
589 Ben Terra and Julie Kajus (n 126) pp 502–507.
a. Direct Link Requirement

A taxable transaction requires a direct link between the supply and its consideration.\textsuperscript{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.\textsuperscript{592} Moreover, a link exists only if the consideration reflects the actual value of the supply.\textsuperscript{593} Additionally, in \textit{Hong-Kong Trade} the ECJ expressed that an agreement for a consideration is required in advance.\textsuperscript{594}

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


\textsuperscript{592} Holger Stadie (n 254) para 163 with further references.


\textsuperscript{594} ECJ of 01.04.1982 – C-89/81, \textit{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, \textit{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

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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: Alfonso 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 misinterpretating the term „for consideration“: David Williams (n 1) p 169 at footnote 26.
598 Affirmative: Alfonso Simons (n 345) (90).
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

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\textsuperscript{600} CJEU of 22.06.2016 – C-11/15, 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 Stadic (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-
tion of private expenditure and, consequently, taxation of final consumption. This restricts the general character of the EU VAT system.

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.\(^\text{608}\) 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.\(^\text{609}\) The limits turn out to be important for the further discussion concerning the challenges of digitalization.\(^\text{610}\)

The EU VAT law does not include all kinds of private consumption.\(^\text{611}\) Within the framework of a general consumption tax, comparable goods and services should be taxed equally\(^\text{612}\) without distorting competition.\(^\text{613}\) To avoid distortions and unequal treatments, exceptions concerning the tax base should be limited to a minimum.\(^\text{614}\) 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\(^\text{615}\)), explicitly excludes some transactions which are – under

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608 Alfons Simons (n 345) (87).
609 Further limits are sometimes outlined but not discussed here, see e.g.: Jasmin Kollmann (n 121) pp 61–64 who analyzes whether the purpose of the supply is another limit to EU VAT law.
610 See the discussion in chapter 3 (pp 182 et seqq).
611 See especially the discussion on pp 120 et seqq.
612 Robert van Brederode (n 258) p 46; Ben Terra (n 149) p 9; Ben Terra and Julie Kajus (n 126) p 249–250; moreover, “equality” has already been noted by Adam Smith (n 129) book V chapter II, part third, p 825.
613 Ben Terra and Peter Wattel (n 272) p 111.
614 David Williams (n 1) p 184; concerning possible alterations of the scope of taxation (e.g. non-taxable transactions like entity exemptions) see: Alan Schenk, Victor Thuronyi and Wei Cui (n 75) pp 39–44.
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. 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-

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 Eleanor 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.617 The Japanese Consumption Tax also grants only few exemp-
tions.618

In addition to the restrictions imposed on transactions, ECJ case law fur-
ther limits and defines more clearly the concept of EU VAT as a tax on private consumption.619 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 distinguis-
ghished 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.).

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 birth-
place of modern sales taxes but the New Zealand model should be used as a role model: Robert van Brederode (n 245) p 49.

mof.go.jp/english/public_relations/publication/, last accessed: 01.02.2020); for outlines of the Japanese consumption tax system see e.g.: Yumi Nishiyama and Kotaku Kimu, Japan, in Improving VAT/GST: Designing a Simple and Fraud-Proof Tax System (Michael Lang and Ine Lejeune eds, 2014) pp 205–225; concerning recent developments regarding electronic services within the Japanese Consump-

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

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.

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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-

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.
behaviour. Online purchases of goods are steadily increasing, and as a result, the number of returns or cancellations of the original transaction is also increasing.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 Air France-KLM,643 MEO644 and Société thermale d’Eugénie-les-Bains645), which aim to clarify when taxed non-consumption of services is identical to taxed non-consumption of goods.646

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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. 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. The CJEU ruled that such situations fulfil the requirements of taxable supplies of services. Regardless of the fact that the customers did not enjoy any benefits (as they did not take the flights), the option to enjoy air passenger transport services was based on a legal relationship and was directly linked to the renu-

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648 These tickets were non-refundable ones which lost their validity because the customer had not appeared for the flight (so-called “no-shows”). Besides “no-shows”, the VAT for exchangeable tickets which lost their validity after a certain period and had never used by the purchaser was not declared, too: CJEU of 23.12.2015 – C-250/14 and C-289/14, Air France–KLM, ECLI:EU:C:2015:841 paras 9–12.


650 The performance of the services (to transport the customer from A to B) is only possible when the customer appears: CJEU of 23.12.2015 – C-250/14 and C-289/14, Air France–KLM, ECLI:EU:C:2015:841 para 27.
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 perspective.

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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-
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.\textsuperscript{663} 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.\textsuperscript{664} 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.\textsuperscript{665} 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”.\textsuperscript{666} 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.\textsuperscript{667} Preparatory services from the supplier were based on the original accommodation contract and not made because

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\textsuperscript{664} Advocate General Kokott argues that MEO stands between Société thermale and Air France-KLM: Opinion of Advocate General Kokott of 07.06.2018 – C-295/17, MEO, ECLI:EU:C:2018:413 para 39.


\textsuperscript{666} ECJ of 18.07.2007 – C-277/05, Société thermale d’Eugénie-les-Bains, ECLI:EU:C:2007:440 para 12.

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.

es. 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

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673 Beiser also defines consumption as the satisfaction of human needs. Consequently, compensation payments are excluded: Reinhold Beiser (n 427) (Section 1 paragraphs 3 and 4 of the suggestion).

674 Ben Terra and Julie Kajus even argue that *Société thermale* should not longer be applicable: Ben Terra and Julie Kajus (n 126) p 793.

675 In this context, Stephen Dale points out that a full pre-payment may be non-taxable consideration when the civil law of a Member State or the underlying contract provides that such a payment is a non-taxable compensation payment: Stephen Dale (n 643) (59); similar: Yanitsa Radeva (n 656) (13).

composite supply of reservation and accommodation services is splitted, 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.677 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.678 These special ar-

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. Therefore, 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. Like imports, such deemed supplies are not based on the generally defined concept of transactions.

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.

Free supplies of

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.
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.
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 Söhne (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.
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. 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”. 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.


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 year seems ok according to the judgment; such a fixed ceiling is assessed negatively by Nathalie Wittock, Sales Promotion Techniques and VAT, (27)(3) EC Tax Review (2018) 127 (137) as the same fixed monetary amount for all kinds of businesses is contrary to the neutrality principle.

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.

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.

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-161/14, 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 Stadie (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.

The ECJ emphasized that a supply of goods is only “for consideration” when a legal relationship, based on reciprocal performances between the parties, exists. 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. This was not the case. Kuwait Petroleum described the promotional products as gifts. Furthermore, the price of the fuel (whether the customers accepted the vouchers or not) did not change. 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{footnotesize}
\begin{enumerate}
\item[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[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); 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: Nathalie Wittock (n 686) (133–137).
\item[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{enumerate}
\end{footnotesize}
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

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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}

\textsuperscript{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.
\textsuperscript{714} CJEU of 05.07.2018 – C-544/16, Marcandi, ECLI:EU:C:2018:540 paras 14–15; Opinion of Advocate General Tanchev of 07.03.2018 – C-544/16, Marcandi, ECLI:EU:C:2018:164 para 16.
\textsuperscript{715} CJEU of 05.07.2018 – C-544/16, Marcandi, ECLI:EU:C:2018:540 paras 16–17; Opinion of Advocate General Tanchev of 07.03.2018 – C-544/16, Marcandi, ECLI:EU:C:2018:164 paras 17–19.
\textsuperscript{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.
\textsuperscript{717} CJEU of 05.07.2018 – C-544/16, Marcandi, ECLI:EU:C:2018:540 para 19; Opinion of Advocate General Tanchev of 07.03.2018 – C-544/16, Marcandi, ECLI:EU:C:2018:164 para 21.
\textsuperscript{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.
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

720 Concerning the arguments see: CJEU of 05.07.2018 – C-544/16, Marcandi, ECLI: EU:C:2018:540 paras 26–49 with further references.
722 Heidi Friedrich-Vache (n 106) p 332.
723 See pp 96 et seqq.
724 See pp 107 et seqq.
IV. Summary: The Concept of EU VAT as a General Consumption Tax

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 advantageously use them.\footnote{See pp 111 et seqq.} 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 \textit{Mohr} and \textit{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 ("\textit{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.\footnote{See pp 116 et seqq.}

Since it is difficult to tax consumption in the literal sense of the word, the EU VAT system is based on \textit{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
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.\footnote{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.\footnote{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.\footnote{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.\footnote{733}

\footnote{730} See pp 133 et seqq. \footnote{731} See pp 148 et seqq. \footnote{732} See pp 153 et seqq. \footnote{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

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734 See pp 159 et seqq.
and neutralize any input tax deductions made in advance. Untaxed final consumption is avoided.\footnote{See pp 167 et seqq.}

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.\footnote{See pp 171 et seqq.}
Chapter 3: Digital Challenges to the Concept of EU VAT as a General Consumption Tax

The first two chapters have dealt with the concepts of consumption in economics, marketing, EU VAT and further areas of taxation. This analysis has paved the way for approaching thorny issues arising from the megatrend of digitalization, which form the object of the following chapter.

While it has often been claimed that digitalization would give rise to tremendous, if not unsurmountable challenges for EU VAT,737 a careful analysis reveals that digitalization can be satisfactorily dealt with under the traditional concept of consumption.738 This perspective has become widely accepted for three groups of cases, namely (1) the move towards an increasing importance of services, (2) a changed interaction of private consumers at markets and (3) the emergence of virtual currencies (I.). The same is arguably true for another issue which is still the subject of a vivid controversy in the scholarly literature: situations where online companies render electronically supplied services in exchange for the right to use and exploit their customers’ personal data. A case by case analysis is necessary to assess whether the requirements for taxable transactions are met. In contrast to the participants of the sharing economy, private users do not act as taxable persons. Finally, the missing agreement on an exact transaction price can and has to be overcome by performing internal cost calculations (II.).

I. Digital Changes of Supply and Demand Structures and their Market Exchange

Digital trends alter the product range, consumers seek for other kinds of benefits and the exchange of supply and demand is no longer solely based on traditional legal tender. The pertinent literature identifies as challenges for the scope of EU VAT alignments of the traditional and digital economy, hybrid business models like the sharing economy, transactions involv-

737 See e.g. OECD (2015a), BEPS Action 1 – Final Report (n 2), which is even called “tax challenges of the Digital Economy”.
738 Concerning the concept of consumption see chapter 2 (pp 96 et seqq).
ing Bitcoins and new business concepts which exploit personal data. In the following, it is shown that the EU VAT system covers such transformations. An adjustment of the traditional concept of consumption is not necessary.

Initially, it is argued that the alignment of the traditional and digital economy (like mail-order businesses or pay TV) and the mushrooming of new digital offers lead to an increased importance of services. Yet the EU VAT concept of consumption already covers services (1.). It is irrelevant whether the higher number of services is caused by a change in supply or by the changing demand of private customers for other kinds of benefits. However, as nowadays consumers tend to prefer sharing instead of ownership, they themselves become suppliers. Besides initial controversies, arising hybrid business models can be framed by the traditional tie to transactions which are rendered by taxable persons. Consequently, the sharing economy is not a challenge to the concept of consumption which underlies EU VAT (2.). This also applies for issues concerning crypto currencies which have been satisfactorily resolved by the CJEU. In doing so, the court introduced an economic concept of money within EU VAT (3.).

1. Increased Importance of Digital Services

The increasing trade in services causes no problems concerning the concept of VAT as a general consumption tax. The trend towards a greater range of (intangible) services is based on two major developments. Firstly, internet technologies promote the development of new kinds of ser-

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739 See, for example, Marie Lamensch who presents “new” challenges in comparison to “old” challenges of EU VAT law: Marie Lamensch (n 108) pp 118–131; Kofler, Mayr and Schlager also list (1) the further development of the traditional economy, (2) new hybrid business models which rely on multi-sided platforms (sharing economy) and (3) new models relying on the exploitation of personal data: Georg Kofler, Gunter Mayr and Christoph Schlager, Taxation of the Digital Economy: A Pragmatic Approach to Short-Term Measures, (58)(4) European Taxation (2018) 123–126.

740 Georg Kofler, Gunter Mayr and Christoph Schlager (n 739) (124–125).

741 E.g.: Ian Crawford, Michael Keen and Stephan Smith (n 75) pp 279 and 342; similar: Marie Lamensch (n 77) p 34 with further references; concerning the reliance on intangibles: OECD (2015a), BEPS Action 1 – Final Report (n 2) para 2; concerning the two developments see also e.g.: Heinz Kußmaul and Chantal Naumann, Grenzüberschreitende elektronische Dienstleistungen in der USt, (69)(44) Der Betrieb (2016) 2566–2573.
vices which were not known before. Secondly, traditional goods are now designed as services. As long as the requirements for a taxable supply are fulfilled, it is clear that the taxation of services is in line with the concept of consumption which underlies EU VAT laws. The composition of supplies which are traded at marketplaces changes and the kinds of benefits which are provided to private customers may differ. However, when consumers enjoy advantages, VAT needs to be levied. Problems arise mostly at subsequent levels concerning, for example, tax assessments.742

EU VAT laws cover all distribution channels as the tax is designed as an all-stage one with a mechanism to relieve businesses from input tax. The question that arises about online distribution channels is not the scope of VAT, but that of an efficient tax collection procedure. Traditionally, economists have described a market as a physical trading place.743 With the advent of e-commerce and m-commerce, the criterion of “physical” is undermined, and markets become more mobile744 and virtual. Traditional methods of distribution are altered by increased complexity in channel systems.745 Companies which had been interacting at traditional “offline” marketplaces (brick-and-mortar channel strategies) before, have to compete with online opponents (pure-click companies) now, since consumers purchase goods via online distribution channels. Nowadays, goods are often shipped directly to the customers instead of being delivered to

742 See for example: generally, cross-border trade is enhanced by internet: Robert van Brederode (n 258) p 231; the number of cases of cross-border taxation will additionally increase as an EU regulation prohibits geoblocking: Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (OJ L 60I, 02.03.2018, pp 1–15); Thus goods and services can be purchased EU-wide, new markets are made accessible for online marketplaces and customers. However, remote digital B2C supplies are one of the most challenging issues concerning taxing the digital economy: OECD (2015a), BEPS Action 1 – Final Report (n 2) paras 314–320 and 357; concerning an overview of some other problems see e.g.: Robert Prätzler and Jürgen Stuber, Umsatzsteuer und E-Commerce – Bestandsaufnahme, Ausblick und Compliance, (73)(10) Betriebs-Berater (2018) 536–542.

743 Philip Kotler and Kevin Keller (n 15) p 29.

744 Dietmar Aigner et al (n 80) para 15/2.

745 This creates value networks: Philip Kotler and Kevin Keller (n 15) pp 515 and 519–521.
stores.746 Traditional companies are forced to rearrange their distribution channels by adding online services and acting as brick-and-click retailers.747 The process of disintermediation promotes integrated supply chains and reduces the number of traders which are still involved in the supply chain.748 Indirect distribution channels are designed with the help of intermediaries749 like online marketplaces which in turn often use different terms and conditions.

The digital economy causes a move from supplies of goods to supplies of services as goods are dematerialized and become supplies of services. Thus, conventional goods like books, CDs or DVDs are now available as “digital goods”, namely online streaming services. Such digital goods, like e-books or online streaming offers, are for VAT purposes mostly categorized as services because of their intangibility.750 Previous to the introduction of mandatory taxation of services,751 this development would have caused se-

747 Philip Kotler and Kevin Keller (n 15) pp 41 and 536–537; similar: Francesco Cannas (n 569) p 6.
748 Goods and services are directly sold to customers with the help of cost efficient online and mobile opportunities: Philip Kotler and Kevin Keller (n 15) p 552; see also: Claudia Neugebauer (n 22) (104) with further references.
749 Concerning direct versus indirect distribution see: Werner Pepels (n 15) p 166; concerning challenges caused by intermediate delivery: Marie Lamensch (n 77) p 159; see further e.g.: Marie Lamensch and Rebecca Millar, The Role of Marketplaces in Taxing B2C Supplies, in CJEU: Recent Developments in Value Added Tax 2018 (Michael Lang et al eds, 2019) pp 51–78; Walter Hellerstein, US Experience and Recent Developments in the Collection of Tax on Online Sales, in CJEU: Recent Developments in Value Added Tax 2018 (Michael Lang et al eds, 2019) pp 79–128; online platforms replace some stages of supply chains: E.C.J.M. van der Hel-van Dijk and M.A. Griffioen (n 526) (391); however, complexity rises: Christophe Waerzeggers (n 91) p 135.
751 In the past, sales taxes often only taxed goods – taxation of services was added later; see e.g: Paul Farmer and Richard Lyal (n 273) p 87: with the introduction of the Sixth EU VAT Directive, taxation of services became compulsory; Peter Schmidt (n 149) pp 97–99 with further references.
vere distortive issues. Nowadays, it implies that the principle of VAT neutrality is stressed inter alia due to a different application of tax rates on goods and digital services. However, the EU legislator is aware of the discriminative treatment and has, for instance, outlined a solution for the treatment of e-books.\footnote{See the discussion on pp 57 et seqq (in particular footnote 165); reduced rates are now allowed for e-book, too: Council Directive (EU) 2018/1713; similar problems occurred in Norway: Ole Gjems-Onstad, \textit{The pricing of electronic newspapers}, (3)(2) \textit{World Journal of VAT/GST Law} (2014) 127–129; however, further disharmonization concerning tax rates will occur after the following proposal will be accepted: EU Commission (2018b), \textit{Proposal for a Council Directive amending Directive 2006/112/EC as regards rates of value added tax}, COM(2018) 20 final.}

Moreover, certain services like lonely heart communities or teaching services which were only rendered offline in the past, are now performed also online.\footnote{The term “media neutrality” is also used e.g. by: Tina Ehrke-Rabel (n 37) p 373.}

Additionally, new services are available which have no conventional predecessors.\footnote{Liam Ebrill et al (n 5) p 187; Marie Lamensch (n 77) pp 1–2 and 50–51 with further references; OECD (2015a), \textit{BEPS Action 1 – Final Report} (n 2) para 114 with further examples; the EU is aware of this development for a long time now, see e.g.: EU Commission (1997), \textit{Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: A European Initiative in Electronic Commerce}, COM(97) 157 final.}

For example, the car industry is developing new services in cooperation with internet businesses. Connections to smart homes


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(Car2Home), which are integrated into a car, are only one example businesses work on.⁷⁵⁶ Such new kinds of supplies are mostly categorized as services. Yet it might be problematic which kind of service is rendered,⁷⁵⁷ though it is clear that such services must be taxed according to the broad-based concept of EU VAT consumption.

In the digital age, bundles of different products blur the lines between goods and services,⁷⁵⁸ making correct assessment for VAT purposes more complicated than before. In situations when services are accompanied to a supply of goods (a bundle), the rules for tangible assets could be applicable. Standard software, for example, can be delivered on a compact disc, a USB-stick or via the Internet. The first two ways of delivery are supplies of goods, the last one has to be subsumed under a provision of services.⁷⁵⁹ Furthermore, new distribution models enable businesses to individualize and to customize their products. An example is the online service www.my postcard.com which enables customers to design their own postcards. The company commissions the sending all over the world. Depending on the offered bundle, VAT law may categorize the activity as supply of goods or services. Similar difficulties occur when a bundle of services can be subsumed under diverse categories of services. The rendering of electronically supplied services within the context of immovable property for considera-


⁷⁵⁷ Francesco Cannas (n 569) p 10; see also for further problems like the determination of the place of taxation: Marie Lamensch (n 750) pp 18–27 with further references.

⁷⁵⁸ OECD (2015a), *BEPS Action 1 – Final Report* (n 2) para 111; however, apart from digitalization, inconsistencies have also been identified in terms of e.g. leasing (a supply of goods or services?): CJEU of 22.12.2010 – C-277/09, *RBS Deutschland Holding*, ECLI:EU:C:2010:810 para 20.

⁷⁵⁹ ECJ of 27.10.2005 – C-41/04, *Levob Verzekeringen and OV Bank*, ECLI:EU:C:2005:649; Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 111; see also: Dietmar Aigner et al (n 80) paras 15/2–15/3 who discuss customized software, too.
tion is only one example which causes problems.\textsuperscript{760} When two services are combined, a potential application of different tax rates may also be necessary.\textsuperscript{761} This is reinforced by the marketing trend to price goods and services together that can be observed at the same time.\textsuperscript{762} Due to these developments, a reorganization of the categories of goods and services has sometimes been proposed.\textsuperscript{763} However, even if issues like the correct assessment of the place of supply or the applicable tax rates might cause different outcomes for taxation,\textsuperscript{764} the transactions themselves are covered by the broad-based concept of EU VAT as a tax on consumption.\textsuperscript{765}

The growing importance of services, however, may also be due to a changed consumer behaviour\textsuperscript{766} to which businesses adapt. The motivation for changing one’s own behaviour may be different from person to person, but this is irrelevant for tax purposes. Some consumers buy, for instance, a new car (a supply of goods) and others only “borrow” the vehicle (a supply of services). In this context, the expansion of the shared economy further promotes, for example, car-sharing. Car-sharing is not just a supply of services to a consumer for a longer time period but promotes the repeated supply of services to various customers. The combination of mobile

\begin{itemize}
\item \textbf{Concerning the problematic of smart homes see:} Peter Denk, \textit{Immobilie 4.0: Smart-Home-Technologien und Nutzungsdaten im Mehrwertsteuerrecht}, (67)(11) \textit{Umsatzsteuer-Rundschau} (2018) 426–432.
\item \textbf{Concerning a discussion whether a bundle of services can be taxed with reduced and standard tax rates in an “offline” context, see e.g.:} CJEU of 18.01.2018 – C-463/16, \textit{Stadion Amsterdam}, ECLI:EU:C:2018:22.
\item \textbf{Werner Pepels (n 15) pp 65–67.}
\item \textbf{See e.g.:} Marie Lamensch (n 77) pp 270–275; within the context of \textit{Bitcoins:} Francesco Cannas (n 750) (85–87).
\item \textbf{Differences may also occur by determining the tax point, different rates can be applicable or differences by applying tax exemptions are apparent:} Ben Terra and Julie Kajus (n 126) p 449; Joachim Englisch (n 261) para 86; David Williams (n 1) p 188.
\item \textbf{Alan Tait describes the conflict between a supply of goods and services by the sale of a racehorse which constitutes a supply of a good. In addition, the sale of shares in the racehorse represents a supply of services. In a situation, in which all shareholders of the racehorse sell their shares, the question raises whether there are rendered supplies of services or a single supply of one good. By applying a residual definition for services, the answer to this question does not matter. The transactions are taxable ones and thus are covered by VAT law:} Alan Tait (n 74) pp 387–388.
\item \textbf{See pp 189 et seqq.}
\end{itemize}
marketplaces and inflexible consumers must be solved by answers of where consumption is to be taxed.\textsuperscript{767}

The behavioural change towards sharing (instead of owning) has turned out to be disruptive for some traditional manufacturing businesses. Such businesses are forced to participate by either creating their own solutions or by co-operating, for example, with start-ups.\textsuperscript{768} For this reason, some businesses do not sell goods in a B2C transaction for enabling private individuals to share goods in a subsequent transaction. The businesses themselves offer sharing services by retaining the ownership of the property. A major difference to conventional rental and leasing services is the short duration of the contracts. Car manufacturers which have traditionally sought to sell their cars, offer additional car sharing services today. The customers can book the vehicles just for a few minutes or for a longer period.\textsuperscript{769}

These interactions of businesses, which are categorized as taxable persons according to Article 9 of the EU VAT Directive, do not cause problems concerning the scope of VAT. It is a merely other example for the replacement of supplies of goods by services.

2. Increased Digital Market Interaction of Private Consumers

As digitalization changes consumer behaviour, more services are supplied. Furthermore, consumers increasingly favour sharing (instead of an exclusive ownership) and act themselves as providers of services. This trend is commonly described as “sharing economy”\textsuperscript{770} which is often seen as a hy-

\textsuperscript{767} In this context see e.g.: Joachim Englisch (n 261) para 394; similar: Ian Crawford, Michael Keen and Stephan Smith (n 75) pp 331 and 342; Marie Lamensch (n 77) p 39; similar concerning mobile companies: E.C.J.M. van der Hel-van Dijk and M.A. Griffioen (n 526) (393); customers are inflexible as they consume mostly where they live; Dietmar Aigner et al (n 80) para 15/2.


\textsuperscript{769} See for example the car-sharing service \textit{sharenow} (https://www.share-now.com/de/de last accessed: 01.02.2020).

\textsuperscript{770} The shared economy is known under diverse labels like collaborative economy or peer-to-peer economy. For further synonyms see e.g.: Giorgio Beretta (n 93) (383–384) with further references to the origins of the terms; the EU Commission often uses the term “collaborative economy”, for a definition see: EU Commission (2016c), \textit{A European agenda for the collaborative economy} (n 94) p 3; see also the outline of various definitions in: Cristiano Codagnone and Bertin Martens, EU Commission – JRC Technical Reports: Institute for prospective
brid form between production and consumption. Such a mix would cause problems regarding the VAT treatment of the involved transactions. EU VAT laws are designed to capture every stage of the production chain and not to burden taxable persons but private consumers. It is to note that the EU VAT Directive does not contain any rules how to handle a mixture of the two concepts. However, it is argued that the sharing economy can be completely subsumed under the traditional EU VAT concept of consumption without any necessities for alteration. The sharing economy just represents one more step within the supply chain (a.). The consumers who render the supplies do not act as private persons anymore. Their increased market interaction implies that they become taxable persons in the sense of Article 9 of the EU VAT Directive (b.).

a. Transactions of the Sharing Economy

The original intentions and transactions of the sharing economy were to a large extent irrelevant for value-added taxation. Initially, the shared economy was based on the thought of reconsidering what a person really needs to own. Renting, borrowing or sharing multiple goods and services turned out as alternative options. A focus was set on getting access to the assets which were needed for consumption instead of their ownership. Thus, the consumers acted in a way which allowed them to extract more value from goods and skills. Consequently, different products were more extensively used with the purpose of harnessing the available resources more efficient-


772 Giorgio Beretta (2017) (n 771) (2).
ly by releasing unused capacities.\textsuperscript{773} These first intentions to share belongings with peers on an occasional basis caused no issues concerning the concept of EU VAT consumption. It was rather the expansion of, for example, accommodation or car sharing with a third party instead with family. The focus was set on social needs and wants (like being part of a community) and not on the sole trading or sharing process.\textsuperscript{774} Thus, sharing a couch from time to time with third parties (against no or little money) can be compared with the sharing of home-cooked meals with family members. Both situations are not captured by the scope of EU VAT consumption because, in particular, the requirements of Article 9 of the EU VAT Directive are not met.

The digital commercialization of the shared economy has transferred its principles to better known market structures. Various industries and kinds of companies are affected.\textsuperscript{775} Nowadays, many of the offers are seen as an “access economy” and the participants seek to earn money instead of following the altruistic peer community spirit underlying the original shared

\begin{thebibliography}{9}
\footnotesize
\item \textsuperscript{773} Sharing for monetary or non-monetary consideration, sometimes also for a mixture of both: Giorgio Beretta (2017) (n 771) (2) with further references; Ivo Grlicca (n 768) (124) with further references; Stefan Groß and Stefan Heinrichshofen, “\textit{Share Economy} und die Frage nach der Umsatzsteuer, (65)(10) Umsatzsteuer-Rundschau (2016) 385 (385); similar: Heidi Friedrich-Vache (n 106) pp 343–344; E.C.J.M. van der Hel-van Dijk and M.A. Griffioen (n 326) (392) with further references; Marie Lamensch (n 108) p 119; Claudia Neugebauer (n 110); OECD (2015a), \textit{BEPS Action 1 – Final Report} (n 2) para 94; durable goods and skills are shared: Philip Kotler and Kevin Keller (n 15) p 486 and Glossary: sharing economy; concerning the sharing economy in general see e.g.: Jeremy Rifkin, \textit{The Age of Access: The New Culture of Hypercapitalism, Where All of Life Is a Paid-For Experience} (2001); Arun Sundararajan, \textit{The sharing economy: the end of employment and the rise of crowd-based capitalism} (2016).
\end{thebibliography}
Special online peer-to-peer marketplaces offer services which facilitate the contact to other consumers by providing an almost all-round carefree package. Online platforms mediate between the supplier and the customer and contracts among the peers can be easily concluded. Today, transactions among the parties are frequently implying that former private consumers become taxable persons according to Article 9 of the EU VAT Directive. Thus, the original idea of privately sharing with others seems to be lost. The transactions are often taxable supplies (in cases when all other outlined prerequisites are also fulfilled) which is why they line up in the all-phase system of VAT and must be taxed under the premise of a broad-based tax. Thus, the shared economy causes no particular VAT problems concerning the EU VAT concept of consumption. The necessity for issuing completely new rules is not given.

A fine grained analysis of different kinds of transactions which are rendered under the roof of the sharing economy shows that either supplies for
consideration or free supplies are performed. Firstly, there are identified transactions of services against monetary consideration which can be designed, for example, as cost-sharing agreements. The underlying idea may meet the original aims of the sharing economy. The supplier only receives a part of his costs back, as it is the case with the provision of car journeys via BlaBlaCar. This does, however, not change the categorization under VAT laws: a supply for consideration takes place. Secondly, supplies against consideration in kind (so-called barter transactions like house swapping or the exchange of services within closed networks and without the possibility of earning “real” money) must be named. Barter transactions involve every form of renting, lending, swapping, sharing and bartering. Lastly, free non-taxed supplies of services (which are known from services like couchsurfing) are rendered. Presumably, such kinds of transactions are closest to the original idea of the sharing economy.

A very popular sector of the sharing economy is renting. Online marketplaces like airbnb connect hirers with renters. The suppliers on the platform seek to share a room or an appartment with others against payment. Assuming that a taxable person is supplying his flat, it can be supposed that the other requirements for a taxable VAT transaction are met,

782 There are known four different kinds: supplies for monetary consideration, barter transactions with individuals or with a common pool and free supplies, see e.g.: Giorgio Beretta (2017) (n 771) (4–5) or EU Commission (2015d), VAT Treatment of sharing economy, VAT Committee Working Paper No 878 (n 774) pp 2–3.
783 Giorgio Beretta (n 93) (418–423); Marie Lamensch (n 108) p 121.
784 See: https://www.blablacar.de/ (last accessed: 01.02.2020); Giorgio Beretta (2017) (n 771) (5).
786 Giorgio Beretta (2017) (n 771) (3 and 5); Giorgio Beretta (n 93) (422) with a brief reference to personal data as possible consideration (therefore, see the analysis on pp 212 et seq an pp 214 et seq).
788 https://www.airbnb.de/ (last accessed: 01.02.2020); a short description on how airbnb works can be found in: Philip Kotler and Kevin Keller (n 15) p 486.
too. Especially the direct link requirement seems not to be problematic as payments are made for certain renting periods and for specific apartments. This increased market potential leads to higher tax revenues as the neutrality principle demands taxation of the transactions. In the case of *airbnb*, such accommodation services compete with traditional commercial providers of hotels, hostels or bed and breakfast which are mostly categorized as taxable persons and, consequently, must also tax their outputs. However, some transactions of the sharing economy do not fall under regulatory laws. Thus, for example, in the case of sharing apartments, prices are lower than for the hotel sector, which has to follow special regulatory rules. Non-taxation of the shared services would intensify disparities. Moreover, the renting of accommodations faces further challenges: In Germany, some municipalities prohibit the renting of accommodations via online marketplaces as they have categorized such renting as misuse of private living space. However, as explained above, the illegality of transactions does not limit the scope of the EU VAT Directive as the rentals via *airbnb* compete with “legal” lettings. In a nutshell, a peer who rents out his apartment or house through *airbnb* and is categorized as a taxable person is liable to pay VAT. By contrast, in situations in which the supplier is still categorized as a private person, their transactions are out of scope of EU VAT law.


790 This fact leads to unfair competition: Ivo Grlica (n 768) (125); see also: Giorgio Beretta (2017) (n 771) (3).


792 See pp 156 et seqq.
Beyond the relatively clear determination of the VAT consequences of the “airbnb-model”, barter transactions require a case-by-case examination of whether there is a direct link between a supply and its consideration. The assessment of the direct link requirement is not easy and the exact circumstances of the transactions as well as the terms and conditions of the interacting online marketplaces need to be analyzed. If a direct link is confirmed and the supplier is a taxable person, VAT must be charged. However, the EU VAT Committee identifies no direct link between transactions when both services are valued differently. Barter transactions based on participation in a pool network are therefore rarely directly linked. By contrast, when a taxable person does render free supplies, the limits of Article 26 of the EU VAT Directive must be followed. This means that taxation of supply of services depends on the relationship to the customer. Thus, free services which are rendered by taxable persons to related people are taxed, whereas free services to third parties are not covered by the EU VAT concept of consumption. Free services which are rendered by private individuals are always out of scope.

b. Private Consumers as Taxable Persons (“Prosumers”)

Taxation of the shared economy depends to a large extent on the status of the supplier. As described in the previous chapter, private consumers are involved in the sharing process. As long as they do not fulfil the conditions of Article 9 of the EU VAT Directive, no VAT consequences will appear. Yet the sharing economy is characterized by an increased market participation of private individuals which is especially promoted by online plat-
forms. Such people are sometimes called prosumers, consumer-traders or micro-entrepreneurs. A prosumer blurs the boundaries between private and business. He is a person who acts both privately and commercially. This is just one consequence of the sharing economy as it is a double-sided phenomenon. The question about the VAT status of the supplier, however, is decisive as the status separates taxable and non-taxable transactions on a personal level. Given the close links between the suppliers of services and online marketplaces, private individuals could also be employees of the intermediaries. Insofar, the sharing economy challenges the concept of taxable persons. As this is crucial for the boundaries within the concept of consumption, the new business models challenge the broad base of the EU VAT Directive in an indirect way.

The concept of a prosumer is based on the idea that he is on the one hand a supplier and on the other hand a consumer. In a peer-to-peer relationship, a prosumer passes on goods or services that he has initially purchased for his own use. Even if private consumers have resold goods for a long time (untaxed C2C transactions), the underlying concept of these transactions was to sell mainly goods and to transfer ownership of them. A private seller did not act as a supplier and a consumer at the same time. By contrast, the sharing economy may generate an additional step in the supply chain. In the past, a person purchased, for example, a house or rented an apartment for consideration. This was the end of the “accommodation” supply chain. Today, there is another link in the chain, as consumption is shared in order to further exploit certain consumer goods and to increase the possibilities of use and enjoyment. The double interaction as a consumer and a producer may not be problematic in cases in which the activi-

799 Increasing consumer contribution is characteristic for the digital economy: Dietmar Aigner et al (n 3) para 12/2; Giorgio Beretta (2017) (n 771) (2); Wolfram Scheffler and Christina Mair (n 775) (24); see also: E.C.J.M. van der Hel-van Dijk and M.A. Griffioen (n 526) (393).
800 Prosumer e.g.: Marco Allena (n 771) (307); concerning consumer-trader: Marie Lamensch (n 108) p 119; concerning micro-entrepreneur e.g.: Giorgio Beretta (n 93) (388) or Giorgio Beretta (2017) (n 771) (2).
801 Giorgio Beretta (2017) (n 771) (5–6); E.C.J.M. van der Hel-van Dijk and M.A. Griffioen (n 526) (393).
802 Similar: Giorgio Beretta (2017) (n 771) (3).
803 Marco Allena (n 771) (307).
804 See pp 133 et seqq; C2B transactions are neither taxed.
ties take place occasionally within a private context. However, the online marketplaces facilitate the contact with other consumers. Thus, it is easy for people to engage in the sharing economy and to regularly supply services. Thus, private people may become taxable persons. Consequently, there would be no prosumers but regular suppliers which offer their services via digital platforms.

The VAT status of a prosumer has to be assessed on a case-by-case basis in accordance with Article 9 of the EU VAT Directive. With regard to the VAT status of prosumers, there is already disagreement as to whether registration on an online platform is sufficient to qualify the person as a taxable person. However, the registration cannot be the crucial point. The actual operation as a taxable person must be the critical factor. Especially the frequency and professionality (e.g., profile maintenance, e-mail communication) of suppliers of services may be determinative and re-

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805 Article 12 paragraph 1 of the EU VAT Directive, however, restricts this general statement as occasional transactions may be included in the scope of VAT. The special rule is an optional provision. Concerning Article 12 of the directive see e.g.: EU Commission (2015d), VAT Treatment of sharing economy, VAT Committee Working Paper No 878 (n 774) p 6; Ivo Grlica (n 768) (128); Marie Lamensch (n 108) p 121; Katerina Pantazatou (n 771) p 228; concerning some conditions for the application of Article 12 of the EU VAT Directive see e.g.: CJEU of 15.09.2011 – C-180/10 and C-181/10, Slaby and Others, ECLI:EU:C:2011:589; problems can arise as soon as the taxable status is already affirmed on the basis of another activity: Stefan Groß and Stefan Heinrichshofen (n 773) (386); in this context see also: CJEU of 13.06.2013 – C-62/12, Kostov, ECLI:EU:C:2013:391.

806 The online platforms acting as intermediaries have adapted the shared economy to traditional market dynamics. The remaining change concerns the use of information technology: Marco Allena (n 771) (308).


808 See e.g.: ECJ of 26.09.1996 – C-230/94, Enkler, ECLI:EU:C:1996:352; concerning a thorough analysis of whether prosumers are taxable persons see: Giorgio Beretta (n 93) (401–414); EU Commission (2016c), A European agenda for the collaborative economy (n 94) p 14; Katerina Pantazatou (n 771) pp 227–230; for an analysis in connection to consumers involved in barter transactions of “free” electronically supplied services see pp 224 et seqq.

809 EU Commission (2015d), VAT Treatment of sharing economy, VAT Committee Working Paper No 878 (n 774) p 8: registration is a sign for continuity; Marie Lamensch (n 108) pp 120–121; registration is only of incidencial nature: Desiree Auer, Esther Freitag and Annika Streicher (n 573) (117–118).

sponsible for the categorization as a taxable person. A person who occasion-
ally provides services is therefore no taxable person but still a private consumer. Conversely, if a prosumer meets the requirements of Article 9 of the EU VAT Directive (this means that he carries out an economic activity and receives continuous income) he has to comply with the obligations of EU VAT laws. However, the clear categorization which is made by Article 9 of the EU VAT Directive means that the prosumer, as defined, does not exist in VAT law. Rather, the supplier of shared services is either a private individual or a taxable person. A mix of both concepts neither exists nor is it necessary to subsume the prosumer under EU VAT law.

Prosumers respectively the suppliers of the shared services can act as taxable persons in all categories of transactions discussed above. In terms of peer-to-peer supplies for consideration and cost-sharing agreements the tax status of the supplier may be the most obvious. Such transactions are very similar, for instance, to normal rental businesses or transport services. Concerning barter transactions, it may be questionable whether a private person who does not interact with any market apart from the shared economy can be categorized as a taxable person when he only renders barter transactions without earning any money. For ensuring neutrality, however, it is irrelevant whether monetary or non-cash considerations are made for supplies. Thus, such prosumers may also fulfil the prerequisites of taxable persons in some cases. By contrast, prosumers who exclusively render free transactions cannot fulfil the requirements of Article 9 of the EU VAT Directive. Such transactions are out of scope then. However, when free services are provided by a taxable person, the transactions must be taxed in accordance with the rules for deemed supplies.

In some cases, the close ties between online marketplaces and the suppliers of shared services could be interpreted as an employer-employee relationship. By losing the initial intentions of the shared economy and given the increased importance of online marketplaces, the shared economy is rather an interaction of the general public with businesses (the market-

811 See pp 190 et seqq.
812 ECJ of 01.04.1982 – C-89/81, Hong-Kong Trade, ECLI:EU:C:1982:121 paras 10–11; Giorgio Beretta (n 93) (404); Ben Terra and Peter Wattel (n 272) p 177.
813 By contrast, it is argued that such a relationship is hardly feasible as the platform’s terms exclude it: Carrie Brandon Elliot (n 777) (chapter 4); in most cases, no employer-employee relationship is on hand: Tina Ehrke-Rabel (n 37) p 385; see also: VAT Committee (2018a), Guidelines resulting from the 111th meeting of 30 November 2018 (n 777).
This also changes the labour market which is why discussions are being conducted about whether the supplier of shared services is an independent contractor or an employee of the online platform. A prominent example is Uber. The discussion whether the person who offers taxi rides is an independent contractor or an employee of Uber is not just up to date in Europe but also in Australia, for example. The terms and conditions on which an Uber driver operates are quite strict. Uber has almost full control over the services rendered by the drivers. In situations in which Uber drivers refuse to carry a potential rider, they have to bear negative consequences like bad ratings. Furthermore, Uber calculates the prices for the rides and manages the payment process. The drivers have no influence on these procedures. It may be argued that a driver is fully reliant on Uber, which is why the drivers might be employees of Uber according to Article 10 of the EU VAT Directive. The idea of sharing services is completely suppressed in this case. From an economic perspective, Uber could be named a taxi service provider searching for customers via online technologies.

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815 Giorgio Beretta (2017) (n 771) (2); Marie Lamensch (n 108) p 120; see e.g. Employment Tribunals between Aslam, Farrar and others v Uber BV, Uber London Ltd and Uber Tritannia Ltd [2016] Case No: 2202550/2015: the UK employment tribunal identified an employment status of Uber drivers; see for a discussion: Katerina Pantazatou (n 771) pp 226–227 with further references.

816 Marie Lamensch (n 108) p 121; see: https://www.uber.com/de/de/ (last accessed: 01.02.2020).

817 Concerning the discussion see e.g.: Rebecca Millar, UberX drivers supply taxi travel and so must be registered for GST, (6)(1) World Journal of VAT/GST Law (2017) 47–54; in general, the differences between employees and contractors become – the same development is recognized by distinguishing personal and business property: Giorgio Beretta (2017) (n 771) (6).

818 Federal Court of Australia, Uber B.V. v Commissioner of Taxation, [2017] FCA 110 (17.02.2017) paras 4–10; see also: Rebecca Millar (n 817) (49).

819 Uber services were discussed in two non-tax CJEU judgments: CJEU of 20.12.2017 – C-434/15, Asociación Profesional Elite Taxi, ECLI:EU:C:2017:981; of 10.04.2018 – C-320/16, Uber France, ECLI:EU:C:2018:221; the two cases may possibly help to categorize sharing economy supplies and the role of online marketplaces: Marcos Álvarez Suso, Comments on CJEU Case Law on Taxable Transactions 2017: the anti-abuse doctrine (Cussens) and the sharing economy (UBER), in CJEU: Recent Developments in Value Added Tax 2017 (Michael Lang et al eds, 2018) pp 242–247 and Marcos Álvarez Suso, E-Platforms Providing Services in the Short-Term Rental Accomodation Market: The Challenges for Taxation of These
Besides some employer-employee relationships, the sharing economy causes a rise in the number of taxable persons under EU VAT law. The suppliers of shared services, however, are not always aware of their tax obligations. As argued above, suppliers of shared services may fulfil the prerequisites of Article 9 of the EU VAT Directive. In some cases, the special rules for small enterprises cushion the consequences of full output VAT liability. Nevertheless, the increasing number of tax collectors erodes the indirect character of EU VAT, raises collection costs and causes efficiency issues. The interactors are often not aware of their tax obligations so that they are non-compliant. Additionally, the tax authorities hardly audit such income because it is often too complicated for them to collect the relevant information.

To counter the loss of tax revenues in connection with the shared economy, clear communication to the users of the online platforms is decisive. Especially the concept of taxable persons must be clearly outlined.

Services under the EU VAT, (31)(1) International VAT Monitor (2020) published online 02.12.2019; in this context see also: Anton Joseph, Taxing Uber Drivers, (24)(2) Asia-Pacific Tax Bulletin (2018) published online 20.03.2018 (chapter 1); it seems that the drivers are employees of uber (emphasis must be set on the economic reality!): Giorgio Beretta (n 93) (412–413); by contrast – uber drivers are no employees of uber: Lily Zechner, How to Treat the Ride-Hailing Company Uber for VAT Purposes, (39)(6) International VAT Monitor (2019) 261 (261–262).
as this reveals the highest uncertainty for prosumers. In this case, current different handlings in countries all over the world can be counteracted. Above all, all problems connected to the shared economy can be handled within the traditional EU VAT concept of consumption.

3. Digital Kinds of Consideration

The already discussed alterations triggered by the digitalization concern the supply and demand at marketplaces. Such transformations are closely related to each other and are hardly distinguishable as it is not clear where the change had its starting point. The proxy of transaction, however, is characterized by an exchange of goods or services for mostly monetary consideration. Therefore, the concept of money is a backbone for EU VAT laws. The amount of money to be paid also serves as the basis for calculating the amount of VAT to be applied to the transaction. Consideration is mostly expressed in legal tender. To ensure the exchange of goods and services for money, the simple payment of money constitutes no supply of goods or services because it includes no consumption in the sense of EU VAT. Furthermore, the exchange of different legal tender is a taxable transaction according to Article 2 paragraph 1 lit c) of the EU VAT Direc-

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826 The application of the pertinent rules is generally challenging: Giorgio Beretta (2017) (n 771) (3); Marco Allena (n 771) (308) calls for a “system upgrade”.
827 For an overview of how other countries deal with the shared economy, see e.g.: OECD (2017c), Technology Tools to Tackle Tax Evasion and Tax Fraud (https://www.oecd.org/tax/crime/technology-tools-to-tackle-tax-evasion-and-tax-fraud.htm, last accessed: 01.02.2020) pp 24–25; potential lies in an increased cooperation between states and special online search tools to expose taxable persons – see for a similar suggestion concerning the application of the German search tool Xpider, but also for other solutions: Wolfram Scheffler and Christina Mair (n 775) (29) with further references; concerning Xpider see: https://www.bzst.de/DE/Behoerden/Steuerstraftaten/UStBetrugsbekaempfung/ustbetrugsbekaempfung_node.html#js-toc-entry2 (last accessed: 01.02.2020); similar: Claudia Neugebauer (n 22) (109).
828 See e.g.: ECJ of 09.10.2001 – C-409/98, Mirror Group, ECLI:EU:C:2001:524 para 26; Joachim Englisch (n 261) para 89.
New virtual currencies initially challenged the EU VAT concept of money as it was not clear how to treat them. In the meanwhile, the CJEU has recognized Bitcoins as an example of bidirectional virtual currencies and has equated them with legal tender. This was a step towards neutrality (the equal treatment between the analogue and digital world) within EU VAT. In this context, the court has concentrated on an economic definition of money. This further points out the economic interpretation of EU VAT law. By contrast, personal data, which are often called the money of the 21st century, do not fulfil the economic definition of money.

a. Bidirectional Virtual Currencies: Money in an Economic Sense

Money facilitates more complex and indirect transactions as any potential trading partner can use the money. It is accepted and trusted because everybody else uses it. In a continuous process, different kinds of money have evolved. The ongoing trend towards online banking and cashless payment is therefore only one further step in the development process of

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829 ECJ of 14.07.1998 – C-172/96, First National Bank of Chicago, ECLI:EU:C:1998:354; concerning the treatment of money in EU VAT law see also: Oskar Henkow (n 96) pp 51–52 with further references (concerning the discussion see also: Oskar Henkow, VAT and Virtual Reality: How Should Cryptocurrencies Be Treated for VAT Purposes?, in Value Added Tax and the Digital Economy: The 2015 EU Rules and Broader Issues (Marie Lamensch, Edoardo Traversa and Servaaas van Thiel eds, 2016) pp 135–147; please note: as the two contributions are very similar, this one is not cited in addition); see also: Ben Terra and Julie Kajus (n 126) pp 993–996.

830 Electronic currencies respectively virtual currencies have been discussed for a certain period now, see e.g.: Kerry Macintosh, How to Encourage Global Electronic Commerce: The Case for Private Currencies on the Internet, (11)(3) Harvard Journal of Law & Technology (1998) 733–796.


832 Tina Ehrke-Rabel (n 37) p 378: by promoting media neutrality, economic reality is emphasized.

833 Concerning a short history of money see e.g.: ECB, Virtual Currencies (n 831) pp 9–10; concerning the development of commodity and fiat money see e.g.: Gregory Mankiw (n 131) pp 605–606 or Gregory Mankiw (n 133) p 81.
money. Money which is transferred from one online bank account to another has the same value of coins and bank notes. It is just the “online version” of legal tender (electronic money schemes). However, despite the importance of money, there is no straightforward definition, just some common characteristics. Economists, for example, call money a flow of information which enables trade. The EU VAT Directive does not define money.

Traditional EU VAT rules for money must also be applied to new emerging virtual currency systems. However, EU VAT provisions concerning the consideration for a supply were codified at a time when money was the dominant, if not only means of payment. On this basis, rules concentrate on legal tender of the EU Member States. For a while, new kinds of considerations in the form of virtual currencies have been emerging. Such virtual money systems challenged the application of VAT rules insofar as it was not clear how to categorize them under EU VAT law. In detail, VAT experts disagreed whether crypto currencies must be equated with curren-


836 Furthermore, the directive does not contain definitions for “means of payment” and “currency”: Aleksandra Bal, Bitcoin Transactions: Recent Tax Developments and Regulatory Responses, (17)(5) Derivatives & Financial Instruments (2015) published online 19.08.2015 (chapter 3.3.3.3); concerning potential relevant definitions of money see the discussion in: Oskar Henkow (n 96) pp 50–51 with further references.
cies, services (digital goods), forms of debts, checks, financial instruments or maybe vouchers.\textsuperscript{837} EU Member States had dealt with virtual currencies in different ways.\textsuperscript{838} In the meantime, the CJEU took in \textit{Hedqvist} a decision

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\begin{itemize}
\item \textsuperscript{837} Is it payment in money or consideration in kind?: Redmar Wolf (n 834) (255); concerning a discussion about vouchers see: Oskar Henkow (n 96) pp 52–55 with further references to ECJ case law; the exchange possibilities for vouchers are more limited compared to a payment instrument: Christian Amand, \textit{EU Value Added Tax: The Directive on Vouchers in the Light of the General Value Added Tax Rules}, (45)(2) \textit{Intertax} (2017) 150 (164); for an analysis see also e.g.: Francesco Cannas (n 569) p 10; Francesco Cannas (n 750) (80–84); a B2C barter transaction: Aleksandra Bal, \textit{Taxing Virtual Currency: Challenges and Solutions}, (43)(5) \textit{Intertax} (2015) 380 (386–389); see also e.g.: Machiel Lambooij, \textit{Retailers Directly Accepting Bitcoins: Tricky Tax Issues?}, (16)(3) \textit{Derivatives & Financial Instruments} (2014) 138 (140–141); see also: EU Commission (2014b), \textit{VAT Expert Group: VAT treatment of Bitcoin} (taxud.c.1 (2014)3933496 – VEG N°037) and EU Commission (2014c), \textit{VAT treatment of Bitcoin}, VAT Committee Working Paper No 811 (taxud.c.1(2014)2772524).
\item \textsuperscript{838} In an international comparison, \textit{Bitcoins} are neither treated consistently. Qualifications range from a certain kind of services or asset to (foreign or digital) currency as a means of payment. Other countries prohibit \textit{Bitcoins}. Concerning some different qualifications with further references see e.g.: Stefano Capaccioli, \textit{VAT & BITCOIN}, (23)(6) \textit{EC Tax Review} (2014) 361–362; see also: Aleksandra Bal (n 837) (383 and 389); concerning Australia, Singapore, South Africa and China see: Rebecca Millar et al (n 98) pp 186–190; concerning UK, Germany and Austria see: Redmar Wolf (n 834) (255–256); concerning the treatment of virtual currencies in Japan see e.g.: Makiko Kawamura and Keitaro Uzawa, \textit{Note on the Consumption Tax Exemption for Virtual Currency}, (23)(3) \textit{Asia-Pacific Tax Bulletin} (2017) published online 01.05.2017; European and third countries: Aleksandra Bal (n 836) (chapter 3.2); EU, Japan, Spain, Switzerland and Mexico: Fernando Juárez and Raymond Vázquez Hernández, \textit{Virtual Currencies in Mexico: Is Bitcoin Subject to VAT in Mexico?}, (29)(3) \textit{International VAT Monitor} (2018) 126–130; Germany, the Netherlands, Norway, Singapore, Spain, United Kingdom and United States: Machiel Lambooij (n 837) (141–143); see also the examples in: Oskar Henkow (n 96) p 56–57 with further references; concerning Australia (\textit{Bitcoins} cannot be money): Ine Lejeune and Sophie Claessens, \textit{The Future of VAT in a Digital Global Economy – Innovation versus Taxation}, in \textit{VAT/GST in a Global Digital Economy} (Michael Lang and Ine Lejeune eds, 2015) p 207 with further references; there exist calls for regulatory frameworks to achieve a uniform tax treatment, see e.g.: Aleksandra Bal, \textit{Developing a Regulatory Framework for the Taxation of Virtual Currencies}, (47)(2) \textit{Intertax} (2019) 219–233 or Piergiorgio Valente, \textit{Bitcoin and Virtual Currencies Are Real: Are Regulators Still Virtual?}, (46)(6/7) \textit{Intertax} (2018) 541–549.
\end{itemize}

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on Bitcoins, a representative of a bidirectional crypto currency system, and has given them the status of a means of payment. For example, the facts that Bitcoins are no legal tender and that they are issued by another institution than a government are considered to be irrelevant. Consequently, Bitcoins have been recognized as a parallel possibility for payments within EU VAT laws.

In its case Hedqvist, the CJEU stressed an economic point of view rather than a legal interpretation of the law. The treatment of Bitcoins may also be extended to all similar kinds of bidirectional virtual currency systems, but not to other varieties of virtual payment facilities. In short, the categorization as a bidirectional virtual currency system implies that real money can be exchanged for Bitcoins and vice versa. Closed virtual currency schemes, on the other hand, cannot be exchanged for real money and are

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840 This seems to be in line with ECJ of 26.06.2003 – C-305/01, MGK-Kraftfahrzeuge-Factoring, ECLI:EU:C:2003:377 para 49 – see: Lars Dobratz (n 356) p 48 according to whom it can be concluded that the ECJ intends to equate all monetary claims in its VAT treatment with legal tender.

841 Similar: Benjamin Beck and Dominik König (n 839) (871); by contrast, the ECJ emphasized a legal and economic understanding e.g. in: ECJ of 27.03.1990 – C-126/88, Boots, ECLI:EU:C:1990:136 para 21; of 15.10.2002 – C-427/98, Commission v Germany, ECLI:EU:C:2002:581 para 57; CJEU of 12.06.2014 – C-461/12, Granton Advertising, ECLI:EU:C:2014:1745 para 17.

842 Dietmar Aigner et al, Digitale Währungen im Steuerrecht – Beispielfall Bitcoin, in Digitale Transformation im Wirtschafts- & Steuerrecht (Elias Felten et al eds, 2019) paras 13/23 and 13/28; Walther Pielke (n 839) (152); concerning bidirectional virtual currency schemes see e.g.: Oskar Henkow (n 96) p 50 or Jasmin Kollmann (n 121) pp 155–159.
therefore not comparable to *Bitcoins*. Furthermore, virtual currency schemes with unidirectional flow are as well different to *Bitcoins* and thus with legal tender, as they can be acquired with real money but cannot be exchanged back.

The CJEU judgment *Hedqvist* clarified the categorization of *Bitcoins* as money but did not solve all the following questions concerning EU VAT law. By equating *Bitcoins* with legal means of payment, the mining (production) of *Bitcoins* should be irrelevant for VAT purposes. By solving

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843 These are usually used in a game: Aleksandra Bal (n 96) pp 61–63; Aleksandra Bal (n 834) (352–353); Francesco Cannas (n 750) (76); ECB, *Virtual Currencies* (n 831) pp 13–14; Oskar Henkow (n 96) p 49; Jasmin Kollmann (n 121) pp 148–155 and 160–171 with further references; OECD (2015a), *BEPS Action 1 – Final Report* (n 2) paras 87–88.

844 Such systems are categorized as pre-payments for goods and services and as such they are underlying the EU VAT regime: Aleksandra Bal (n 836) (chapter 2); *Bal* uses a slightly different wording; Francesco Cannas (n 750) (76); ECB, *Virtual Currencies* (n 831) p 14; Oskar Henkow (n 96) p 49; Jasmin Kollmann (n 121) pp 146–148 with further references.

complex tasks via computers, Bitcoins can be mined individually. Legal tender (in the form of income or wealth) expresses the financial capability of individuals which is used to seek for consumption possibilities. It seems rather strange, why “self created” money like Bitcoins can be equated with legal tender which has to be earned by work or be inherited. Nonetheless, if one interpreted the concept of VAT as the ability to consume, it would be plausible that Bitcoins are treated like money (because they facilitate the purchase of goods and services). The exchange of Bitcoins for real money and transactions which are paid with Bitcoins are treated like transactions paid with legal tender. Trading with Bitcoins falls within the scope of the EU VAT Directive, but it is an exempt transaction.

The CJEU judgment provided legal certainty on the general treatment of Bitcoins within EU VAT law. However, the judgment did not solve subsequent problems like the determination of the taxable amount of transactions which are paid with Bitcoins. Questions concerning bookkeeping and involved enforcement issues have not been answered so far either.

Bitcoins were classified as money by the CJEU without a clear (VAT) definition of the latter, as the EU VAT Directive does not define money at all. However, money can be described by economic and legal characteristics. The economic features are as follows: Firstly, money is a store of value which enables the transfer of purchasing power into the future.

846 Aleksandra Bal (n 837) (380–381); ECB, *Virtual Currencies* (n 831) p 24; Gregory Mankiw (n 133) p 83; Walther Pielke (n 839) (150 and 152); Redmar Wolf (n 834) (257) with further references.
847 See the discussion on pp 121 et seqq.
848 Redmar Wolf (n 834) (256): Bitcoins represent the same “purchasing power” as traditional money.
849 See e.g.: Redmar Wolf (n 834) (255–256) with further references.
850 Marie Lamensch (n 108) p 130; Walther Pielke (n 839) (152); Redmar Wolf (n 834) (256); see for some subsequent issues and solutions also: Albert Schlund and Hans Pongratz, *Distributed-Ledger-Technologie und Kryptowährungen – eine rechtliche Betrachtung*, (56)(12) Deutsches Steuerrecht (2018) 598 (602) with further references; see e.g. critical on the point that there are no better guidelines to determine the taxable amount in Germany: Bastian Liegmann, *Umsatzsteuerliche Behandlung virtueller Währungen*, (73)(21) Betriebs-Berater (2018) 1175 (1178); on the question how the exchange of two kinds of cryptocurrencies is to be handled under EU VAT laws see: Jasmin Kollmann (n 845) (166).
851 See the references in footnote 836.
852 Christian Amand (n 837) (164); Aleksandra Bal (n 96) p 61; Aleksandra Bal (n 837) (381); ECB, *Virtual Currencies* (n 831) p 10; Oskar Henkow (n 96) p 55; Gregory Mankiw (n 131) p 605; Gregory Mankiw (n 133) p 80; Charles Proctor (n 835) para 1.07 with further references.
ondly, money is a generally accepted standardized numerical unit of account which expresses, for example, prices, values or debts. This makes it easy to compare market offers. Its legitimacy needs to be accepted by the users. Additionally, users should not spend time and effort looking at the unit of account of a currency. Thirdly, money is a medium of exchange. It is an exchange catalyst which is used for trade in order to avoid the necessary double coincidence of consumer needs in barter economies. The legal definition of money is composed of the economic characteristics and three additional attributes. The latter are a central management, legal tender status and the existent of a physical carrier.853

Bitcoins fulfil the functions of money in an economic sense. This has often been questioned in the scholarly literature.854 However, as the following discussion shows, the concerns can be refuted.

Despite their high volatility,855 Bitcoins meet the first function of money (a store of value).856 The exchange rate of Bitcoins depends on the interplay of supply and demand at certain real-time exchange platforms.857 In general, a currency which is a value storage needs to be operated in an effective, reliable and stable manner. However, risks which are accompanied by the exchange at real time platforms cannot be a decisive criterion to negate this criterion, as legal tender can also suffer from high volatility. History has shown that legal tender of different countries can also suffer from inflation.858 By contrast, decentralized currencies like Bitcoins react to market

853 See e.g.: Charles Proctor (n 835) para 1.17.
855 Gregory Mankiw (n 133) p 83.
856 Critical: Aleksandra Bal (n 837) (382).
857 Francesco Cannas (n 750) (76); ECB, *Virtual Currencies* (n 831) p 21; Gregory Mankiw (n 133) p 83; Redmar Wolf (n 834) (254); this is a challenge of the tax treatment of Bitcoins: EU Commission (2015c), *VAT Treatment of Bitcoin (II)*, VAT Committee Working Paper No 854 (taxud.c.1(2015)2066488) pp 8–10 (see also for other challenges of Bitcoins).
858 See, for example: Germany (1923) and most recently: Venezuela (2019, IMF DataMapper on Venezuela, see: https://www.imf.org/external/datamapper/PCPI PCH@WEO/WEOWORLD/VEN, last accessed: 01.02.2020); Aleksandra Bal (n 96) p 62.
forces and are independent from governmental influences.\textsuperscript{859} This makes them a more constant value storage, compared to legal tender. However, Bitcoins may be not reliable as they can be forbidden by governments, may crash because of technical problems or may be downgraded by another virtual currency.\textsuperscript{860} Bitcoins are subject to uncertainties just like legal tender. Therefore, Bitcoins fulfil the requirements to be a value storage.

Further doubts about the next function of money \textit{(a unit of account)} can also be dispelled. A unit of account must be a numerical unit of measurement, it must be legitimated by its users and it further must provide a nearly intuitive unit of relative value.\textsuperscript{861} Bitcoins are used to measure the value of goods and services, they are numerical and divisible. Furthermore, users of Bitcoins attest them legitimacy as they trust in the cryptographic algorithm which underlies Bitcoins. Some may be even more convinced of the decentrally “mined” Bitcoins than of a government-controlled currency and the intermediary needed for the transfer of legal money.\textsuperscript{862} The requirement, i.e. to be a unit of relative value, is controversially discussed. It is uncertain whether Bitcoins enable people to intrinsically and instinctively capture the underlying value. Therefore, Aleksandra Bal denies the fulfillment of this requirement.\textsuperscript{863} However, the German Federal Financial Supervisory Authority does not see any problems with this.\textsuperscript{864} Bitcoins can be converted into a common unit of account using exchange rates. This also happens with foreign currencies. Thus, Bitcoins can be used as a unit of account.

\textsuperscript{859} Similar: ECB, \textit{Virtual Currencies} (n 831) p 25; in past times, money was not always issued by a central government – thus, this is no new phenomenon, just one which was not present while designing EU VAT laws: Redmar Wolf (n 834) (254).

\textsuperscript{860} Aleksandra Bal (n 96) p 63.

\textsuperscript{861} Similar see e.g.: Charles Proctor (n 835) para 1.17.

\textsuperscript{862} Aleksandra Bal (n 96) p 62 with further references.

\textsuperscript{863} Aleksandra Bal (n 96) pp 62–63; Aleksandra Bal (n 837) (382); Aleksandra Bal (n 836) (chapter 3.3.3): Bitcoins fulfil the requirement of being a unit of account, but “it is impossible to determine the value of particular goods in Bitcoin without knowing the bitcoin exchange rate at a particular time.”; see also: Francesco Cannas (n 750) (81).

\textsuperscript{864} The German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht) recognizes Bitcoins as a means of payment. It does not question the criterion of “a unit of account”: Bundesanstalt für Finanzdienstleistungsaufsicht, Bitcoins: Aufsichtliche Bewertung und Risiken für Nutzer (19.12.2013) (https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Fachartikel/2014/fa_bj_1401_bitcoins.html, last accessed: 01.02.2020); see also: Albert Schlund and Hans Pongratz (n 850) (600) with further references.
Finally, doubts about the fulfilment of the function as a medium of exchange can be dispelled. Bitcoins are accepted by businesses and private people who deal and pay with them. Of course, this does not imply general acceptance by all market participants; Bitcoins are a rather weak exchange catalyst. Critics indeed centre on the fact that only few companies accept Bitcoins as a medium of exchange. Consequently, only a few transactions are paid with them. However, the exchange of Bitcoins either for goods, services or for real currencies, is the inherent raison d’être of them. All in all, the three economic preconditions of money are fulfilled by Bitcoins.

In contrast to the economic functions of money, Bitcoins do not meet the legal definition of money. Bitcoins lack all three additional features. Firstly, it does not have a central management as it is based on a decentralized system (so called “distributed-ledger-technology”). There is no central bank which issues new Bitcoins and controls the amount in free circula-

865 Aleksandra Bal (n 837) (382); Gregory Mankiw (n 133) p 83; OECD (2015a), BEPS Action 1 – Final Report (n 2) para 88; Redmar Wolf (n 834) (254); Aleksandra Bal (n 836) (chapters 1 and 3.3.3): virtual currencies gain acceptance and they are a medium of exchange.

866 Aleksandra Bal (n 96) p 61; critical because of a lack of mandatory acceptance: Francesco Cannas (n 750) (82).

867 Gregory Mankiw (n 133) p 83.

868 The court ruled that Bitcoins have “no other purpose than to be a means of payment”: CJEU of 22.10.2015 – C-264/14, Hedqvist, ECLI:EU:C:2015:718 para 52; in the same vein: Opinion of Advocate General Kokott of 16.07.2015 – C-264/14, Hedqvist, ECLI:EU:C:2015:498 para 17; Redmar Wolf (n 834) (254); Bitcoins are also used for speculative purposes and investment: Dietmar Aigner et al (n 842) para 13/22 or Michael Tumpel and Johannes Kofler (n 839) p 183 (concerning a possible tax treatment of private investments in digital currencies see also p 185); C Back and M Elbeck, Bitcoins as an investment or speculative vehicle? A first look, (22)(1) Applied Economics Letters (2015) 30–34: Bitcoins are often bought for speculative purposes; the outcomes of the judgment Hedqvist may not longer apply because of the use for speculative purposes has changed the economic reality: Tina Ehrke-Rabel (n 37) pp 378–381.

869 Bitcoins fulfill the economic functions of money: Oskar Henkow (n 96) p 56.

870 Aleksandra Bal (n 96) pp 63–64 with further references; Aleksandra Bal (n 836) (chapter 3.3.3); Aleksandra Bal (n 837) (382); ECB, Virtual Currencies (n 831) p 16; Oskar Henkow (n 96) p 56; concerning the fulfilment of the German civil law characteristics see e.g.: Albert Schlund and Hans Pongratz (n 850) (600–601).
Instead, it is based on an open-source, decentralized peer-to-peer network which is not issued by a government. Bitcoins are also not legal tender. However, taxes must be paid in a unit of legal tender. Finally, Bitcoins exist only in electronic form without physical carriers. This discrepancy between non-compliance with the legal and compliance with the economic definition of money is also reflected in the definition of a virtual currency. According to the Financial Action Task Force a virtual currency is “a digital representation of value that can be digitally traded and functions as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value and unit of account, but does not have legal tender status.”

The additional features of the legal definition of money, however, seem to be no longer suitable for the digital economy. For example, the requirement of centralism is eroded by the guiding idea of the shared economy, too. In the same way, financing is no longer dependent on one central lender, one can also rely on decentralized crowdfunding initiatives.
thermore, cashless payments is just another peculiarity which occurs in addition to virtual payment systems. Digitalization immaterializes markets, goods and services in all areas of life. Means of payment are not excluded from this trend and the existence of a physical carrier may be redundant in the future. In conclusion, the additional features of the legal definition of money seem to be outdated in times of the digital economy.\textsuperscript{876}

Against this background, it can be said that the CJEU has made the right decision by treating \textit{Bitcoins} like money for EU VAT purposes and by emphasizing economic notions instead of (outdated) legal ones. While Aleksandra Bal regards this status as somewhat dubious, she also respects that \textit{Bitcoins} can gain the status of money in the future.\textsuperscript{877} CJEU \textit{Hedqvist} was an important step to integrate the digital economy into EU VAT laws. When groups of individuals further develop the concept of money, this should not be a reason for VAT laws to not apply. The very nature of the digital economy is still to sell goods and services for consideration. This is identical to the basic notions of EU VAT and it is moreover compliant with the concept of consumption. The only limitation in this regard is that the CJEU case only concerned \textit{Bitcoins}. Other bidirectional virtual currencies must therefore be similar to \textit{Bitcoins} in order to be valued as money.

b. Personal Data: No Money According to the EU VAT Directive

An increasing number of business models is designed to receive personal data for electronically supplied services. As with \textit{Bitcoins} before the CJEU judgment \textit{Hedqvist}, it is not clear whether these situations can be categorized as the provision of free services, services for consideration in kind or whether data represent a new kind of money. The issue which is discussed in the following is whether seemingly free services of online companies are bought for the provision of personal data which are not services but a kind of money.\textsuperscript{878} When this should be true, the supplies would be subject to

\textsuperscript{876} See e.g.: Oskar Henkow (n 96) p 56 who also ignores all other characteristics of money despite the economic ones.

\textsuperscript{877} Aleksandra Bal (n 96) p 63; Aleksandra Bal (n 837) (382).

\textsuperscript{878} Similar: Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (537–538); Claudia Neugebauer (n 22) (107); Sebastian Pfeiffer (n 100) pp 138–139; in the same vein: Gorka Echevarria Zubeldia, \textit{How VAT-Free Can Free Internet Services Be?}, (30)(3) \textit{International VAT Monitor} (2019) 101 (101); not convinced by this approach: Tobias Rohner, Nicole Looks and Benjamin Bergau (n 30) (497); data are not defined as money: Raoul Riedlinger (n 97) p 704.
EU VAT law in the same way as transactions paid with legal tender. The tax amount would rest on the value of the data. Yet personal data cannot be categorized as money.

Data do not fulfil all economic characteristics of money. Firstly, personal data cannot provide the ability to store purchasing power for future times. One can give away the information for free, it can be sold instantly or later. However, personal data only have a value for companies which sell and buy them or analyze the data in order to carry out targeted marketing, for example. The data themselves do not have any value which expresses wealth or could be transferred to the future. Furthermore, it is complicated to express prices, values or debts with personal data. It is correct that a set of personal data can be sold for a certain amount and that there are some pricing lists for data sets, but this fact is not sufficient to price all goods or services with personal information. Each data set is composed differently and has a different value depending on the buyer and seller. Therefore, data are no standardized unit of account. By contrast, the third requirement, namely the use of data as a medium of exchange, seems to be partly met. Especially social media companies provide services in exchange for data. Such services increase in number and people generally accept the underlying conditions. The number of users rises worldwide. However, the nature of data differs from that of money. Once spent, money is not any longer available for a certain person. The same applies to Bitcoins. As personal data always belong to the individual, however, each person could create more and more data and change it which means that the provision of data is not limited, like legal tender or Bitcoins.

Data also do not fulfil the legal definition of money as they lack all additional prerequisites. Personal data are neither centrally managed (as they are the “property” of each individual), nor do they have legal tender status, nor are there any physical carriers available. In conclusion, data cannot be consulted as money. Consequently, services which are rendered in exchange for data are not treated like classical supplies of goods and services for monetary consideration.

879 Nevada Melan and Bertram Wecke (2015a) (n 99) (2269) with further references to possible estimation bases according to which an average user’s data on a social network is worth USD 40–50; David Dietsch (n 21) (873); Sebastian Pfeiffer (n 22) (162).

880 Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (537).
II. The Concept of EU VAT as a General Consumption Tax Suitable for Multi-Sided Online Business Models

The first part of this chapter has illustrated that digitalization alters both the supply and demand at marketplaces and the concept of money. These challenges can largely be summarized under the traditional concept of consumption from chapter 2. The only exception is the treatment of seemingly “free” services for personal data. Such services are inherent above all in multi-sided online business models which have been briefly explained in the introduction. As shown in the last chapter, personal data cannot be categorized as money. Thus, the question how to integrate such relationships into EU VAT patterns must be answered. This is particularly related to the VAT status of the involved private interactors and the determination of the taxable amount.\footnote{This is in line with the open issues identified by: Nevada Melan and Sebastian Pfeiffer (n 33) (1072–1073).}

In the following, the focus is set on the provision of electronically provided services in B2C situations against the exploitation of personal data (1.). Unlike in the sharing economy, private consumers mostly do not act as taxable persons (2.). Furthermore, the two services constitute taxable barter transactions when the two are directly linked and they are reciprocally performed. Otherwise, no taxable issues can be identified (3.). In the second case, a directly linked consideration is missing and the electronically supplied services are therefore free of charge. An extension of Article 26 of the EU VAT Directive in order to tax these latter situations is not advisable as free supplies are generally not covered by the EU VAT concept of consumption (4.). Concerning the taxable amount of the identified barter transactions, there exist doubts in the scholarly literature as to its identification. These problems can be tackled by suitable cost calculation methods which are tailored to the supply of services (i.e., activity-based costing calculations) and allow to calculate suppliers’ costs (5.). Regardless of whether the electronically supplied services are actually free or bartered, this means that they can all be defined according to the traditional concept of EU VAT consumption. A comprehensive adaption of the basic doctrine of EU VAT law is therefore not necessary, even in the digital age.
1. Supplies in the Context of Multi-Sided Online Business Models

Multi-sided online business models are based on two relationships.\(^{882}\) The first one is established between the online company and other companies for the purpose of online marketing services. This relationship is clearly covered by Article 24 of the EU VAT Directive and causes no problems as it regards the scope of the general concept of EU VAT as a tax on consumption. By contrast, the relationship between the online company and its private/business users is not as clear. Based on an isolated perspective, the online companies provide B2B electronic services respectively B2C electronically supplied services according to Article 58 paragraph 1 lit c) of the EU VAT Directive (a.). Furthermore, it is noted that the users of the platforms of the online businesses tolerate the collection, analysis and exploitation of personal data (b.).

a. Electronically Supplied Services by Online Businesses

The online businesses provide a benefit to an identifiable user. The kind of advantage differs from company to company and from service to service. An individual who uses an online search engine would like to find the answer to his question, a definition of the search term or possible selling points of goods and services he looks for. The spectrum of information is wide; the result, however, is a gain in knowledge. In the field of social media networks, private consumers are eager to get in touch and stay in touch with peers. The online platforms may be directed towards private contacts, business contacts or others. Additional tools provide games or messaging services. Online services like videos, short clips or pictures deliver other kinds of benefits. All such offers are covered by the concept of consumption under EU VAT law (as long as all other conditions are met) as they can be attributed to an identifiable user.

Multi-sided online businesses provide bundles of services. The enjoyment of a specific online service often involves the broadcasting of advertisements.\(^{883}\) Because of the collected personal data, the ads are more tar-

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882 See pp 27 et seqq.
883 See, for example, google which broadcast ads based on information gathered e.g. from previous web site visits (https://support.google.com/ads/answer/2662922?hl=en, last accessed: 01.02.2020).
Some users ban the ads on their computers or smartphones with the help of ad blockers, spam filters or other kinds of software programmes. While some consumers only tolerate the advertisements, others even attest them a certain benefit. For example, when a consumer searches for a product he would like to purchase and a respective advertisement from the closest shop pops up, this information is as useful as the list of results provided by a search engine. The same applies for social media networks. When, for instance, a network user shows his interest in music it would be an additional advantage if he was shown an ad for the next concert of the artist or band. These bunches of services must be seen as a bundle of services in connection with the main electronic services of the search engine, social media network or video platform. All in all, there is one supply which is provided by the online companies.

Online businesses, which are the centre of diverse multi-sided online business models, are undoubtedly taxable persons. Via online channels or smartphone applications, such companies provide either B2B electronic services according to Article 24 of the EU VAT Directive or B2C electronically supplied services according to Article 58 paragraph 1 lit c) of the EU VAT Directive. The B2C services fulfil the criteria of Article 7 paragraph 1 of the EU VAT Implementing Regulation. In this context, a judg-

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884 See pp 27 et seqq; Nicole Looks and Benjamin Bergau (n 18) (865); Nevada Melan and Bertram Wecke (2015b) (n 99) (2814–2815).
885 Werner Pepels (n 15) pp 148–149.
886 Philip Kotler and Kevin Keller (n 15) p 107 with further references.
ment of the German Federal Fiscal Court may cause ambiguity. The judgment concerned “lonely hearts” communities which have been categorized as databases under Article 58 paragraph 1 lit c) of the EU VAT Directive.\textsuperscript{888} Google, wikipedia or ibfd tax research platform\textsuperscript{889} are typical examples for databases. It is rather surprising that online communities such as facebook are also regarded as databases. Matthias Luther explains this outcome as follows: Google or wikipedia are certainly databanks as their intention is to provide information which is stored online. However, when using a social media platform, a user has to search for contacts in a database as well. The subsequent interaction with other users is just the next step of a search within the social media provider’s database. This may be the reason why the German Federal Fiscal Court has categorized these two kinds of supplies in the same group.\textsuperscript{890} Matthias Luther’s line of reasoning is convincing. Whether such kinds of online services are grouped together, however, is not decisive. They are both subsumed under B2C electronically supplied services, according to Article 58 paragraph 1 lit c) of the EU VAT Directive.

b. Transfers of the Right to Exploit Personal Data by Users

It seems clear that the success of multi-sided online businesses depends on the data which is collected from the users. The users do not pay any money


\textsuperscript{889} See: https://research.ibfd.org/#/ (last accessed: 01.02.2020).

\textsuperscript{890} Matthias Luther (n 888) (794).
for the services received, though they provide personal data. In the context of EU VAT law, users do not supply anything when the data are needed for the best possible use of the electronic services (aa.). By contrast, if the users grant the right to exploit the personal data beyond the optimal use of the services, they will provide services themselves.\textsuperscript{891} The latter is mostly the case when the users agree on the collection, analysis and exploitation of their data (bb.). Therefore, this distinction strongly correlates with the underlying data collection reasons and is responsible for the classification for VAT purposes. A case-by-case analysis is necessary.

aa. Ancillary Services

It is generally accepted that recipients of mostly services are sometimes required to assist businesses in carrying out their activities and to provide ancillary services which are not taxable under the EU VAT Directive. The customers themselves bring in goods or services in order to enjoy the purchased delivery in the best possible way. For example, a hairdresser can only cut someone’s hair if the customer makes his hair available to him.\textsuperscript{892} In such situations, the addressee of a supply does not render a service himself, irrespective of his VAT status.

With regard to ancillary services in the context of multi-sided online business models, users can also support companies in the optimal provision of services. Such supportive provision of personal data bears no additional VAT consequences. Within the framework of supplies of online services, some details are provided due to technical specifications such as the user’s IP address.\textsuperscript{893} This information is necessary to identify the recipient’s device and to communicate with the online service provider. Furthermore, an online navigation service \textit{inter alia} needs the position of the user to navigate him from A to B or to show the distance to a destination. The same applies for a fitness app tracking the run distance. A mobile app needs to get access to the stored pictures when the purpose of the app is to edit them, and a search engine needs the search term in order to look for re-

\textsuperscript{891} Beyond dispute, the users may supply services and no goods: Patric Schwarz (n 20) (783).

\textsuperscript{892} Concerning contradicting views in the German scholarly literature, see e.g.: Nevada Melan and Sebastian Pfeiffer (n 33) (1074–1075) with further references; see also: Hans-Martin Grambeck (n 8) (2028).

\textsuperscript{893} Nevada Melan and Sebastian Pfeiffer (n 33) (1073).
sults. With regard to social networks, storing the data of birth or preferences forms the basis of the user profile that the user would like to share with colleagues in a private or professional context. The list of examples is not complete. All these data, their collection and storage are necessary and, therefore, a requirement to enjoy the desired online services. Such ancillary services will be irrelevant for VAT purposes if no further commercial activities, like the additional exploitation, are performed by the companies. If the users provide no additional monetary or non-monetary consideration, the supplier will render the platform services for free and will be not subject to a VAT charge.

bb. Independent Services: Exploitation Rights on Personal Data

Multi-sided online business model work under the prerequisite that online companies receive as much personal data as possible from their users. The bulk of personal data collected by online businesses is often not necessary for the performance of the electronic services. The provision of personal information than exceeds the boundaries of ancillary services. The online and mobile applications are often programmed in a way which prohibits their installation or use when the access to personal data is not possible. For example, a torch application may require access to the personal calendar, or the address book saved on the mobile phone of the user. Without permit to access, the torch function is not available, even if this kind of information is not required for the exercise of the desired service. The data are necessary for targeted marketing. If this information were not available, the marketing companies might not be willing to pay that much for advertising. This correlation is the essence of the business model and rests

894 Hans-Martin Grambeck (n 8) (2028–2029); Joachim Englisch (n 12) (878).
895 Tina Ehrke-Rabel (n 37) p 397; Hans-Martin Grambeck (n 8) (2029); Hans-Martin Grambeck (n 103) (3937); Nevada Melan and Sebastian Pfeiffer (n 33) (1073); Nevada Melan and Bertram Wecke (2015b) (n 99) (2812–2813) with further reference to Martin Robisch, in Johann Bunjes and Reinhold Geist, UStG (18th ed, 2019) § 1 para 38; mostly not only ancillary services: Peter Denk (n 760) (429–430) and Joachim Englisch (n 12) (878); Nicole Looks and Benjamin Bergau (n 18) (866–869) deny that the users provide services themselves. They argue that the users mostly provide ancillary services; mostly ancillary services: Heidi Friedrich-Vache (n 106) pp 347 and 353.
896 Hans-Martin Grambeck (n 8) (2028–2029); Joachim Englisch (n 12) (878).
on the availability of user data. Today, all internet and app users should know that they often provide personal data to companies which use them for advertising or other third-party purposes.\textsuperscript{897} In terms of VAT, users of free online services themselves offer a separate service. This is especially the case when personal data are stored and exploited above the level which is needed for the best enjoyment of the services.\textsuperscript{898}

The personal data are an advantage for online businesses and thus comply with the restrictions of EU VAT legislation. According to the ECJ case law \textit{Mohr} and \textit{Landboden-Agrardienste}, an advantage capable of leading to consumption in terms of VAT must be attributed to an identifiable recipient.\textsuperscript{899} The user knows his contribution not least because of the terms and conditions and the legal notice on the website of the company.\textsuperscript{900} Furthermore, the data – in whatever form provided – are an economic advantage for the online companies: they use such data to make money by, for example, giving marketing companies the ability to broadcast personalized ads.\textsuperscript{901} This requirement applies in particular to data which is not publicly accessible. By contrast, no advantage is transferred when the acceptance in the processing of personal data is only of declaratory nature. Only when the personal data are not available elsewhere, an advantage is transferred.\textsuperscript{902}

The actions of the users must be interpreted as services for VAT purposes. Data and respective rights on them are not tangible property according to Article 14 of the EU VAT Directive.\textsuperscript{903} Information inherent to personal data can be provided to countless businesses. A company which receives

\textsuperscript{897} Nevada Melan and Bertram Wecke (2015a) (n 99) (2268).
\textsuperscript{898} Joachim Englisch (n 12) (878); Nevada Melan and Bertram Wecke (2015b) (n 99) (2812–2813).
\textsuperscript{900} Patric Schwarz (n 20) (784); in contrast to this argument: Nicole Looks and Benjamin Bergau (n 18) (868).
\textsuperscript{901} Tina Ehrke-Rabel (n 37) p 396 with further references; Patric Schwarz (n 20) (784); arguing differently but with the same result: Nevada Melan and Bertram Wecke (2015b) (n 99) (2812).
\textsuperscript{902} Peter Denk (n 760) (430); Joachim Englisch (n 12) (878); Susie Martin, in Otto Sölch and Karl Ringleb, \textit{UStG} (loose leaf 86th June 2019) § 3 para 560.
\textsuperscript{903} Joachim Englisch (n 12) (878); EU Commission (2018a), \textit{Conditions for there being a taxable transaction when Internet Services are provided in exchange for user data}, VAT Committee Working Paper No 958 (taxud.c.1(2018)6248826) p 3 (hereafter: EU Commission (2018a), \textit{Conditions for there being a taxable transaction}
access to personal data is not the only one which can benefit from it, as it does not have exclusive ownership. Thus, the assigned advantage can only be categorized as a service. Users deliberately act in the form of an action, omission or toleration. This is ensured by the acceptance of the conditions of the online company (for getting access to the data). It does not matter whether this is done actively by checking a box or by continued use of the online service. This behaviour can be interpreted as intended.

The users do not provide a dataset but rather the exploitation right to personal data. By accepting the terms of use and privacy statements, users allow the companies to collect the information provided through the use of the online services. The users cannot unilaterally modify the terms and conditions. However, the users must not undertake active steps to provide specific information, as the suppliers do not require a given set of data, specific information or a continuous flow of new information. Thus, the actual content and the value of the data are uncertain and irrelevant. It does not matter whether the customer discloses a lot or few, useful or use-

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when Internet Services are provided in exchange for user data, VAT Committee Working Paper No 958); OECD (2015a), BEPS Action 1 – Final Report (n 2) para 97.

904 Suse Martin (n 902) § 3 paras 523–526; Patric Schwarz (n 20) (784); e.g. Pinkernell doubts that the users provide services in the form of a toleration of an act: Reimar Pinkernell (n 33) (144–145).

905 Patric Schwarz (n 20) (783–784); see also: ECJ of 06.04.1995 – C-4/94, BLP Group, ECLI:EU:C:1995:107 para 24; of 12.01.2006 – C-354/03, C-355/03 and C-484/03, Optigen and Others, ECLI:EU:C:2006:16 para 44; of 21.02.2006 – C-255/02, Halifax and Others, ECLI:EU:C:2006:121 para 56; CJEU of 20.06.2013 – C-653/11, Newey, ECLI:EU:C:2013:409 para 41 according to which the intentions of service providers are irrelevant (objective nature of a service); dissenting: Nicole Looks and Benjamin Bergau (n 18) (868).

906 Hans-Martin Grambeck (n 8) (2028); Christian Grebe (n 573) (248); Marie Lamensch (n 108) pp 126–127; apparently: Nevada Melan and Bertram Wecke (2015a) (n 99) (2269).

907 See: LG Berlin of 19.11.2013 – 15 O 402/12, ECLI:DE:LGBE:2013:1119.15O402.120A para 30; Peter Bräutigam, Das Nutzungsverhältnis bei sozialen Netzwerken – Zivilrechtlicher Austausch von IT-Leistung gegen personenbezogene Daten, (15)(10) MultiMedia und Recht (2012) 635 (640); distinguishing the two is essential: Nevada Melan and Sebastian Pfeiffer (n 33) (1073); Peter Denk (n 760) (429); David Dietsch (n 21) (870); Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (536); Nevada Melan and Bertram Wecke (2015b) (n 99) (2812); Sebastian Pfeiffer (n 22) (159–160); similar to an administrative concession: EU Commission (2018a), Conditions for there being a taxable transaction when Internet Services are provided in exchange for user data, VAT Committee Working Paper No 958 (n 903) pp 2–3.
less, right or wrong data. Therefore, the transfer of the right to use personal data is a service according to Article 25 lit b) of the EU VAT Directive. The right is extended by the further use of the online services because new data are generated and provided. The mere possibility to use the data is sufficient. The online companies obtain a non-exclusive licence which can be assigned by the users worldwide. The data may then be used by third parties without further consent of the users, without any request or compensation. Third parties can use, copy, modify, distribute, publish or manipulate the data.

The scholarly literature discusses controversially whether the users consciously or unconsciously accept the terms of use and the data protection declarations. It should be noted that when an online provider collects personal information without a user's consent, no service is provided by

908 Nevada Melan and Sebastian Pfeiffer (n 33) (1073); Sebastian Pfeiffer (n 22) (159–160).

909 A kind of a licence: Peter Bräutigam (n 907) (640); a service in form of tolerating an act: Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (536); Joachim Englisch (n 12) (876); Nevada Melan and Bertram Wecke (2015b) (n 99) (2812); Sebastian Pfeiffer (n 100) (136); Patric Schwarz (n 20) (784); by contrast, it is argued that users do not provide services themselves: Nicole Looks and Benjamin Bergau (n 18) (866–869).

910 It is not clear whether the right is provided once or a persistent toleration must be certified; it is a persistent toleration of an act: LG Berlin of 19.11.2013 – 15 O 402/12, ECLI:DE:LGBe:2013:1119.15O402.120A para 32 or David Dietsch (n 21) (870) and Nevada Melan and Bertram Wecke (2015b) (n 99) (2815); a persistent toleration causes difficulties concerning the determination of the taxable amount: Hans-Martin Grambeck (n 8) (2031).

911 Similar: ECJ of 21.03.2002 – C-174/00, Kennemer Golf, ECLI:EU:C:2002:200 para 42; see also: Patric Schwarz (n 20) (784).

912 David Dietsch (n 21) (870); Nevada Melan and Bertram Wecke (2015b) (n 99) (2812).

913 The data are consciously or unconsciously provided: Helena Wenninger et al (n 28) (14); most users do not notice, ignore or tolerate the data transfer: Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (532); by using the services, consumers agree conclusively: Nevada Melan and Sebastian Pfeiffer (n 33) (1075); with doubts when the user does not actively use the online services: Nevada Melan and Bertram Wecke (2015b) (n 99) (2812); the users must be consciously and willingly accept the terms and conditions and as since users do not act consciously nor willingly, they do not perform own services: Nicole Looks and Benjamin Bergau (n 18) (866–868) and in the same vein: Tobias Rohner, Nicole Looks and Benjamin Bergau (n 30) (495); Marie Lamensch (n 108) p 126: due to technological tools, metadata are collected without consumers’ knowledge or at least willingness; by contrast, the users only have to accept the terms consciously (willingness is no criteria named by the ECJ), this seems to be clear to the aver-
the private individuals. The user does not act willingly. By contrast, many free online services cannot be enjoyed without the acceptance of the terms of use. In such situations, the users are willing to accept the terms and conditions as otherwise they cannot enjoy the online services. It is questionable whether a user gives his consent to the data exploitation rights when he immediately closes a homepage or an app without even being able to take note of the data protection regulations. In the future, it will be easier to determine whether there is conscious consent to the granting of exploitation rights. The CJEU has ruled in this respect that active ac-

914 Only a consciously provided advantage can constitute a supply: Joachim Englisch (n 261) para 90; Joachim Englisch (n 12) (877): without any approval (which is normally given), the situations lack a legal relationship; the consent must be given voluntarily: CJEU of 22.06.2016 – C-11/15, Český rozhlas, ECLI: EU:C:2016:470 para 24; in terms of users’ services: Hans-Martin Grambeck (n 8) (2029); Hans-Martin Grambeck (n 103) (3937); in the same vein: Patric Schwarz (n 20) (784); critical of the arguments of Nicole Looks and Benjamin Bergau: David Dietsch (n 21) (870–871) with reference to Kuuya Chibanguza and Zacharias-Alexis Schneider (n 62) (2054).

915 Dietmar Aigner et al (n 30) (350); Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (535); if the terms are not accepted, the service cannot be used: Sebastian Pfeiffer (n 100) pp 135–136; similar: providers require the acceptance of the terms and conditions: Tobias Rohner, Nicole Looks and Benjamin Bergau (n 30) (492).

916 Tina Ehrke-Rabel (n 37) pp 399–400; the acceptance of the terms and conditions is consciously because of Article 6 paragraph 1 lit a) of the Regulation (EU) 2016/679; users willingly accept the terms and conditions: Sebastian Pfeiffer (n 100) p 135; see also e.g.: Joachim Englisch (n 12) (877) or Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (535).

917 Nevada Melan and Bertram Wecke (2015b) (n 99) (2812).
tions are necessary in order to consent to the use of (not necessary) cookies and therefore data collection. Passive consent is not sufficient for the use of such technical software products. Consequently, in many situations, users provide services by consciously agreeing to the terms of the online businesses that set out the data exploitation rights. However, this does not make a case-by-case analysis on the basis of the terms and conditions of the online companies unnecessary.

2. Privately Acting Users: A B2C Relationship

The granting of exploitation rights by private users leads to an increased market interaction of private individuals. This is reminiscent of the increased market participation in the context of the sharing economy. Just like there, a discussion about the VAT status of users of free electronic services is determined by a trichotomy: a single user can be a private interactor, can meet the requirements of a taxable person or can be an employee of the online business. In contrast to prosumers in the sharing economy, the users of free internet and mobile applications are usually not taxable persons (a.). Likewise, the users do not act as dependent employees of the online businesses (b.). As a result, users act in most cases privately. Their services are C2B supplies which are out of scope of the EU VAT Directive. By contrast, the suppliers of free online services render B2C barter transactions which are categorized as electronically supplied services according to Article 58 paragraph 1 lit c) of the EU VAT Directive.

a. Private Consumers as Non-Taxable Persons

A private user who provides exploitation rights may be a taxable person. If the interaction with the provider of electronic services is classified as a barter transaction, the user will not receive money for his supply, but a consideration in kind. If the relationship between the two parties is not classified as a barter transaction, the customer will render supplies free of

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918 CJEU of 01.10.2019 – C-673/17, Planet49, ECLI:EU:C:2019:801.
919 See pp 195 et seqq.
920 If the user is categorized as a taxable person, two taxable transactions (B2B barter transaction) will be on hand: Reimar Pinkernell (n 33) (144).
921 Sebastian Pfeiffer (n 22) (160–161); see the discussion on pp 234 et seqq.
charge implying that he does not act as a taxable person according to Article 9 of the EU VAT Directive. Therefore, the following discussion is based on the premise that a barter transaction takes place between the two parties. Furthermore, the focus is set on the assessment of an economic activity of the users of electronic services.

The discussion as to whether or not the recipient of “free” online services is a taxable person is important for the users and the providers of the services. Generally, the EU VAT concept of consumption includes online services. However, while in B2B and B2C cases the destination country principle is applied, the person who is responsible for collecting the tax may be different. Furthermore, if the user is also a taxable person, a B2B barter transaction will cause two separate supplies instead of only one. Even if one is of the opinion that a user acts as a taxable supplier who renders a deemed supply (because he “uses” the free online services for private purposes), the exact terms and conditions of the tax collection differ.

Categorizing users of “free” online services as taxable persons would substantially increase the number of taxable persons. Tax administrations would have to handle a significant additional number of taxable persons when every user of google and other online services would fulfill the prerequisites of Article 9 of the EU VAT Directive. The number may be limited by means of the thresholds for small and medium-sized enterprises. However, it is possible that people do not understand why they become taxable persons because they only use their personal property.

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922 ECJ of 01.04.1982 – C-89/81, Hong-Kong Trade, ECLI:EU:C:1982:121 paras 10–11.
923 This is emphasized by e.g.: Sebastian Pfeiffer (n 22) (158) who points out that both relationships (B2B and B2C) are taxed according to the destination principle.
924 Regarding B2B supplies of services, a reverse-charge mechanism may be on hand, see Article 194 of the EU VAT Directive. For electronically supplied services, the MOSS scheme must be applied.
925 Reimar Pinkernell (n 33) (144).
926 Taxation occurs once since the user is granted a right for input tax deduction at business level: Wolfram Scheffler (n 6) (1783–1786).
927 Hans-Martin Grambeck (n 8) (2031); Sebastian Pfeiffer (n 22) (160).
928 Hans-Martin Grambeck (n 8) (2031) suggests to abstain from the application of the exemption rules to be allowed to deduct input VAT; the thresholds for small and medium sized enterprises should be applied to youtuber (who are taxable persons) in order to lessen bureaucracy: Andreas Brunchorst and Christian Sterzinger, Umsatzsteuerliche Beurteilung von Bloggern, YouTubern und Podcastern, (56)(33/34) Deutsches Steuerrecht (2018) 1743 (1744).
929 Sebastian Pfeiffer (n 22) (160).
Most authors do not affirm a change in the VAT status of private individuals through the use of “free” online services. By contrast, the view that users act in any case as taxable persons is advanced as well. It is argued that the toleration of the collection and exploitation of the data is a permanent and repeating activity. Users do interact not only with a single online company, but with a variety of companies that all want to get access to personal data. In cases where users are already engaged in an economic activity, the tolerance of the collection and exploitation of personal data forms an additional part of the economic activity. If a user does not engage in any other economic activity, it will start with the interaction with the online companies.

In theory, the broad concept of Article 9 of the EU VAT Directive would not preclude the application to users of “free” online services. The concepts of “taxable person” and “economic activity” are interpreted broadly. The reasons why a person carries out an economic activity are irrelevant; it is just crucial that income is realized continuously. A single or occasional activity is usually no economic activity. The general principle is aligned to repeating actions. Whether the granting of the right to exploit personal data is a single or systematic activity, is not uniformly assessed in

930 Dietmar Aigner et al (n 30) (356); Andreas Brunckhorst and Christian Sterzinger (n 928) (1743–1174); Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (537); Christian Grebe (n 573) (249); Nevada Melan and Sebastian Pfeiffer (n 33) (1075–1076); Sebastian Pfeiffer (n 100) p 138; Patric Schwarz (n 20) (784–786); with a rather open result: Sebastian Pfeiffer (n 22) (160–161); see also: VAT Committee (2018b), Guidelines resulting from the 111th meeting of 30 November 2018, document B – taxud.c.1(2019)3722302–967 (hereafter: VAT Committee (2018b), Guidelines resulting from the 111th meeting of 30 November 2018) and the accompanying EU Commission (2018a), Conditions for there being a taxable transaction when Internet Services are provided in exchange for user data, VAT Committee Working Paper No 958 (n 903) pp 4–5.

931 Hans-Martin Grambeck (n 8) (2031): this result is undesirable; Hans-Martin Grambeck (n 103) (3938–3939).

932 Hans-Martin Grambeck (n 8) (2031).

933 See pp 133 et seqq; Sebastian Pfeiffer (n 22) (160); Patric Schwarz (n 20) (786).

934 Andreas Brunckhorst and Christian Sterzinger (n 928) (1743) with further references.

935 Andreas Brunckhorst and Christian Sterzinger (n 928) (1743); Patric Schwarz (n 20) (786); it does not matter whether profits are realized: ECJ of 26.09.1996 – C-230/94, Enkler, ECLI:EU:C:1996:352 para 25.

936 Andreas Brunckhorst and Christian Sterzinger (n 928) (1743); ECJ of 26.09.1996 – C-230/94, Enkler, ECLI:EU:C:1996:352 para 20; in this context, Article 12 paragraph 1 of the EU VAT Directive must also be interpreted: Patric Schwarz (n 20) (786).
The majority of private users of “free” online services does not meet the requirements of ECJ case law (concerning a taxable person) as no economic activity is applied.\textsuperscript{940} Whether an economic activity is carried out or not must be assessed according to pertinent ECJ case law.\textsuperscript{941} The ECJ clarified the term “economic activity” for the first time in its decision \textit{Enkler}. According to the reasoning in \textit{Enkler}, an economic activity must be considered on the basis of a two-step approach: First of all, it must be assessed whether a product can be used for business purposes. Afterwards, a case-by-case analysis must be initiated.\textsuperscript{942}

According to the two-step approach, personal data fulfil the first condition as they can be used for private and business purposes and thus for an economic activity. The initial step is to examine whether a product can be used for an economic activity. In general, Article 9 paragraph 1 subparagraph 2 sentence 2 of the EU VAT Directive demands the exploitation of the property.\textsuperscript{943} The answer to this question depends to a large extend on

\textsuperscript{937} See e.g.: Andreas Brunckhorst and Christian Sterzinger (n 928) (1743) who point out that the right is granted once; by contrast: Hans-Martin Grambeck (n 103) (3938) who points to the permanent use of free internet services with a permanent update of user data.

\textsuperscript{938} Hans-Martin Grambeck (n 8) (2031).

\textsuperscript{939} The barter transactions would then be based on a B2B relationship with two taxable supplies involved: Sebastian Pfeiffer (n 22) (161).

\textsuperscript{940} Peter Denk (n 760) (431); Nevada Melan and Sebastian Pfeiffer (n 33) (1075); Patric Schwarz (n 20) (786); certainly no taxable person: Marie Lamensch (n 108) 126; no taxable persons: Raoul Riedlinger (n 97) p 709.


the nature of the goods or services supplied.\textsuperscript{944} Tangible and intangible property that can only be used for commercial purposes can undoubtedly be the basis for an economic activity.\textsuperscript{945} Personal data is immaterial property. Typically, the rights to one’s own data is not used exclusively for economic purposes.\textsuperscript{946} So far, these have mostly been used privately. Although there is the opinion that an individual does not generally exploit his personal data commercially,\textsuperscript{947} they can be used both privately and commercially.\textsuperscript{948} Thus, it is possible to use the data in the context of an economic activity.

In cases where a property can be used privately and for commercial purposes, all the circumstances of the individual case must be assessed. This is the case for personal data.\textsuperscript{949} Only when the overall picture of the individual case is comparable to the regular activity of taxable persons who generate continuous income,\textsuperscript{950} it is an economic activity. In order to be able to take a decision on this issue, all the circumstances of the individual case must be compared with the circumstances in which the corresponding economic activity is typically carried out.\textsuperscript{951} However, the normal conduct

\footnotesize{Nevada Melan and Sebastian Pfeiffer (n 33) (1075) with further references.}
\footnotesize{Sebastian Pfeiffer (n 22) (161).}
\footnotesize{Nevada Melan and Sebastian Pfeiffer (n 33) (1075).}
of an economic activity is not a static criterion, but it may be a reference framework. The circumstances of a specific case comprise different objective criteria like the kind of the goods or services, time aspects, the actual duration of use of the products, the number of customers or the amount of income. Yet each individual case does not have to fulfil all the characteristics of a typical economic activity of this kind. Some features may be absent or of secondary importance. The overall picture is crucial.

The exploitation of personal data by internet users is in most cases not comparable to an economic activity. In order to compare the granting of the exploitation rights with a typical economic activity, the scholarly literature uses a business whose economic activity comprises the sale of data as a point of reference. Such taxable persons act actively like a producer, trader or service provider in markets. They systematically collect, exploit and trade external data and rights to use the data and thus scale their businesses. Such activity does normally not take place within the management of private assets. Instead, a private individual only provides his own data. Furthermore, a private user does not act in a methodical and systematic manner to get access to the online offerings. He grants the right to use the data once in order to use the service permanently. Moreover, private

952 Peter Denk (n 760) (431).
953 See e.g.: Andreas Treiber, in Otto Sölch and Karl Ringleb, UStG (loose leaf 86th June 2019) § 2 para 65 with further references; Patric Schwarz (n 20) (785) with further references; the taxable person itself has to prove the status by objective evidence: ECJ of 14.02.1985 – C-268/83, Rompelman, ECLI:EU:C:1985:74 para 24.
957 Nevada Melan and Sebastian Pfeiffer (n 33) (1076).
958 See e.g.: CJEU of 15.09.2011 – C-180/10 and C-181/10, Slaby and Others, ECLI:EU:C:2011:589 para 41; of 09.07.2015 – C-331/14, Trgovina Prizma, ECLI:EU:C:2015:456 para 24; Nevada Melan and Sebastian Pfeiffer (n 33) (1076).
959 Andreas Brunckhorst and Christian Sterzinger (n 928) (1743); Nevada Melan and Sebastian Pfeiffer (n 33) (1076); Patric Schwarz (n 20) (786).
960 Patric Schwarz (n 20) (786) with further references to German case law on a similar example; in contrast to this: Martin Grambeck (n 8) (2031); see also footnote 910.
users are not actively and intensively involved in the market. The acceptance on the exploitation of personal data by users is rather a responsive interaction. Users do not act consciously to generate sustainable revenue, but impulsively in the heat of the moment to be allowed to use the applications. Furthermore, users do not make marketing for their services, consider a business plan, perform competition analyzes or establish a complaint management for taking care of their partners. They do not use any special knowledge or skills for offering the exploitation rights either. In addition, no new data are generated to increase the value of the provided services. In an overall view, an individual who permits the exploitation of his data is not comparable to a professional business even though the number of “customers” of the exploitation rights may be high. Consequently, the “area of activity” lacks the criterion of sustainability respectively economic activity. An individual who just passively allows the use of his data is no taxable person. He acts as a private person. In the same vein, the status as a taxable person was rejected for a private tenant of an apartment with smart home technology. The use of personal data was also allowed there.

A user can, however, generate continuous income by selling the exploitation rights, granting permission to broadcast ads or taking active measures to increase the value of personal data. In such situations, a private user is a taxable person. If a private user wanted to earn continuous income, selling his data would be much easier than bartering. Users may sell the rights on their data to special businesses for monthly consideration

961 Nevada Melan and Sebastian Pfeiffer (n 33) (1076); Patric Schwarz (n 20) (786).
962 Patric Schwarz (n 20) (786).
963 Dietmar Aigner et al (n 30) (356); Peter Denk (n 760) (431); Patric Schwarz (n 20) (786).
964 Andreas Brunckhorst and Christian Sterzinger (n 928) (1743); David Dietsch (n 21) (874); Peter Denk (n 760) (431); Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (537); Nevada Melan and Sebastian Pfeiffer (n 33) (1076); Sebastian Pfeiffer (n 22) (161); Patric Schwarz (n 20) (786); VAT Committee (2018b), Guidelines resulting from the 111th meeting of 30 November 2018 (n 930); ECJ of 20.06.1996 – C-155/94, Wellcome Trust, ECLI:EU:C:1996:243 para 37; possibly just as contrary: CJEU of 15.09.2011 – C-180/10 and C-181/10, Słaby and Others, ECLI:EU:C:2011:589 para 41 and of 27.10.2011 – C-504/10, Tanoarch, ECLI:EU:C:2011:707 para 46.
965 Peter Denk (n 760) (431).
966 Peter Denk (n 760) (431); Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (537); Nevada Melan and Sebastian Pfeiffer (n 33) (1076); Sebastian Pfeiffer (n 100) p 138.

Chapter 3: Digital Challenges to the Concept of EU VAT as a General Consumption Tax

230
or a lump sum payment. Different procedures are known. Some companies work with auctions, additional questionnaires to the usual tracking methods or the complete monitoring of all internet and smartphone data. By cooperating with such companies, a private user takes active steps like a service provider. He is a taxable person. Similarly, a user who uploads videos to the platform youtube may also be a taxable person. A “youtuber” (the person who uploads videos) must register on the platform and must allow the company to broadcast advertisements during the playback of the videos. The youtuber receives a certain amount of money every time a person watches one of his videos. By allowing youtube to broadcast ads, the youtuber acts independently and seeks to earn a regular income. In addition to his interest in income, he is also interested in distributing the videos. This shows a further economic interest. By uploading videos, the youtuber interacts on a market (the platform). If the youtuber uploads more than one video or at least has the intent to do so, the activity will be a repeating one and therefore sustainable. Since youtube continuously pays for every broadcast of each video, the upload of just a single video also constitutes an economic activity. Likewise, so-called “instagrammers” are

967 See e.g. companies and services like: https://citizenme.com or https://datawallet.io (both last accessed: 01.02.2020); Olivia Solon, ‘Data soul’ of Shawn Buckles sells for £288 (2014) (https://www.wired.co.uk/article/shawn-buckles-is-worth-350-euros, last accessed: 01.02.2020).
968 Andreas Brunckhorst and Christian Sterzinger (n 928) (1743–1174); Peter Denk (n 760) (431); Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (537); Nevada Melan and Sebastian Pfeiffer (n 33) (1076); Patric Schwarz (n 20) (786); Sebastian Pfeiffer (n 22) (161); similar: VAT Committee (2018b), Guidelines resulting from the 111th meeting of 30 November 2018 (n 930); concerning active steps: CJEU of 09.07.2015 – C-331/14, Trgovina Prizma, ECLI:EU:C:2015:456 para 24 with further references.
969 See: https://www.youtube.com/ (last accessed: 01.02.2020).
970 Dietmar Aigner et al (n 30) (356); Andreas Brunckhorst and Christian Sterzinger (n 928) (1744).
972 Christian Grebe (n 573) (249); Christiane Dürr (n 971) (2421–2422).
974 See: https://www.instagram.com/ (last accessed: 01.02.2020).
paid to show their interest in certain products. They are also taxable persons according to Article 9 of the EU VAT Directive.

In a nutshell, the previous discussion shows that the users of the respective online services are usually not taxable persons within the meaning of Article 9 of the EU VAT Directive. They are still private consumers despite their consent to the transfer of exploitation rights on personal data. In most cases, users do not meet the criteria for an economic activity. Only in rare cases (where users actively seek continuous income), they become taxable persons.

b. Private Consumers as Non-Employed Persons

Private users of “free” online and mobile services are rarely taxable persons. Regarding the relationship between the two parties it is also discussed whether users are employees of digital companies according to Article 10 of the EU VAT Directive.\(^\text{975}\) If such a relationship was confirmed, the exchange of services would not be covered by the VAT system. A similar discussion can be found with regard to the sharing economy and in particular on the relationship between uber and its drivers. A final decision as to whether uber drivers are self-employed entrepreneurs or uber employees has not yet been taken. However, it appears likely that the drivers of uber are employees of uber. As stated above, the conditions under which uber drivers operate are very strict. Uber has almost total control over the services of the drivers and when one of them does not act as requested by the company, negative consequences must be feared. In addition, there are no possibilities to influence the procedure, the price or other components of the transport service.\(^\text{976}\) By contrast, the following discussion about private users shows that these do not act as employees of the online companies.

The relationship between users and online companies is different from an employer-employee relationship. In general, an employee of a company does not act independently. According to Article 10 of the EU VAT Directive, an employment contract or other legal relationship containing provi-

\(^{975}\) Within the context of direct taxation, a similar idea is presented by: Raffaele Petruzzi and Svitlana Buriak, *Addressing the Tax Challenges of the Digitalization of the Economy – A Possible Answer in the Proper Application of the Transfer Pricing Rules*, (72)(4a) *Bulletin for International Taxation* (2018) published online 26.03.2018 (chapter 5.3.2.1.): users of online services are called “unconscious employees”.

\(^{976}\) See the discussion on pp 195 et seqq.
sions on working conditions, remuneration or other employer liability indicates a relationship of dependence. If one assumed that a private user is an employee of an online business, the provision of personal information could be interpreted as work performance. Certainly, there are no employment contracts or other similar legal relationships between the parties involved. The users do not receive a fixed monetary salary and the online businesses do not pay any social-insurance contributions for the users. Thus, there is no legal relationship that indicates an employer-employee relationship.

Users also do not act according to the instructions of the online business as to allocate the most valuable data. If users were employees of the online companies, the latter would instruct their “employees” to generate most valuable personal data which can best be marketed in order to receive high revenues with marketing services. The users would have to follow the instructions and would not be free to decide which information they provide. However, the users are not subordinated to the online companies in such a way. A user is free to decide which information he directly and deliberately passes on to an online company. Especially when using social media networks, the user is free to provide information such as personal preferences. Thus, the users may decide for themselves which exploitation rights on which data they want to transfer.

Unlike Uber drivers, users of free online services do not need to fear negative consequences when they only provide useless data or just a limited amount of personal information. Users are given full access to free internet services for their

977 See for further indications to an employment contract: ECJ of 18.10.2007 – C-355/06, van der Steen, ECLI:EU:C:2007:615 paras 10 and 22; a discussion of van der Steen can be found in: Ben Terra and Julie Kajus (n 126) pp 384–386.


979 Further personal data and the online user behaviour can be collected with the aid of cookies. However, it is often possible to limit the information that an online company may collect respectively use. See, for example, the terms of use of Google: https://support.google.com/ads/answer/2662922?hl=en (last accessed: 01.02.2020).

980 By contrast, Werner Haslehner attests the online companies a certain control over the users as the underlying terms and conditions codify which data are collected and the users agree: Werner Haslehner, Taxing where value is created in a post-BEPS (digitalized) world?, Kluwer International Tax Blog (2018) (http://kluwer-taxblog.com/2018/05/30/taxing-value-created-post-beps-digitalized-world/, last accessed: 01.02.2020).
data without a direct reference to the quality of their data. Thus, the users do not act as employees of the internet businesses.

3. Barter Transactions versus Non-Taxable Exchanges

So far, it has been pointed out that users of free internet and mobile applications in most cases act as private individuals but provide services to companies in the form of exploitation rights on personal data. Since the online businesses offer their services not in exchange for money but against consideration in kind, it remains to be clarified whether these two parts of the exchange are linked in such a way that they constitute taxable transactions. As the EU VAT Directive does not include specific rules, the general rules must also be applied to barter transactions.981 In situations where taxable transactions are confirmed, a B2C transaction is made by online businesses to private users.982 Based on a case-by-case analysis, it turns out that some apparently “free” supplies of online businesses are rendered against consideration and must be taxed.

The starting point for the discussion on whether “free” internet services and apps are be bartered for the right to exploit personal data of internet users was a German civil court judgment.983 The national civil laws of the EU Member States may be indicative of EU VAT legislation but they are no mandatory standard to be followed for VAT purposes. The EU VAT law must be interpreted autonomously. The pertinent judgment itself did not concern tax issues.984 The court ruled that services were exchanged between an online search engine and its users. The users provided services that were considered as consent to the right to use the generated data. This

981 In Germany, the VAT Act contains a specific rule (Section 3 paragraph 12 of the German VAT Act). This rule has got only clarifying character.
982 Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (536–537); Sebastian Pfeiffer (n 100) p 138.
983 LG Berlin of 19.11.2013 – 15 O 402/12, ECLI:DE:LGBE:2013:1119.15O402.120A; see also: Directive (EU) 2019/770 recital para 24: „Digital content or digital services are often supplied also where the consumer does not pay a price but provides personal data to the trader“.
984 Nicole Looks and Benjamin Bergau (n 18) (867); concerning the non-application of national civil law see e.g.: ECJ of 08.02.1990 – C-320/88, Shipping and Forward Enterprise Safe, ECLI:EU:C:1990:61 para 8; concerning an autonomous interpretation see also: Paul Farmer and Richard Lyal (n 273) p 90.
reciprocal exchange was based on a synallagmatic contract. This civil law finding has been transferred to VAT law: Accordingly, electronically supplied services of online companies are directly linked to the users’ concessions to the exploitation of their personal data for advertisement and other purposes. The two services are based on a reciprocal relationship and are therefore subject to VAT.

The existence of reciprocal performances between the two services concerned is sometimes denied and parallels are drawn between traditional offline marketing measures and online advertising. Critical voices on possible barter transactions explicitly draw a parallel between targeted online marketing tools and classic advertising in print media. Offline media like newspapers enable only limited targeting, based on their target group. Customers who are confronted with ads in the offline world face ads that are based on assumptions of the marketing companies and not on comprehensive personal data. Instead, online tools enable a targeted approach to potential customers. Critics focus on the argument that if the new online possibilities were taxed according to the rules of barter transactions, then traditional offline advertising should also be taxed. In both cases, critics point out, customers provide services in the form of tolerating advertisements. However, the two situations are not comparable as the advertisement recipients do not provide services by tolerating ads. Furthermore, users of online services provide own services and not just ancillary services. On the contrary, it would probably have to be argued that data is also exchanged for services in the offline world. A taxation of this ex-

985 LG Berlin of 19.11.2013 – 15 O 402/12, ECLI:DE:LGBE:2013:1119.15O402.120A para 30; Peter Bräutigam (n 907) (640); Hans-Martin Grambeck (n 8) (2026); Nicole Looks and Benjamin Bergau (n 18) (867); Nevada Melan and Bertram Wecke (2015b) (n 99) (2812); the synallagmatic benchmark is also referred to by the CJEU, see e.g.: ECJ of 14.07.1998 – C-172/96, First National Bank of Chicago, ECLI:EU:C:1998:354 para 28; CJEU of 26.09.2013 – C-283/12, Serebryannay vek, ECLI:EU:C:2013:599 para 41 with further references.

986 Stefanie Baur-Rückert (n 51) pp 146–149; Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (535); Nevada Melan and Sebastian Pfeiffer (n 33) (1073–1075); Nevada Melan and Bertram Wecke (2015a) (n 99) (2268–2269); by contrast, see the arguments of Hans-Martin Grambeck (n 8) (2029–2030) or Nicole Looks and Benjamin Bergau (n 18) (870) who argue for no VAT consequences because of a lack of a direct link.

987 Hans-Martin Grambeck (n 8) (2029–2032); concerning an analysis of the triangular relationship between online companies, advertisers and users see also: Cristina Trenta (n 40) pp 121–130.

988 See pp 219 et seqq; Nevada Melan and Sebastian Pfeiffer (n 33) (1076–1077).
change, which has not yet been carried out, would therefore have to be examined more closely.\textsuperscript{989}

Regarding “free” online services and exploitation rights on personal data, the crucial question is whether the two services meet the conditions for a taxable transaction. In other words, whether the services constitute B2C barter transactions.\textsuperscript{990} In the absence of specific provisions in the VAT legislation, the ECJ case law has specified the treatment of barter transactions.\textsuperscript{991} In line with the above considerations, a supply needs to be directly linked to its consideration\textsuperscript{992} and needs to be based on a legal relation-

\textsuperscript{989} Concerning potential taxation of some lotteries or prize competitions: Stefanie Baur-Rückert (n 51) p 146; Hans-Martin Grambeck (n 8) (2031–2032); Hans-Martin Grambeck (n 103) (3938) or Christian Grebe (n 573) (249); in a similar context concerning vouchers against data: Sebastian Pfeiffer (n 22) (164); however, \textit{Heidi Friedrich-Vache} argues that lotteries are not taxed and therefore “free” online services should not be taxed either: Heidi Friedrich-Vache (n 106) p 350.

\textsuperscript{990} Joachim Englisch (n 12) (882); Nicole Looks and Benjamin Bergau (n 18) (865–866); Sebastian Pfeiffer (n 22) (158).


\textsuperscript{992} See the discussion on pp 149 et seqq; established CJEU case law requires both a consideration and a direct link, see: CJEU of 10.11.2016 – C-432/15, \textit{Baštová}, ECLI:EU:C:2016:855; furthermore, identifying consideration and valuing it are two separate issues: Deborah Butler (n 445) (100); concerning barter transactions see in particular: ECJ of 23.11.1988 – C-230/87, \textit{Naturally Yours Cosmetics}, ECLI:EU:C:1988:508 paras 11–12; of 02.06.1994 – C-33/93, \textit{Empire Stores}, ECLI:EU:C:1994:225 para 12; of 03.07.1997 – C-330/95, \textit{Goldsmiths}, ECLI:EU:C:1997:339 para 23; of 03.07.2001 – C-380/99, \textit{Bertelsmann}, ECLI:EU:C:2001:372 para 17; CJEU of 19.12.2012 – C-549/11, \textit{Orfey Balgaria}, ECLI:EU:C:2012:832 para 36; of 26.09.2013 – C-283/12, \textit{Serebryannay vek}, ECLI:EU:C:2013:599 para 38; this criterion is recognized in the pertinent scholarly literature: Peter Denk (n 760) (428); David Dietsch (n 21) (869); Hans-Martin Grambeck (n 8) (2028); Nicole Looks and Benjamin Bergau (n 18) (866); Nevada Melan and Bertram Wecke (2015a) (n 99) (2268); Nevada Melan and Bertram Wecke (2015b) (n 99) (2811); Sebastian Pfeiffer (n 22) (158–159); so far this criterion has been respected by the court without any difficulties: Joachim Englisch (n 12) (876).
ship in order to establish reciprocal performances. A direct link is established when a supply depends on the receipt of a consideration and thus triggers the intended or expected consideration. It is sufficient that consideration can be expected; The determination of detailed arrangements, for example, on the exact amount of the consideration is not necessary. Consideration is everything a customer spends to obtain goods or services. In the case of a barter transaction, the consideration is not money but something that must be expressible in monetary terms.

Barter transactions have special features as the benefits are not transferred in money, but in kind. For practical reasons, the two involved sup-

993 See the discussion on pp 151 et seqq; David Dietsch (n 21) (869–870); Nicole Looks and Benjamin Bergau (n 18) (867 and 869); Nevada Melan and Sebastian Pfeiffer (n 33) (1073–1074); Nevada Melan and Bertram Wecke (2015a) (n 99) (2268); concerning smart-home-technologies and a legal relationship: Peter Denk (n 760) (428); see exemplary: CJEU of 26.09.2013 – C-283/12, Serebryannay vek, ECLI:EU:C:2013:599 para 37.

994 Nicole Looks and Benjamin Bergau (n 18) (865–866); Nevada Melan and Bertram Wecke (2015a) (n 99) (2268); Sebastian Pfeiffer (n 22) (158–159); see also: ECJ of 17.09.2002 – C-498/99, Town and County Factors, ECLI:EU:C:2002:494.

995 Nicole Looks and Benjamin Bergau (n 18) (866) with further reference to Hans Nieskens, in Günter Rau and Erich Dürrwächter, Umsatzsteuergesetz Kommentar (loose leaf 183rd 2019) § 1 para 825; Andreas Brunckhorst and Christian Sterzinger (n 928) (1746); Ulrich Grünwald (n 514) p 680; Nevada Melan and Bertram Wecke (2015a) (n 99) (2268).

996 Hans-Martin Grambeck (n 8) (2028); Nevada Melan and Bertram Wecke (2015a) (n 99) (2268) with further references to German case law; in this context see also: CJEU of 27.03.2014 – C-151/13, Le Rayon d’Or, ECLI:EU:C:2014:185 paras 36–37 (the services were not precisely defined in advance).

plies are merged as no money is exchanged.998 If the exchange of online services for the right to use data is a barter transaction, two distinct supplies must be identified. Both participants are then the supplier of their own service and the recipient of the other service.999 The online services and the transfer of the right to use the data are therefore be qualified as supplies for consideration. The exact VAT treatment of the two supplies depends on the VAT status of the suppliers. Where both actors are taxable persons, VAT is payable on both transactions. When one party is a private person, only the B2C transaction is subject to VAT, whereas the C2B transaction is out of scope.1000 Given that the users are mostly not categorized as taxable persons, the transfer of the right to exploit personal data is not subject to VAT. This implies that only B2C barter transactions rendered by the online businesses are the object for the further analysis.1001

With regard to potential online B2C barter transactions, the scholarly literature sometimes denies the necessary direct link between the electronically supplied services and the consideration on the basis of the ECJ judgment *Commission v Finland*.1002 The facts of the case can be summarized as follows: A public entity performed legal aid services. The renumeration was partly estimated on the basis of social aspects, namely the income and assets of the customers. Thus, the values of the legal aid services were not the only reference for calculating the consideration. The money to be paid was not entirely dependent on the actual value of the services rendered. Additional criteria were decisive for the amount to be paid. The payments were therefore considered as a non-cost-covering fee rather than a consider-

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998 Nicole Looks and Benjamin Bergau (n 18) (869); Hans Nieskens (n 995) § 3 para 4468.
999 See e.g.: David Dietsch (n 21) (869); Hans-Martin Grambeck (n 8) (2028); Reimar Pinkernell (n 33) (144); Hermann-Josef Tehler, *Tausch und tauschähnliche Umsätze: Grundsätzliche Überlegungen zur Steuerbarkeit und Bemessungsgrundlage*, (103)(8) Umsatz- und Verkehrsteuer-Recht (2017) 236 (237).
1000 Reimar Pinkernell (n 33) (144); see above the general considerations on pp 133 et seqq.
1001 See pp 224 et seqq; Nicole Looks and Benjamin Bergau (n 18) (866).
1002 ECJ of 29.10.2009 – C-246/08, *Commission v Finland*, ECLI:EU:C:2009:671; according to the case, a direct link between the discussed services must be denied: Hans-Martin Grambeck (n 103) (3937); Tobias Rohner, Nicole Looks and Benjamin Bergau (n 30) (496); for a short discussion of the case: Sebastian Pfeiffer (n 22) (159); see also: Jasmin Kollmann (n 121) pp 198–199; critics founded on this ECJ case is not justified: Nevada Melan and Sebastian Pfeiffer (n 33) (1074–1075); a similar situation was present in *Gemeente Borsele* concerning school bus transports: CJEU of 12.05.2016 – C-520/14, *Gemeente Borsele*, ECLI:EU:C:2016:334.
The court argued that the less income and assets the recipient of legal aid services has, the weaker the link between these services and their remuneration is. Consequently, a direct link and thus the existence of a taxable transaction was denied.

The provision of “free” online services differs from the situation in Commission v Finland. The consideration paid by the users is dependent on the value of the services provided electronically free of charge. Firstly, the concerned online companies are not public entities and do not operate near the break-even point or below, but usually generate high gross margins. Secondly, the data are, as discussed above, not the consideration for the electronically supplied services. The consideration is the exploitation right which has always the same value. Although a user may grant the right to exploit his data, he does not disclose many personal information on the social media platform concerned, uploads any pictures or provides wrong information. As a result, online companies have less data available without limiting the enjoyment of their own services. Each user has the same rights to use the services regardless of the amount of shared information. Thus, the argument the less data, the weaker the direct link cannot be applied to “free” online services. The value of the exploitation rights stays the same, whether the available data are of good quality or not. The quantity and quality of the exploitation rights is determined by the terms of use and the data protection clauses and not by the behaviour of the users. The quality and the quantity are known in advance and the two services are directly linked.


1005 ECJ of 29.10.2009 – C-246/08, Commission v Finland, ECLI:EU:C:2009:671 paras 43 and 51 with further references to ECJ of 01.04.1982 – C-89/81, Hong-Kong Trade, ECLI:EU:C:1982:121 paras 9–10 and of 03.03.1994 – C-16/93, Tolsma, ECLI:EU:C:1994:80 para 12; see also CJEU of 27.10.2011 – C-93/10, GFKL Financial Services, ECLI:EU:C:2011:700 para 17.

1006 Nevada Melan and Sebastian Pfeiffer (n 33) (1074) with further references.

1007 See pp 219 et seqq.

1008 This viewpoint is represented under the premise that a set of data is the potential consideration for the online services: Sebastian Pfeiffer (n 22) (159); similar: Hans-Martin Grambeck (n 8) (2030) and Marie Lamensch (n 108) p 127.

1009 Similar: Tina Ehrke-Rabel (n 37) p 401; Nevada Melan and Sebastian Pfeiffer (n 33) (1073–1075); Sebastian Pfeiffer (n 100) p 136; by contrast: Hans-Martin
Also from an economic point of view, the consideration in the form of the exploitation right is directly linked to the electronically supplied services. In general, consideration must reflect the actual value of a supplier’s service. This condition may lead to uncertainties with regard to the taxability of barter transactions between the online services and the granting of exploitation rights when it is pointed out that the value of the rights on personal data may depend on the user behaviour and is therefore uncer-

1010 The ECJ emphasized an economic point of view e.g. in: ECJ of 06.02.2003 – C-185/01, Auto Lease Holland, ECLI:EU:C:2003:73 paras 35–36; CJEU of 07.10.2010 – C-53/09 and C-55/09, Loyalty Management UK and Baxi Group, ECLI:EU:C:2010:590 paras 39–40 with further references; of 20.06.2013 – C-653/11, Newey, ECLI:EU:C:2013:409 paras 42–52 with further references; of 26.05.2016 – C-607/14, Bookit, ECLI:EU:C:2016:355 para 27; Joachim Englisch (n 12) (883); the economic reality of the digital economy makes it clear that user data has remuneration character: Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (532); more generally: Simons favours taxation against the background of the consumption tax character. He favours an economic notion of consumption: Alfons Simons (n 345) (90); by contrast, the EU Commission argues that from an economic perspective, the activity of online providers is to earn money by selling personal data and not to render free online services: EU Commission (2018a), Conditions for there being a taxable transaction when Internet Services are provided in exchange for user data, VAT Committee Working Paper No 958 (n 903) p 7.

Parallels are drawn with regard to the case law on dividends: the ECJ argued that the nature of payments is coincidental. The fact that a shareholder has a right to receive part of the net profit is not directly linked to the transfer of equity. Whether the CJEU would transfer these principles to the provision of free online services or not is not clear. Based on an economic point of view, however, Joachim Englisch does not identify any convincing arguments which would be decisive to apply the CJEU case law on dividends to “free” online services. He states that the intensity of use of electronically supplied services correlates positively with the data collection and thus corresponds to the monetary value. Moreover, the CJEU does not require that the two exchanged values are the same. This rationale can be derived from the case law concerning lump-sum payments. Furthermore, at the time when it is clear that VAT must be charged, the exact amount of tax must not be known yet.

A consideration cannot be ruled out based on the CJEU’s decision in Baštová either. In that case the court denied taxable transactions because of an uncertainty whether consideration was paid at all. In the cases discussed here, however, consideration in the form of the exploitation rights is provided. It is not uncertain. Furthermore, the cases lack neither the necessary quantity nor the quality of consideration as the exploitation rights
and not the data themselves are the consideration. There is therefore a direct link between the consideration and the electronically supplied services if the online service can only be used when the rights of use are transferred. By contrast, a direct link cannot be affirmed when online services can also be used without granting exploitation rights. This must also apply when the granting of exploitation rights can again be objected and no restrictions in the use of the online services must be feared.

As far as VAT is concerned, the question of whether or not users need to register for the free services is irrelevant. The German civil court judgment has asserted a contractual reciprocal relationship in cases in which a personal registration was necessary. Without any registration and transfer of the exploitation right on personal data, the service of the online company could not be used. Transferred to VAT laws, this indicates a barter transaction: An electronically supplied service is performed against consideration. But even without a necessary personal registration, the same conclusion can be drawn. Although the German civil court has not yet had to deal with such cases, a direct link can be derived from most of the terms of use, which can be found on the homepages of the service providers. Accordingly, an online company provides its services with the expectation of receiving various personal data for advertising purposes. Thus, a synallagma between the two services can be attested and a legal relationship

1018 Peter Denk (n 760) (429); Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (535); Nevada Melan and Sebastian Pfeiffer (n 33) (1073–17074); Sebastian Pfeiffer (n 22) (160).
1019 This is particularly (but not only) underlined by: Dietmar Aigner et al (n 105) para 14/12 with further references and Michael Tumpel (n 105) pp 62–63.
1020 Joachim Englisch (n 12) (882): such services are hardly offered; similar: VAT Committee (2018b), Guidelines resulting from the 111th meeting of 30 November 2018 (n 930).
1021 Similar: Hans-Martin Grambeck (n 8) (2030); Joachim Englisch (n 12) (882).
1023 David Dietsch (n 21) (871); Nevada Melan and Bertram Wecke (2015a) (n 99) (2268–2269); Nevada Melan and Bertram Wecke (2015b) (n 99) (2812); Sebastian Pfeiffer (n 22) (159).
1025 Nevada Melan and Sebastian Pfeiffer (n 33) (1074).
1026 Concerning pertinent ECJ see the discussion above; Peter Bräutigam (n 907) (640); David Dietsch (n 21) (871); Nevada Melan and Sebastian Pfeiffer (n 33) (1075); apparently also the EU legislator: Directive (EU) 2019/770 recital
exists because of the terms of use and the data protection clauses. A direct link between the reciprocal services is therefore established.

In both cases – with and without personal registration – an identifiable and individual beneficiary is available regardless of the anonymity of users. Irrespective of whether the name, a pseudonym or no name at all is used, users receive benefits in the form of electronically supplied services. These are to be categorized as consumption for VAT purposes. By contrast, in Mohr and Landboden-Agrardienste no single individual was identifiable. Either way, the access to the data is for the online business or a third party of economic interest, as targeted advertising is possible. This also applies in the event that online companies anonymize data after it has been collected. A taxable barter transaction is given. The direct link has already been established with the acceptance of the permission to exploit the data. Anonymizing the data is just another step in the supply chain of marketing services.

The lack of the possibility of shifting the tax to the private consumer does neither hinder the taxation of bartered "free" electronically supplied services. Critics point out that a tax on “free” online services would be a cost factor and would decrease profits of the online businesses concerned because they could not shift the tax to the private consumers. If tax shifting was not possible, taxation of barter transactions discussed

para 24: „Digital content or digital services are often supplied also where the consumer does not pay a price but provides personal data to the trader“.

1027 ECJ of 03.03.1994 – C-16/93, Tolsma, ECLI:EU:C:1994:80 para 17; Jasmin Kollmann (n 121) p 195; Sebastian Pfeiffer (n 100) p 135; a legal relationship is not recognized by: Marie Lamensch (n 108) p 127.

1028 In contrast to this: Nicole Looks and Benjamin Bergau (n 18) (868–869); Tobias Rohner, Nicole Looks and Benjamin Bergau (n 30) (496); Thomas Fischer, Klaus Möller and Wolfgang Schultze (n 53) pp 634–635 are critical concerning personal identification, too (with further references); in a more general context: online platforms provide their users a consumable benefit: Jasmin Kollmann (n 121) pp 189–191.

1029 See pp 111 et seqq; with and without personal registration, an individual recipient is identifiable: Nevada Melan and Bertram Wecke (2015a) (n 99) (2268–2269); doubts in terms of non-registration: Nicole Looks and Benjamin Bergau (n 18) (868–869).

1030 Joachim Englisch (n 12) (878).

1031 Nevada Melan and Sebastian Pfeiffer (n 33) (1077).

1032 Hans-Martin Grambeck (n 8) (2027); Nicole Looks and Benjamin Bergau (n 18) (864); see also: Holger Stadie (n 254) paras 146, 230 and 232; critical of Stadie: Hans Nieskens (n 995) § 3 paras 4467–4468.

1033 See pp 96 et seqq.
here might be refused. The reduction in business income does not appear to be compatible with the concept of EU VAT.\textsuperscript{1034} However, the fact that the tax cannot be passed on is inherent to all barter transactions and is not sufficient to deny taxability.\textsuperscript{1035} Moreover, a supplier can generally adapt his own supply to the consideration in kind provided by the users in such a way as to correspond to the net price plus VAT. Thus, the shifting of the tax is possible in an indirect way.\textsuperscript{1036} Furthermore, the CJEU has not yet issued a final opinion on whether the transfer of the tax is absolutely necessary.\textsuperscript{1037} Yet it can be observed that the court criticizes untaxed final consumption.\textsuperscript{1038} Thus, non-taxation of all barter transactions and the kinds discussed here would be contrary to the legal nature of VAT as this would lead to non-taxed private consumption. Consideration in kind also express-

\begin{enumerate}
\item\textsuperscript{1034} Joachim Englisch (n 12) (879) with further references.
\item\textsuperscript{1035} Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (536); Joachim Englisch (n 12) (878–879); Sebastian Pfeiffer (n 100) p 137; by contrast: Holger Stadie (n 254) paras 146, 226–232.1 points out that VAT is a tax on expenditure and as such, barter transactions should not be taxed; in this vein see also: Holger Stadie, \textit{Tauschvorgänge und Umsatzsteuer}, (58)(21) Umsatzsteuer-Rundschau (2009) 745–750; more generally, the legislator can never guarantee complete shifting of all tax burdens: Holger Stadie (n 254) para 132 with further references; Ben Terra and Julie Kajus (n 126) pp 253–254; generally and from a theoretical perspective, shifting of the tax is ensured as, for staying competitive, competing businesses need to offer their goods and services to similar prices: Robert van Brederode (n 258) p 32; Peter Schmidt (n 149) p 106 with further references; tax shifting is even possible under price regulation schemes: CJEU of 24.10.2013 – C-440/12, \textit{Metropol Spielstätten}, ECLI:EU:C:2013:687.
\item\textsuperscript{1037} It was not necessary to answer this question in CJEU of 24.10.2013 – C-440/12, \textit{Metropol Spielstätten}, ECLI:EU:C:2013:687 paras 46–54.
\item\textsuperscript{1038} See e.g.: ECJ of 27.04.1999 – C:48/97, \textit{Kuwait Petroleum}, ECLI:EU:C:1999:203 para 20; CJEU of 30.09.2010 – C:581/08, \textit{EMI Group}, ECLI:EU:C:2010:559 para 18; similar: Joachim Englisch (n 12) (879).
\end{enumerate}
es capability for consumption\textsuperscript{1039} no matter whether it concerns the consent to the exploitation of personal data or a self-introduction scheme.\textsuperscript{1040} The consent to the term and conditions of online suppliers (by actively ticking a cross) must be treated in the same way as filling out a form to be included in a customer database.

Last but not least, so-called “freemium” models clarify the status of the right to use data as consideration in kind. Many mobile applications are available in a basic and a premium version (freemium model): The basic version of an app or online service is free, but the user is encouraged to buy the premium version. In a similar vein, some online games are free, but during the game, the user must make so-called in-app or in-game purchases to achieve a higher level of enjoyment.\textsuperscript{1041} This model is a version of the marketing pricing strategy which is based on the idea of offering products for free to attract new customers and to provoke subsequent sales of the same good or service or additional sales of other substitute or complementary products. After all, the businesses earn money by giving away some of their products for free.\textsuperscript{1042} With regard to directly linked supplies of services against consideration in kind, a particular form of such freemium models is of interest: Sometimes customers can choose either to pay for the electronically supplied services without being confronted with ads, or to use a free version of the service with personalized ads based on the

\textsuperscript{1039} See for general remarks the discussion on pp 121 et seqq; in the same vein: Tina Ehrke-Rabel (n 37) p 407; similar, Sebastian Pfeiffer discusses whether the barter transactions are covered by the concept of VAT as a general consumption tax – he distinguishes between a tax on consumption and a tax on the use of income: Sebastian Pfeiffer (n 22) (163) with further references; by contrast: Joachim Englisch (n 12) (877–878 and 884) who argues against taxation of bartering exploitation rights on personal data \textit{de lege lata} as the users have no efforts (as the collection of data happens automatically) and therefore no capability of income or wealth is expressed; in the same vein (no income or wealth is used): Tobias Rohner, Nicole Looks and Benjamin Bergau (n 30) (498).

\textsuperscript{1040} See: ECJ of 02.06.1994 – C-33/93, Empire Stores, ECLI:EU:C:1994:225.

\textsuperscript{1041} OECD (2015a), \textit{BEPS Action 1 – Final Report} (n 2) paras 132 and 145 (freemium models and cloud-computing); Stefan Rogge (n 56) (1047); Helena Wenninger et al (n 28) (14); the argument pointed out by Hans-Martin Grambeck (n 8) (2027) that customers who pay for the services subsidize the services rendered to people who do not pay cannot be followed; this is reasoned also by Joachim Englisch (n 12) (881–882).

\textsuperscript{1042} Concerning free samples, premium (gifts) and free trials see: Philip Kotler and Kevin Keller (n 15) pp 485 and 624 with further references; see also e.g.: Chris Anderson, \textit{Free: The Future of a Radical Price} (2009); Ju-Young Kim, Martin Natter and Martin Spann (n 222); Koen Pauwels and Allen Weiss (n 223).
collected user data.\textsuperscript{1043} In such cases, the exploitation rights on personal data take up the status of monetary consideration\textsuperscript{1044} and the provision of these “free” online services must be taxed.

4. Equal Treatment of Goods and Services: No Extension of the Definition of Deemed Transactions of Services

The discussion on “free” internet services has shown that there are both electronically provided services which are bartered for data exploitation rights and services that are provided without consideration. Further problems may arise in individual cases when it comes to distinguishing ancillary services from independent service provision. It is necessary to assess on a case-by-case basis which situation constitutes a taxable barter transaction and which online services are non-taxable.\textsuperscript{1045} This entails legal uncertainty and high collection costs.

If an electronically supplied service is rendered without consideration, taxation will be not possible according to Article 26 of the EU VAT Directive.\textsuperscript{1046} \textit{De lege lata}, the wording of Article 26 of the EU VAT Directive does not allow taxation of any provision of benefits to third parties.\textsuperscript{1047} By contrast, the same situations are taxable when goods are transferred rather than electronically supplied services as the constellation in the ECJ judg-

\begin{thebibliography}{99}
\bibitem{1043} Such constellations are special among freemium models (e.g. for some online games): Stefan Rogge (n 56) (1047).
\bibitem{1044} Similar: Tina Ehrke-Rabel (n 37) p 398; Nevada Melan and Sebastian Pfeiffer (n 33) (1077); Sebastian Pfeiffer (n 22) (159–160); Jasmin Kollmann (n 121) p 197–198 with further references: the consumer pays not for the online service but for being free of advertising (personal data are collected in both cases); in contrast to this statement: Hans-Martin Grambeck (n 8) (2027) and EU Commission (2018a), \textit{Conditions for there being a taxable transaction when Internet Services are provided in exchange for user data}, VAT Committee Working Paper No 958 (n 903) pp 6–7: it is argued that the monetary consideration is paid for not receiving ads instead of the online services.
\bibitem{1045} David Dietsch (n 21) (874); Joachim Englisch (n 12) (884–885); Jasmin Kollmann (n 121) p 225; Nevada Melan and Bertram Wecke (2015b) (n 99) (2814–2815); Sebastian Pfeiffer (n 100) p 139.
\bibitem{1046} Dietmar Aigner et al (n 30) (353); Nicole Looks and Benjamin Bergau (n 18) (866); Tobias Rohner, Nicole Looks and Benjamin Bergau (n 30) (492).
\bibitem{1047} Reimar Pinkernell (n 33) (145); see also: Gorka Echevarria Zubeldia (n 878) (101): it is questionable why such taxation cannot take place.
\end{thebibliography}
ment *Kuwait Petroleum* has taught. However, in his Opinion in *Kuwait Petroleum*, Advocate General Fennelly pointed out that there are differences between free supplies of goods and free supplies of services. In particular, a smaller number of services than of goods should be provided free of charge. This assertion is called into question by digitalization, in particular by the “free” services of multi-sided online businesses just discussed.

In order to tax the (gratuitous) consumption of goods and services equally and to reduce uncertainties related to online business models, an extension of Article 26 of the EU VAT Directive could be considered. The consumption of goods and services would then be taxed equally. A distinction between the two kinds of consumption as currently laid down in Articles 16 and 26 of the EU VAT Directive would be avoided. In concrete terms, Article 26 of the EU VAT Directive could be extended to include the provision of free services to independent third parties, as this would bring a benefit to the suppliers and customers. Furthermore, the advantages of the online businesses obtained through the free provision of online services would not override those of private consumers, so that taxation based on *Julius Fillibeck Söhne*’s principles would not be excluded either. The taxable amount would be calculated according to the costs of the online businesses to minimize discrepancies between deemed supplies and barter transactions of “free” online services. By taxing the gratuitous supply of services, online suppliers would no longer have to review

1048 See the discussion on pp 171 et seqq; in the other way round, Nathalie Wittock (n 686) (136) argues that the outcome of *Kuwait Petroleum* is incorrect – free services to customers are not taxed and gratis promotional goods should neither be taxed; Holger Stadie is of the opinion that all free services rendered to third parties are taxed *de lege lata*: Holger Stadie (n 254) para 189.


1050 The benefits of the private users are not of subordinate importance; see: ECJ of 16.10.1997 – C-258/95, *Julius Fillibeck Söhne*, ECLI:EU:C:1997:491 see also: Joachim Englisch (n 261) para 177 with further reference; this is called the “business purpose test”, see: Ben Terra and Julie Kajus (n 126) pp 540–543 with further references to ECJ of 11.12.2008 – C-371/07, *Danfoss and AstraZeneca*, ECLI:EU:C:2008:711 and CJEU of 18.07.2013 – C-124/12, *AES-3C Maritza East 1*, ECLI:EU:C:2013:488; the case law cited concerned relations between companies and their employees – by extending Article 26 of the EU VAT Directive, the principles could also apply to relations between companies and third parties.

1051 The taxable basis for deemed supplies of services (Article 75 of the EU VAT Directive) refers to the cost price (in absence of a purchase price) and as such to the taxable person’s full costs; see the discussion on pp 167 et seqq; by applying
on a case-by-case basis how to distinguish between taxable barter transactions and non-taxable services. In addition, administrative costs would be reduced due to the uniform treatment of both kinds of supplies. Such extension of Article 26 of the EU VAT Directive *de lege ferenda* would reduce legal uncertainty in the provision of “free” online services by multi-sided companies and would reduce associated compliance costs.

However, a possible change of the rules for deemed supplies would also apply to the offline world and would cause high challenges for all businesses and tax administrations. All kinds of business models would have to be reviewed with regard to the provision of free services. For example, traditional offline advertising might then also be taxed. All free services would then be regarded as supplies for consideration.\(^\text{1052}\)

Extending the scope of Article 26 of the EU VAT Directive would also run counter the common proxies in EU VAT law as no income or wealth is used to obtain free of charge benefits. An extension *de lege ferenda* is therefore not recommended, despite its potential for simplifications for online businesses.

By contrast, when equal treatment of free supplies is desired, a restriction of Article 16 of the EU VAT Directive should be considered. The wording of Article 16 of the EU VAT Directive in terms of taxation represents a systematic error.\(^\text{1053}\) The articles for deemed supplies provide a correction mechanism when the general rules fail (respectively should correct input tax deduction). They should not become the main rule for entire business sectors. Thus, the wording of Article 16 should be restricted and aligned to Article 26 of the EU VAT Directive instead of an extending the latter rule. Yet this also means that online companies must continue to carry out a case-by-case analysis.

5. A Cost Approach for the Taxable Amount of Barter Transactions

According to CJEU case law, "taxable" transactions fall outside the scope of the EU VAT Directive as soon as the tax base cannot be reliably deter-
mined.\textsuperscript{1054} So far discussed, the scholarly community has doubted whether a taxable amount can be determined for the discussed barter transactions.\textsuperscript{1055} In the following, it will be argued that the taxable amount of the barter transactions must be calculated on the basis of suppliers’ incurred full costs in order to be able to provide the electronically supplied services (a.). Furthermore, it is recognized that costing is more challenging for service companies than for companies producing physical goods and that adapted costing mechanisms allowing a thorough calculation of the taxable amount are needed. It is therefore suggested to consult internal cost calculation using the activity-based-costing method in order to tax the exchange of electronically supplied services for exploitation rights on user data (b.).

\textbf{a. The Taxable Amount According to Suppliers’ Costs}

The tax base for VAT is generally everything a customer spends. This approach ensures that the proxies of the concept of VAT as a general consumption tax – the tax should reflect the financial capability of private consumers – can be applied to each transaction. However, in barter transactions, the consideration for a good or a service is another good or service. Therefore, the consideration in kind must be expressed in monetary terms. There are no special European rules.\textsuperscript{1056} The taxable amount of barter transactions must be determined according to the general rules of the EU VAT Directive, in particular Article 73 of the directive.\textsuperscript{1057} Literally, the directive provides as follows: \textit{“In respect of the supply of goods or services […]}
the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.” The taxable amount must be the subjective value, which is not an estimated value calculated according to objective standards.1058 Only the subjective value of a transaction expresses the actual expenditure a consumer spends on the possibility of consumption.1059 In other words, the subjective value is the value that the parties assign to a particular transaction. It is therefore necessary to distinguish the subjective value of a transaction from supposedly independent objective valuations that are not used by the parties involved.1060 However, as soon as the taxable amount cannot be expressed easily and lacks unambiguous quantifiability, a transaction is rendered without consideration.1061 Consequently, it would be not taxed.


1059 Ben Terra and Julie Kajus (n 126) pp 703 and 759.


1061 CJEU of 10.11.2016 – C-432/15, Baštová, ECLI:EU:C:2016:855 para 35; Joachim Englisch (n 12) (884); identifying consideration and valuing it are two separate issues: Deborah Butler (n 445) (100).
II. The Concept of EU VAT as a General Consumption Tax

Figure 3: Taxable Amount of Barter Transactions

With regard to barter transactions, the ECJ ruled in *Naturally Yours Cosmetics* that the taxable amount of a barter transaction is the value received from the customer.\(^{1062}\) According to the judgment, the (maximum) monetary equivalent of the consideration in kind was the alternative amount which would have been paid when the supply had been rendered under normal circumstances. It must be determined which subjective value the respective recipient of the supply would have been prepared to pay. The contractual terms or the price at which the product is normally sold can help to determine the subjective value.\(^{1063}\) In the context of B2C barter transactions of “free” online services the following can be said about the subjective value of the supply: Once a user can choose whether to pay for an online service or transfer the right to exploit personal data instead, the (maximum) value of the barter transaction is equal to that of the paid alternative (see Figure 3, reference (1)).\(^{1064}\) Such constellations are rarely offered at present but are known with some kinds of the freemium model.\(^{1065}\)

\(^{1062}\) David Dietsch (n 21) (871); Ben Terra and Julie Kajus (n 126) pp 709–710; *Naturally Yours Cosmetics* should not be used as a general principle for non-monetary consideration: Deborah Butler, *The VAT treatment of goods as non-monetary consideration: the approach taken by courts in the United Kingdom in the light of the general principles established by the European Court of Justice*, (11)(4) EC Tax Review (2002) 191 (192).

\(^{1063}\) ECJ of 23.11.1988 – C-230/87, *Naturally Yours Cosmetics*, ECLI:EU:C:1988:508; Prabhu Narasimhan (n 438) (6); Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 248; the determination of the value of a barter transaction is less problematic in cases a chargeable alternative exists: Joachim Englisch (n 12) (883).

\(^{1064}\) CJEU of 23.11.1988 – C-230/87, *Naturally Yours Cosmetics*, ECLI:EU:C:1988:508 para 17; Joachim Englisch (n 12) (883); see also: Marie Lamensch (n 108) p 127.

\(^{1065}\) See pp 234 et seqq.
However, when the freemium models are based on additional services to be paid for, the supplied services are not comparable and the barter transactions therefore cannot be valued with the help of (alternative) monetary consideration.1066

The ECJ further indicated that the suppliers’ costs constitute the taxable amount.1067 In this context, the court pointed out that the subjective value of a taxable supply under a barter transaction is “the value which the recipient of the services constituting the consideration for the supply of goods attributes to the services which he is seeking to obtain and must correspond to the amount which he is prepared to spend for that purpose. Where, as here, the supply of goods is involved that value can only be the price which the supplier has paid for the article which he is supplying without extra charge in consideration of the services in question.”1068 In other words, the taxable amount of a supply under a barter transaction is equal to the net costs of a supplier’s inputs. This approach entails taxation of the business inputs which are needed to receive the consideration in kind.1069 So far, the court has only ruled on the cost of

1066 Joachim Englisch (n 12) (883).
1067 ECJ of 02.06.1994 – C-33/93, Empire Stores, ECLI:EU:C:1994:225 para 19; Farmer and Lyal point out that this judgment is of greater importance than the one in Naturally Yours Cosmetics: Paul Farmer and Richard Lyal (n 273) p 122; Prabhu Narasimhan (n 438) (6); Lars Dobratz (n 356) pp 88–90: valuation of the consideration is not possible. That is why the costs of suppliers are determinative.
1068 ECJ of 02.06.1994 – C-33/93, Empire Stores, ECLI:EU:C:1994:225 para 19; see also: ECJ of 03.07.2001 – C-380/99, Bertelsmann, ECLI:EU:C:2001:372 paras 23–24; in contrast to: Nevada Melan and Bertram Wecke (2015a) (n 99); Nevada Melan and Bertram Wecke (2015b) (n 99) (2815); Peter Denk (n 760) (430–431); Nicole Looks and Benjamin Bergau (n 18) (870); see also: Alan Schenk, Victor Thuronyi and Wei Cui (n 75) p 249; Ben Terra and Peter Wattel (n 272) p 203; the court took an opposite approach to the wording of Article 73 of the EU VAT Directive: Hermann-Josef Tehler (n 999) (240).
1069 ECJ of 02.06.1994 – C-33/93, Empire Stores, ECLI:EU:C:1994:225 para 19; of 03.07.2001 – C-380/99, Bertelsmann, ECLI:EU:C:2001:372 paras 18 and 22–24 with further references; Dietmar Aigner et al (n 30) (355); David Dietsch (n 21) (871); Tina Ehrke-Rabel and Sebastian Pfeiffer (n 101) (538); Joachim Englisch (n 12) (883–884); Joachim Englisch (n 261) para 251; Nicole Looks and Benjamin Bergau (n 18) (870); Nevada Melan and Bertram Wecke (2015b) (n 99) (2815); concerning problems with supplies for a mix of monetary and consideration in kind and with reference to CJEU of 10.11.2016 – C-432/15, Baštová, ECLI:EU:C:2016:855 para 35: Peter Denk (n 760) (430–431); Ben Terra and Julie Kajus (n 126) p 710: a supplier’s cost price is determinative; Lars Dobratz (n 356) pp 88–90: when an evaluation of the consideration is not possible, a
goods, but similar considerations should also apply to services. With regard to the provision of electronically supplied services for obtaining exploitation rights on personal data, the costs of online suppliers are the tax base of the B2C barter transactions (see Figure 3, reference (2)). There is no uncertainty about the quality or quantity of the consideration. A taxable transaction exists.

The ECJ’s approach to determine the taxable amount of barter transactions on the basis of the suppliers’ costs is often criticized. In particular, it is stated that the relevant case law should not be applied to all cases of barter transactions. Instead, the following two-step procedure should be applied: as long as a retail price of the own supply can be determined, this value must be the basis of the taxable amount of the suppliers’ supply. Alternatively, when no selling price is available, the suppliers’ costs form the basis for the taxable amount. As stated above, a retail price does not

1070 Tina Ehrke-Rabel (n 37) p 406; Raoul Riedlinger (n 97) p 711.
1071 Deborah Butler (n 445) (101): cost approach also for services not just for goods; Ben Terra and Julie Kajus (n 126) p 714; see also: Otto-Gerd Lippross, Bemessungsgrundlage beim Tausch – Bemerkungen zum vorsichtigen Umgang mit einzelfallbezogenen Rechtsausführungen des EuGH, (66)(21/22) Umsatzsteuer-Rundschau (2017) 821 (825).
1072 ECJ of 03.07.2001 – C-380/99, Bertelsmann, ECLI:EU:C:2001:372 para 24; EU Commission (2018a), Conditions for there being a taxable transaction when Internet Services are provided in exchange for user data, VAT Committee Working Paper No 958 (n 903) p 8; Nevada Melan and Bertram Wecke (2015b) (n 99) (2815); Nevada Melan and Sebastian Pfeiffer (n 33) (1074); Sebastian Pfeiffer (n 22) (162); doubts on whether the costs can be determined: David Dietsch (n 21) (872–873).
1073 Nevada Melan and Sebastian Pfeiffer (n 33) (1074); see also the discussion on pp 234 et seqq.
1074 See e.g.: Joachim Englisch (n 261) para 252 with further references; similar: Otto-Gerd Lippross (n 1071) (824); see also: Bettina Spilker, Umsatzsteuerliche Bemessungsgrundlage beim Tausch – BFH im Einklang mit dem EuGH?, (7) Umsatzsteuer-Berater (2019) 212–214; the recent CJEU case law tends in this direction, too: CJEU of 10.01.2019 – C-410/17, A Oy, ECLI:EU:C:2019:12.
1075 Deborah Butler, Non-monetary consideration in the context of VAT: the status of the judgment in Empire Stores v Commissioners of Customs and Excise in the light of later judgments, (10)(4) EC Tax Review (2001) 234 (236); Prabhu Narasimhan (n 438) (6); Wolfram Reiß, Der „subjektive Wert der Gegenleistung“ als Bemessungsgrundlage für den eigenen Umsatz?: Anmerkung zu der verfehlten Gesetzesauslegung des BFH bei Tauschumsätzen im Kfz-Handel, (67)(21) Umsatzsteuer-Rundschau (2018) 822 (827); this is similar to the two-step approach codified in Article 72 of the EU VAT Directive.
exist for most of the “free” online services. Consequently, it is necessary to determine the suppliers’ costs for the electronically supplied services.

The concept of VAT as a general consumption tax is in a certain tension with the cost approach. As a rule, a private consumer bears the tax due to his consumption expenditures. This should be the decisive basis for tax calculation also for barter transactions.\textsuperscript{1076} Thus, a customer’s expenditure reflects his personal financial capability and not the costs of the business, as required by the ECJ.\textsuperscript{1077} Consequently, the value of the goods or services which are provided by the recipient to the supplier regularly reflects the expenditures he is willing to incur on the requested delivery.\textsuperscript{1078} This would mean that the taxable value of barter transactions should be the subjective expenditure from the beneficiary’s point of view.\textsuperscript{1079} Applying this approach to “free” internet services, the taxable basis would be based on the value or cost from the users’ point of view. In particular, however, the subjective value of the exploitation rights that a consumer himself attributes to them seems to be minimal.\textsuperscript{1080} In this context, it is at least doubtful that such a monetary value can be determined by the online providers, i.e. the other party.\textsuperscript{1081}

Furthermore, suppliers’ costs are not relevant in the VAT system for “normal” taxable transactions. Suppliers’ costs are only relevant for determining the tax base for barter transactions (and for deemed supplies). However, they will be irrelevant if the transaction is based on a monetary consideration.\textsuperscript{1082} If a company even sells its products below cost price, the actual price of the transactions will be decisive, not the higher costs. Moreover, the costs of the suppliers do not include a profit mark-up. VAT neutrality is disturbed, as the added value of the stage of the supply chain con-

\textsuperscript{1076} See pp 121 et seqq; Joachim Englisch (n 12) (884); Joachim Englisch (n 261) para 252.
\textsuperscript{1077} Wolfram Reiß (n 1075) (829); Hermann-Josef Tehler (n 999) (240).
\textsuperscript{1078} Joachim Englisch (n 12) (884) with further references.
\textsuperscript{1079} David Dietsch (n 21) (872); Hermann-Josef Tehler (n 999) (241).
\textsuperscript{1080} David Dietsch (n 21) (872); similar: users are not ready to pay high sums for the services instead of providing their personal data: Alessandro Acquisti, Leslie John and George Loewenstein, What is Privacy Worth?, (42)(2) The Journal of Legal Studies (2013) 249–274.
\textsuperscript{1081} In the general context of valuing barter transactions: Ben Terra and Julie Kajus (n 126) p 710.
\textsuperscript{1082} In this regard see e.g.: ECJ of 20.01.2005 – C-412/03, Hotel Scandic Gåsabäck, ECLI:EU:C:2005:4; David Dietsch (n 21) (872); supplier’s costs are also relevant for deemed supplies (Articles 74 and 75 of the EU VAT Directive) and with regard to Article 72 of the EU VAT Directive.

254
cerned is therefore not taxed. The higher a company's margin is, the greater its tax advantage.1083

Suppliers' costs better indicate the subjective value than objective information. Using suppliers' costs for valuing the taxable transactions, is like not taxing the last stage of the supply chain. The retailers' value added is not taxed. As seen above, such a procedure is not to be recommended for a broad-based consumption tax.1084 By bartering within the supply chain, the non-taxed value is taxed ultimately at the final B2C stage. For B2C barter transactions, the suppliers' expenditures are the last reliable source of subjective monetary information that can be reliably identified. In general, the subjective value of a transaction (whether it is the full value of consumption or only a part of it) mirrors the concept of VAT as a general consumption tax better than any objective references or alternative values which have nothing to do with a consumers’ ability to consume.1085

The value of barter transactions is difficult to determine as there are different value concepts and the parties of a transaction often do not know how their counterparts value the products in question. This problem of trading without money is often referred to as the double coincidence of consumer needs1086 and the concept of consumer surplus. This surplus is the difference between the amount a person is willing to pay for a product and the actual price of the product.1087 Social media services and other “free” internet services provide a very high consumer surplus. In other words, such “free” services offer consumers a great deal, even though people do not have to give up income.1088 In the context of EU VAT law, the subjective (exchange) value of each single transaction is important for determining the taxable amount. However, this value cannot be determined for the discussed barter transactions. If instead the value that a consumer is prepared to pay was used, it would be difficult for the supplier to deter-

1083 This circumstance constitutes a tax shelter scheme for the online and data economy: Nevada Melan and Bertram Wecke (2015b) (n 99) (2815–2816); David Dietsch (n 21) (872).
1084 See pp 133 et seqq.
1085 The situation seems to be similar for deemed supplies: Holger Stadie (n 254) para 179.
1086 ECB, Virtual Currencies (n 831) p 10; Gregory Mankiw (n 131) p 604.
1087 See the discussion on pp 57 et seqq.
mine it. By contrast, the value that the supplier is willing to spend in order to receive the consideration can be determined. This is in line with the argumentation of the ECJ and strengthens the cost approach.

Objective values of the raw data are no suitable tax basis. The application of the ECJ’s cost approach is the object of a scholarly discussion concerning the taxable amount of “free” online services. In particular, it is proposed to use a value based on objective estimates. According to the suggestions, the tax basis for B2C barter transactions should be determined by the value of the consideration and thus by an estimated amount for raw data received (see Figure 3, reference (3)). For this purpose, such an objective value is interpreted as the open market value of data sets which would be feasible in the event of a sale. The market values should be based on price catalogues. Using the market value, the rules for bartering would be similar to the rules concerning deemed supplies of goods. This approach is not congruent with CJEU case law which demands a subjective instead of an objective value (like the market value). Therefore, a

1089 Werner Haslehner points out, that data have no use value for the users and only little or no exchange value: Werner Haslehner (n 980).
1090 The suggestion to apply an objective value was first pointed out by: Nevada Melan and Bertram Wecke (2015a) (n 99) (2269); David Dietsch (n 21) (873); an objective estimated value is necessary as the subjective value is hardly determinable because of a lack of costs: Wolfram Scheffler (n 6) (1787).
1091 Nevada Melan and Bertram Wecke (2015a) (n 99) (2269); Nevada Melan and Bertram Wecke (2015b) (n 99) (2815); discussing the issue: Sebastian Pfeiffer (n 22) (162); see also: David Dietsch (n 21) (873); also referring to market values of personal data: OECD (2015a), BEPS Action 1 – Final Report (n 2) Annex B p 175; it may be the idea that the recipient of the bartered supply could sell his own supply at the market and buy the requested supply with the money from his sale: Joachim Englisch (n 12) (884) with further reference.
1092 Nevada Melan and Bertram Wecke (2015a) (n 99) (2269) with further references to possible estimation basis according to which an average user’s data on a social network is worth USD 40–50; David Dietsch (n 21) (873); Sebastian Pfeiffer (n 22) (162).
1093 See Article 74 of the EU VAT Directive and the discussion on pp 167 et seqq; Sebastian Pfeiffer (n 22) (162): Sebastian Pfeiffer is in favour of applying the ECJ case law concerning deemed supplies to barter transactions as well; see: CJEU of 23.04.2015 – C-16/14, Property Development Company, ECLI:EU:C:2015:265 para 43.
1094 Peter Denk (n 760) (430); Nicole Looks and Benjamin Bergau (n 18) (870); Nevada Melan and Sebastian Pfeiffer (n 33) (1074); Sebastian Pfeiffer (n 22) (162); similar: Marie Lamensch (n 108) p 127; see the discussion and references to pertinent ECJ case law above.
change of the ECJ case law is demanded by scholars. But even then there would be no suitable tax base, as the value of personal data cannot be measured reliably. Furthermore, the exploitation rights (and not the raw data per se) are the consideration for the services. In conclusion, an objective value for the data provided does not constitute a suitable basis for valuing B2C barter transactions of “free” online services.

Whatever method should be used to determine the taxable amount, the scholarly literature agrees that it is difficult to attribute the costs of a supplier to a single user of “free” electronic services. In particular, it is not clear what kinds of costs have to be used as a taxable amount. On the one hand, it is argued that all costs associated with the provision of the services must be included. On the other hand, it is stated that the services could also be rendered without any targeted ads. According to this point of view, the exploitation of personal data would be obsolete. The online businesses would also have to bear the costs of setting up and operating the online infrastructure without any exploitation of personal data. Therefore, the exploitation of personal data rights requires only very specific parts of the infrastructure, such as the development of specific algorithms that allow any analysis. According to this, the tax base for the B2C barter transactions would therefore be lower than the total costs.
A narrow tax base is not compatible with the ECJ case law. The ECJ takes a broad approach to the costs associated with obtaining the consideration. For example, a barter transaction of promotional goods for customer data has to be valuated with the purchase price of the promotional goods and the shipping costs.\textsuperscript{1101} The shipping costs are ancillary expenses and part of the company’s own consumption. When calculating the taxable amount, the total sum of the costs which are necessary to obtain the consideration must be considered.\textsuperscript{1102} Concerning “free” online services, the relevant costs may be the costs which ensure the existence of the online services and their \textit{“attractiveness”}.\textsuperscript{1103} In other words, the costs to be considered are the costs required for maintaining the digital infrastructure. This includes, for example, costs for programming and providing the online tools.\textsuperscript{1104} Although these costs are only partially dependent on the number of users, they are significant expenses for the online businesses.\textsuperscript{1105} Other costs depend on the number of users. Such costs are, for example, related to higher data traffic, which may increase linearly or exponentially with the number of users. In addition, the programming of an algorithm is never completed. Further developments may be required as soon as a critical number of users is exceeded.\textsuperscript{1106} The accompanying costs vary with the number of users and the costs associated with network effects (more users, more costs) lead to difficulties concerning a correct assessment.\textsuperscript{1107} Nonetheless, all these costs should be taken into account when calculating the taxable amount.\textsuperscript{1108}

Besides high fixed costs, only little marginal costs per user can be assessed. The latter can be only calculated with the aid of objective estimations.\textsuperscript{1109} The marginal costs per user are almost zero for a large number of

\begin{itemize}
  \item \textsuperscript{1101} ECJ of 02.06.1994 – C-33/93, Empire Stores, ECLI:EU:C:1994:225 para 19; of 03.07.2001 – C-380/99, Bertelsmann, ECLI:EU:C:2001:372 para 24.
  \item \textsuperscript{1102} David Dietsch (n 21) (871) with further references.
  \item \textsuperscript{1103} This is outlined by: David Dietsch (n 21) (872).
  \item \textsuperscript{1104} David Dietsch (n 21) (872).
  \item \textsuperscript{1105} Concerning social networks: David Dietsch (n 21) (872).
  \item \textsuperscript{1106} David Dietsch (n 21) (872) with further references.
  \item \textsuperscript{1107} David Dietsch (n 21) (872); Wolfram Scheffler (n 6) (1786–1877); concerning network effects, see pp 27 et seqq.
  \item \textsuperscript{1108} Similar: Tina Ehrke-Rabel (n 37) p 406; regarding deemed supplies of services, the \textit{full costs} must be calculated as well (Article 75 of the EU VAT Directive); see: Michael Langer, in Wolfram Reiß, Jörg Krausel and Michael Langer, \textit{UStG} (loose leaf 153rd August 2019) Artikel 72–92 MwStSystRL para 26.
  \item \textsuperscript{1109} More generally (and more positively): estimates of the costs are possible: Dietmar Aigner et al (n 30) (355).
\end{itemize}

258
users in a network. Scholars point out that it would be necessary to base taxation on valuations according to average costs per pre-declaration period. This has not yet been considered by the CJEU. Furthermore, such an approach usually requires a cost unit accounting scheme.\footnote{Joachim Englisch (n 12) (883–884).} However, when applying such a scheme, the taxable amount was based on objective estimations which had been rejected by the ECJ in the past.\footnote{See the cited case law above concerning the subjective value without any objective estimations, see exemplary: ECJ of 05.02.1981 – C-154/80, \textit{Coöperatieve Aardappelenbewaarplaats}, ECLI:EU:C:1981:38 para 13; Joachim Englisch (n 12) (883); so far, the CJEU has been restrictive towards objective values and estimates: Raoul Riedlinger (n 97) p 712.} Furthermore, cost calculations which are based on average costs would result in less valuable data when the number of users increases. According to scholarly literature, this is at odds with economic reality.\footnote{Joachim Englisch (n 12) (883–884).} This argument that it is unrealistic that the costs per user (or the value of the data) decrease the more users an online service has, can in any case be countered by the fact that economies of scale also occur in the manufacturing industry\footnote{Tina Ehrke-Rabel (n 37) p 406.} and have not been criticized so far.

In addition to the question of what costs can contribute to the tax base, there are doubts about the allocation of the costs to a specific user. It is argued that the online companies’ costs cannot be directly attributed to a single user profile within a network.\footnote{David Dietsch (n 21) (872).} The cost structure of online businesses seems to be different from that of other companies. For this reason, there are reservations regarding the concreteness of the costs for programming and the provision of the online services. It is outlined that, in particular, the overall costs of the networks cannot be adequately allocated to a single customer as there is no adequate method for allocating the costs. It seems paradoxical that while online providers have spent money for establishing a network to provide users with benefits, it should be impossible to allocate the costs directly to the individual users. If cost allocation was not possible, no taxable amount could be determined. Consequently, VAT could not be imposed. In its case \textit{First National Bank of Chicago}, however, the ECJ pointed out that technical difficulties which hinder the determina-
tion of the monetary consideration are not decisive for the conclusion that there is no consideration or that a transaction is not taxed.  

In a nutshell, it can be said that the scholarly literature is not sure which approach should be used to calculate the taxable amount of B2C barter transactions of “free” online services. It can be decisive whether the CJEU sticks to its case law or uses the opportunity to take a different path. As far as can be analyzed here, the taxable amount should be calculated on basis of the cost approach and not on the basis of a market value, as the one for the exploitation rights cannot be valued. However, when the suppliers’ costs cannot be assigned to a single transaction, they are not taxed. Against this background, the next chapter develops cost calculation methods for B2C barter transactions of "free" electronically provided services.

b. A Cost Approach for Bartering “Free” Online Services

As outlined in the previous chapter, the taxable amount of the B2C barter transactions of electronically supplied services for exploitation rights on personal data must be valued on the basis of the suppliers’ costs, respectively on the basis of the cost price of the electronically supplied services. The calculations must be carried out without any objective estimates and technical difficulties cannot be held responsible for a lack of a tax base or non-taxation of supplies. So far, the ECJ case law has concerned the assessment of goods for resale. Therefore, it was easy to determine the suppliers’ costs for barter transactions. For self-produced goods and services, however, the cost estimation is more complicated. Costs must be calculated.

As a rule, costs are determined for internal and external purposes. On the one hand, costs are internal information which serve different stakeholders of a company as a basis for decision-making. The discipline of cal-

1115 ECJ of 14.07.1998 – C-172/96, First National Bank of Chicago, ECLI:EU:C: 1998:354 para 31: “Moreover, any technical difficulties which exist in determining the amount of consideration cannot by themselves justify the conclusion that no consideration exists.”; see also: CJEU of 10.01.2019 – C-410/17, A Oy, ECLI:EU:C: 2019:12 para 41; concerning a case note on A Oy see: Robert Prätzler and Florian Zawodsky, A Oy: Case Note, (47)(5) Intertax (2019) 523–526; Lars Dobratz (n 356) p 92: in combination with the ECJ judgment Empire Stores (the taxable amount must be assessed according to the suppliers’ costs) it might be possible, that the taxable amount is always assessable.

1116 In the same vein: Joachim Engelsch (n 12) (884–885).

1117 Tina Ehrke-Rabel (n 37) p 406; Raoul Riedlinger (n 97) p 711.
Calculating costs for internal purposes is called management accounting or internal accounting. By contrast, IAS/IFRS standards (International Accounting Standards/International Financial Accounting Standards), according to which the companies’ balance sheets and other documents for external use are prepared, are part of the financial or external accounting.\footnote{Michel Charifzadeh and Andreas Taschner, Management Accounting and Control (2017) p 3; Colin Drury, Management and cost accounting (9th ed, 2015) pp 6 and 23.} In other words, companies calculate costs for two reasons: on the one hand, managers need information for decision-making and, on the other hand, laws require companies to provide data for external purposes.\footnote{Michel Charifzadeh and Andreas Taschner (n 1118) pp 5 and 14–16; Colin Drury (n 1118) p 50.} Tax authorities are one of the external stakeholders for whom information are provided.\footnote{Michel Charifzadeh and Andreas Taschner (n 1118) p 14; Colin Drury (n 1118) p 5.}

The following interdisciplinary analysis demonstrates that the costs for B2C online barter transactions (the monetary value) can be determined. Even if the IAS/IFRS standards provide a uniform European framework for the calculation of the tax base, they are not suitable for determining the costs of “free” electronically supplied services (aa.). It is therefore suggested here to use internal accounting information, such as activity-based cost accounting, to determine the tax base of the B2C barter transactions (bb.).

aa. Unsuitable External Accounting Information According to IAS/IFRS

Assistance in determining the valuation basis for barter transactions could be provided by IAS/IFRS standards. These standards have been developed by the International Accounting Standards Board (IASB), an independent group of experts. To the extent the standards are endorsed by the EU, these are applicable EU law. Should it be possible to apply one or more of the standards to EU VAT law, a common, uniform and, above all, harmonized basis would be created for determining the tax base of B2C barter transactions of “free” online services.

Concerning the supply of “free” online services, IFRS 15 would be the standard that should be possibly used to determine the tax base for VAT...
purposes. In principle, the standard concerns the transfer of goods and services to customers. The online businesses conclude agreements with the users, i.e. their customers. In doing so, both parties agree on the transfer of enforceable rights. The kinds of contracts to be recognized is governed by IFRS 15 paragraphs 9 to 16. Important for the application of IFRS 15 to tax matters should be the fact that online business services are discrete and definable. According to IFRS, the amount shown in the balance sheet should reflect the expected consideration. The question of whether the barter transactions under discussion should be shown in the companies’ balance sheets is not the subject of this academic paper. Only the standards that are important for calculating the tax amount of barter transactions should be analyzed here. If the standards turned out to be attractive, they might be used for all barter transactions under EU VAT law, whether or not they have to be valued for financial accounting purposes.

The financial accounting standards contain explicit rules for non-cash consideration. However, the general rule cannot be assigned to EU VAT barter transactions. In general, the transaction price is the value of the transaction in question. This price should be fixed in accordance with

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1122 Users of online services are customers according to IFRS 15 para 6; according to Appendix A to IFRS 15 a customer is “[a] party that has contracted with an entity to obtain goods or services that are an output of the entity's ordinary activities in exchange for consideration”.

1123 According to Appendix A to IFRS 15 a contract is “[a]n agreement between two or more parties that creates enforceable rights and obligations.”; concerning contracts under IFRS 15 see: Norbert Lüdenbach, Wolf-Dieter Hoffmann and Jens Freiberg (n 1121) § 25 paras 20–25.

1124 See IFRS 15 paras 22 and 26–27; Norbert Lüdenbach, Wolf-Dieter Hoffmann and Jens Freiberg (n 1121) § 25 para 50.

1125 IFRS 15 para 2.

1126 IFRS 15 para 46 and Appendix A: transaction price (for a contract with a customer): “The amount of consideration to which an entity expects to be entitled in
the terms of the contract and commercial practice.\textsuperscript{1127} As barter transactions are characterized by the fact that they do not have a monetary transaction price, this rule cannot be used for VAT purposes. However, the IFRS do also know so called non-cash consideration.\textsuperscript{1128} Barter transactions could be subsumed under this category. Concerning non-cash consideration, IFRS 15 paragraph 66 requires that consideration should be measured at the fair market value of the received consideration.\textsuperscript{1129} This is similar to the scholarly proposals concerning the use of the fair value of personal data which have been rejected above.\textsuperscript{1130} The exploitation rights cannot be assigned any fair value.

The alternative rules for assessing the value of non-cash consideration under IFRS 15 cannot be applied to VAT either. In situations in which the fair value of the consideration cannot reasonably be estimated, IFRS 15 paragraph 67 states that “the entity shall measure the consideration indirectly by reference to the stand-alone selling price of the goods or services promised to the customer (or class of customer) in exchange for the consideration.”. The stand-alone selling price is defined as the value at which the goods or services are sold separately.\textsuperscript{1131} This approach is similar to that of ECJ \textit{Natural-ly Yours Cosmetics}. As discussed above, however, stand-alone selling prices are mostly not available for B2C barter transactions.\textsuperscript{1132} All this means that an application of the IFRS 15 standards cannot form the basis for assessing the taxable amount for EU VAT purposes as they determine an improper basis for calculating the values.

\begin{footnotes}
\footnotetext[1127]{IFRS 15 para 47.}
\footnotetext[1128]{IFRS 15 para 48 lit d) and paras 66–69; Norbert Lüdenbach, Wolf-Dieter Hoffmann and Jens Freiberg (n 1121) § 25 para 101.}
\footnotetext[1129]{IFRS 15 para 66; concerning an overview of fair value measurements according to IAS/IFRS: Norbert Lüdenbach, Wolf-Dieter Hoffmann and Jens Freiberg (n 1121) § 8a see further: § 25a para 123.}
\footnotetext[1130]{See pp 249 et seqq.}
\footnotetext[1131]{See the definition of \textit{stand-alone selling prices} (of a good or service) in Appendix A to IFRS 15: “The price at which an entity would sell a promised good or service separately to a customer”; Norbert Lüdenbach, Wolf-Dieter Hoffmann and Jens Freiberg (n 1121) § 25 para 124.}
\footnotetext[1132]{See pp 249 et seqq.}
\end{footnotes}
bb. The Taxable Amount for Barter Transactions According to Internal Accounting Information

In contrast to IAS/IFRS standards (financial accounting), internal cost calculations (management accounting) is voluntary and can be carried out more frequently than financial accounting for specific products, customers or parts of companies. Due to legal requirements, financial accounting standards are widely used and provide a uniform, consistent, verifiable and objective guidance for external reporting, whereas management accounting is not harmonized by general obligatory guidelines or laws. Nevertheless, global homogenization of management accounting takes place. The alignment process is usually supported by the use of the same enterprise resource planning systems (ERPS) or by other software tools within a company, but also worldwide. Furthermore, the two different accounting schemes are based on the same raw data. The conditions for using internal accounting information for tax purposes, however, are not as good as these of external accounting information. The existing potential for manipulation must be counteracted by binding guidelines or harmonized soft law issued by the EU legislator or national tax administrations that make internal accounting information a reliable source of information for VAT. Policy makers need to recognize that they highly depend on the help of taxable businesses to collect VAT and should therefore offer assistance in the form of guidelines on the one hand. On the other hand, tax authorities

1133 See also for additional differences: Alnoor Bhimani et al, Management & Cost Accounting (7th ed, 2019) pp 3–6; Michel Charifzadeh and Andreas Taschner (n 1118) pp 15–16 and 50; Colin Drury (n 1118) pp 6–7; Thomas Fischer, Klaus Möller and Wolfgang Schultze (n 53) pp 8–9.

1134 Markus Granlund and Kari Lukka, It’s a small world of management accounting practices, (10) Journal of Management Accounting Research (1998) 151–179; in addition, ethical behavioural standards are outlined by e.g. the Chartered Institute of Management Accountants see: https://www.cimaglobal.com/Profession alism/Ethics/ (last accessed: 01.02.2020); concerning ethical guidelines see also: Alnoor Bhimani et al (n 1133) p 20; Colin Drury (n 1118) pp 15–16.

1135 Concerning an overview of the drivers of homogenization see: Markus Granlund and Kari Lukka (n 1134) (157); Colin Drury (n 1118) p 16; furthermore, internal and external accounting are aligned: Adolf Coenenberg, Thomas Fischer and Thomas Günther, Kostenrechnung und Kostenanalyse (8th ed, 2012) p 27 with further references and Thomas Fischer, Klaus Möller and Wolfgang Schultze (n 53) pp 21–22 with further references.

1136 Michel Charifzadeh and Andreas Taschner (n 1118) p 14.
must also specifically detect and punish manipulations conducted by taxable persons.\textsuperscript{1137}

Internal cost information can be a reliable source for calculating the tax base for B2C barter transactions of electronically supplied services. Management accounting should mainly serve different internal needs and multiple objectives.\textsuperscript{1138} Internal accounting schemes are agile and can be adapted to the purposes for which cost information are needed. Businesses of some industries, for instance, run a management accounting system in order to determine retail prices for customized products for which no market prices exist.\textsuperscript{1139} There are also no market prices for most of the “free” electronically supplied services discussed. The manifold application fields open up the possibility of applying internal cost information for VAT purposes. Furthermore, the calculated costs are a sufficiently reliable basis for taxation due to the standardization of software tools. It is even pointed out that information from management accounting is more reliable than information from financial accounting as the former is needed for decisions that require more accurate cost information.\textsuperscript{1140} From this perspective, the internal calculations are more precise. This finding should be welcomed


\textsuperscript{1138} E.g.: decision-making and planning: Colin Drury (n 1118) pp 6 and 18; Michel Charizadeh and Andreas Taschner (n 1118) p 5.

\textsuperscript{1139} Colin Drury (n 1118) p 17.

\textsuperscript{1140} Colin Drury (n 1118) p 51.
by the tax authorities, even if it means that companies which do not currently use internal accounting systems will have to take appropriate measures to introduce such calculations. Therefore, harmonized guidelines referred to above are important not only to limit manipulation, but also to keep compliance costs within reasonable limits for companies in a need to introduce internal accounting systems, but also for these companies which already use internal accounting measures.

Traditional management accounting schemes\textsuperscript{1141} are not suitable for determining the costs of online business transactions. These schemes focus on manufacturing companies operating in a non-competitive environment and with a standardized product range. The methods concentrate on the allocation of direct costs and simple allocation mechanisms for cost calculation.\textsuperscript{1142} Such simple allocation mechanisms are objective and verifiable, but not accurate enough to make decisions for management purposes.\textsuperscript{1143} Due to this inherent inaccuracy, traditional costing systems are neither suitable for VAT purposes. The amounts would also be based on a number of objective estimates which are not supported by ECJ case law.\textsuperscript{1144}

Modern management accounting systems such as activity-based cost accounting systems are more mature and show more accurate product costs. Therefore, they are an adequate basis for the cost calculation for VAT purposes. Like EU VAT, management accounting principles are altered by the changing business environment. Rising indirect costs, technological progress and the expansion of the service sector are only three examples of reasons why new methods of management accounting methods have been developed:\textsuperscript{1145} A new, more sophisticated management accounting

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\textsuperscript{1141} Management accounting principles can be traced back to the nineteenth century and for a long time, standards had been applied which were developed in the 1920s: Colin Drury (n 1118) p 18 with further reference to Thomas Johnson and Robert Kaplan, \textit{Relevance Lost: The Rise and Fall of Management Accounting} (1987).

\textsuperscript{1142} Colin Drury (n 1118) pp 77, 261 and 272.

\textsuperscript{1143} Michel Charifzadeh and Andreas Taschner (n 1118) p 63; Colin Drury (n 1118) pp 51–52 and 272.


\textsuperscript{1145} See for further challenges: Michel Charifzadeh and Andreas Taschner (n 1118) pp 65–66; Adolf Coenenberg, Thomas Fischer and Thomas Günther (n 1135) pp 156–161 with further references; Colin Drury (n 1118) pp 9–13 and 261; Reinhold Mayer and Lutz Kaufmann, \textit{Prozeßkostenrechnung II – Einordnung}.
method is called activity-based costing (ABC).\textsuperscript{1146} ABC accounting is generally accepted by service companies.\textsuperscript{1147} Compared to the past, the service companies in particular operate in a more competitive environment and have to operate under a certain price pressure.\textsuperscript{1148} Consequently, it became necessary to develop more appropriate costing methods, especially for this industry with its growing product ranges.\textsuperscript{1149} The ABC methods were designed to support service organizations and especially their cost structure. In contrast to manufacturing enterprises, service companies have a very high share of indirect costs which cannot be directly assigned to single services.\textsuperscript{1150} Furthermore, information technology has revolutionized management accounting by making it possible to analyze all of a company’s data in near real time. The data collection takes place at the time the costs


\textsuperscript{1147} ABC methods are widely implemented in the USA and Europe and in the service industry: Colin Drury (n 1118) pp 51–52, 261–262 and 273, see also: Colin Drury and Mike Tayles, \textit{Explicating the design of overhead absorption procedures in UK organizations}, (37)(1) \textit{British Accounting Review} (2005) 47–84 who suggest that service organizations are more likely to implement ABC systems; Michael Paul and Martin Reckenfelderbäumer (n 1145) p 645 with further references.

\textsuperscript{1148} Colin Drury (n 1118) pp 272–273.
\textsuperscript{1149} Colin Drury (n 1118) pp 10–11 and 261.
\textsuperscript{1150} Colin Drury (n 1118) pp 272; Michael Paul and Martin Reckenfelderbäumer (n 1145) p 635 with further references.
arise. This enables improved and more appropriate recording and assignment of costs. In a nutshell, highly sophisticated ABC systems are suitable for businesses in a very competitive environment, with a high share of (non-volume-related) overheads and a wide product range. This results in high accuracy at low error costs. This corresponds to the cost calculation for the valuation of “free of charge” service transactions. In particular, the high share of indirect costs is often highlighted in the scholarly literature on the taxability of “free” online services. Furthermore, many service companies have already introduced ABC systems. This fact limits compliance costs. The innovation will only be the use of the derived information for tax purposes.

Alternative methods like direct costing, job-order costing systems or target costing are not suitable for calculating the costs of online companies. The use of direct costing (i.e., a costing system that only takes direct costs into account) is not recommended, since the total costs are to be included in the taxable basis of barter transactions. As “free” online services are characterized by low direct costs, the tax base would be low. The actual costs of online companies would not be reflected. In general, cost accounting for services can also be based on job-order costing systems. Such methods assign the costs to a unique service of a sales order. However, a job-order costing system is unsuitable for most online businesses. One of the reasons for this is that “free” online services are usually not tailor-made for specific customers but identical for a great number of users. This applies especially to social networks or online search engines. It is not possible to immediately assign individual costs to a particular consumer. The job-order costing is therefore neither applicable to bartered electronically supplied services. Target costing is another way for service companies to manage costs. With this approach, the starting point is the target price from the customer’s point of view. The target costs can be as-

1151 Colin Drury (n 1118) pp 12 and 38.
1152 Michel Charifzadeh and Andreas Taschner (n 1118) p 67; Colin Drury (n 1118) pp 51–52 and 272; similar: Thomas Fischer, Klaus Möller and Wolfgang Schultze (n 53) pp 240–241.
1153 See pp 249 et seqq.
1155 See the discussion on pp 249 et seqq.
1156 Colin Drury (n 1118) pp 69–70 and 76.
1157 Common service branches which apply job-order costing systems are e.g. accounting and law: Colin Drury (n 1118) 68.
1158 Colin Drury (n 1118) p 69.
sessed by deducting the desired profit margin from the target price.\textsuperscript{1159} As inherent to the discussed “free” online services, market prices do mostly not exist. Additionally, general principles of EU VAT law prohibit the use of reference values.\textsuperscript{1160} Thus, target costing cannot be applied.

ABC systems are cost accumulation systems which assign costs to cost objects.\textsuperscript{1161} Such cost objects must be identified by the online companies which render “free” electronically supplied services. Cost objects can be “\textit{any activity for which a separate measurement of costs is desired.}”\textsuperscript{1162} Typical examples of cost objects are goods or services which are rendered to customers or certain sales regions. The principles of ABC systems can be applied to any other (suitable) cost object.\textsuperscript{1163} By allocating the costs to cost objects, the resources used by these cost objects can be measured.\textsuperscript{1164} The task of online businesses will be to identify the most suitable cost object for VAT calculations. It seems appropriate to choose either a single service which is provided to customers, or the users themselves as cost objects. VAT calculations require cost information per transaction which is why the two exemplary cost objects are probably the most suitable ones but can also be different for particular kinds of “free” online supplies.

The costs of a cost object are generally identified in a two-step process. This is applied by traditional and ABC systems.\textsuperscript{1165} In an initial step,
Costs are classified according to their affiliation to a category. Different kinds of businesses bear different kinds of costs. Thus, the cost structures of manufacturing, merchandising and service companies are not the same. In the second step, the costs classified in the first step are allocated to the cost objects.

Typical categories of cost classification are the kinds of expenditure. This kind of sorting consists mainly of two broad classes: direct and indirect material costs and direct and indirect labour costs. Direct material costs are material costs which can be directly assigned to a particular cost object. They become part of a physical good. Thus, especially service companies, such as online companies, do not have direct material costs. Like direct material costs, direct labour costs can also be assigned directly to a particular cost object. In the case of service companies, the direct labour costs are the costs which are necessary to serve an individual customer. In contrast to direct costs, indirect costs, also known as overhead costs, cannot be assigned directly to a particular cost object. Indirect costs are classified as manufacturing costs, such as material and labour, administration or marketing overheads. Sometimes, direct costs are categorized as indirect costs because it would be too expensive to assign the costs directly to a certain cost object. Furthermore, it depends on the cost object whether certain costs are direct or indirect. This description indicates that online businesses bear a large share of overheads and only low direct costs. Even if direct labour costs could be incurred, it can be too expensive to assign them directly to a specific user. It therefore appears that

1166 Costs are “a monetary measure of the resources sacrificed”: Colin Drury (n 1118) p 25; Alnoor Bhimani et al (n 1133) p 31.

1167 In particular, service companies perform tasks or activities for customers which cannot be stored. Sometimes, service companies have work in process, but commonly, service companies do not have something like inventory: Colin Drury (n 1118) p 26; Alnoor Bhimani et al (n 1133) p 40.

1168 For a short overview see: Ronald Gleich and Markus Pföhl (n 1162) pp 172–174 with further references.

1169 Colin Drury (n 1118) pp 26–28.

1170 Some other service organisations have some input costs which can be directly attributed to cost objects like a garage which needs to buy parts to repair cars: Colin Drury (n 1118) pp 27 and 40; Alnoor Bhimani et al (n 1133) p 41.

1171 Alnoor Bhimani et al (n 1133) p 41; Colin Drury (n 1118) pp 27 and 39.

1172 Alnoor Bhimani et al (n 1133) p 32.

1173 Alnoor Bhimani et al (n 1133) p 41; Colin Drury (n 1118) pp 40 and 77.

1174 Colin Drury (n 1118) p 28.
the management accounting systems for determining the taxable VAT base must be sufficiently sophisticated to deal adequately with indirect costs.

Like EU VAT, the costing system also works with different proxies at each stage. The use of proxies always involves a certain degree of inaccuracy. However, applying proxies is not new for EU VAT law. As mentioned above, consumption cannot be taxed directly, but is indirectly captured through the use of transactions as a proxy. The proxies used for cost allocation are called allocation bases or cost drivers. In order to calculate costs as correctly as possible, the allocation base should generally be a key determinant of the costs to be allocated. These cost drivers are known as cause-and-effect allocations and are mostly used in ABC systems. The use of non-significant allocation bases is referred to as arbitrary allocation. Such calculations are responsible for incorrect allocations of overhead costs to cost objects and are often used by traditional costing systems. Additionally, ABC systems apply volume-based and non-volume-based cost drivers. Non-volume-based cost drivers may be based inter alia on duration or transaction criteria such as the volume of customer orders. Instead, traditional costing systems employ only volume-based allocation rates. Such cost drivers assume that a cost object’s consumption of overheads is correlated with the output units. They are suitable as long as an output unit is generated each time the activity is performed. By contrast, non-volume-based cost drivers do not correlate with the output units. The use of improper cost drivers leads to inaccurate product

1175 See pp 120 et seqq; additionally, the principle of territorial taxation also relies on proxies, namely place of taxation rules: OECD (2015a), BEPS Action 1 – Final Report (n 2) paras 55 and 58.

1176 Alnoor Bhimani et al (n 1133) p 33; Adolf Coenenberg, Thomas Fischer and Thomas Günther (n 1135) pp 165–167; Colin Drury (n 1118) pp 76 and 277.

1177 Alnoor Bhimani et al (n 1133) pp 141 and 248–249; Michel Charifzadeh and Andreas Taschner (n 1118) p 67; Colin Drury (n 1118) pp 76 and 277.

1178 Alnoor Bhimani et al (n 1133) p 257; Colin Drury (n 1118) pp 52 and 260.

1179 Colin Drury (n 1118) pp 49, 52 and 77 (key word: traditional costing system); concerning this matter see also: Michel Charifzadeh and Andreas Taschner (n 1118) pp 65–66.

1180 See e.g. duration drivers = “A cost driver used to assign the costs assigned to an activity cost centre to products that is based on the amount of time required to perform an activity.” and transaction drivers = “A cost driver used to assign the costs assigned to an activity cost centre to products that is based on the number of times an activity is performed.”: Colin Drury (n 1118) pp 260 and 277.

1181 Michel Charifzadeh and Andreas Taschner (n 1118) pp 67–69; Colin Drury (n 1118) pp 262 and 277.
costs. Non-volume-based overheads are inherent to online businesses. Programming, for instance, is not an activity which is performed every time a consumer uses a network or creates a new account. Thus, non-volume-based cost drivers applied under ABC systems are to be preferred.

In addition to enhance the quality of proxies, ABC systems use a greater number of cost drivers that improve the accuracy of production costs. Traditional costing systems use only a small number of cost drivers and assign the costs of the supporting departments to the production cost centres. Typical cost drivers are direct labour or machine hours or units of production. By contrast, ABC systems apply separate cost drivers for supporting activities. Traditionally, departments were used as cost centres; instead, activity-based costing is based on activities. Activities are “the aggregation of many different tasks, events or units of work that cause the consumption of resources.” The cost centres are then known as activity cost centres.

In a similar manner, traditional cost accounting systems apply a small number of second-stage proxies, most of which depend directly on the quantities produced. By contrast, ABC systems apply activity cost drivers that indicate a major dependence on a certain activity. Overall, ABC systems apply a greater number of proxies and a greater number and variety of cost drivers than traditional costing systems. This allows a more accurate calculation of costs. Thus, ABC methods can better deal with overheads and online businesses should apply these systems to adequately calculate the tax base for “free” online barter transactions.

Traditional costing systems and ABC systems treat direct costs equally, but indirect costs differently. Thus, product costs are calculated more accurately under ABC systems. After the categorization of the costs and the development of cost centres, costs must be assigned to the identified cost objects. This happens in the second stage of the allocation process. Using

1182 Depending on the percentage of non-volume related indirect costs, the one or the other costing system has to be preferred: Colin Drury (n 1118) pp 262–263.
1183 Alnoor Bhimani et al (n 1133) pp 257–258 and 323.
1184 Colin Drury (n 1118) pp 54–59 and 259.
1185 Colin Drury (n 1118) pp 62 and 259.
1186 Adolf Coenenberg, Thomas Fischer and Thomas Günther (n 1135) p 163; Colin Drury (n 1118) pp 61, 76, 259 and 277.
1187 Colin Drury (n 1118) p 61, 76 and 277.
1188 Colin Drury (n 1118) pp 259–260.
1189 Colin Drury (n 1118) pp 60–64 and 259–260.
1190 Colin Drury (n 1118) p 55; Thomas Fischer, Klaus Möller and Wolfgang Schultze (n 53) p 254.
1191 Colin Drury (n 1118) p 60.
modern information technology and digital data processing techniques, direct costs can be easily and directly assigned to a cost object (direct cost tracing). Both kinds of cost systems deal exactly with these costs. In general, the better the direct costs can be attributed to it, the more accurate the total costs of a cost object will be.\textsuperscript{1192} By contrast, overheads mainly contribute to different cost objects. Estimations are necessary to evaluate how much resources are consumed by a certain cost object. This is done with the help of the cost allocation methods discussed.\textsuperscript{1193} As ABC systems operate with more sophisticated proxies and a larger number of them, product costs can be more accurately calculated.\textsuperscript{1194} In summary, it can be said that both costing systems allocate the same amount of costs, but distribute them in different ways.\textsuperscript{1195}

When management accounting is applied for tax purposes, a certain degree of estimation is unavoidable. This requires cooperation from the CJEU, as the court has not yet allowed explicit objective estimates as the subjective value is the only reference point for the taxable amount.\textsuperscript{1196} Firstly, the proxies in the two phases of the cost allocation process are most accurate under ABC calculations, even if they cannot exactly point out the costs. To limit the use of calculated numbers, imputed costs like an equity yield rate should be excluded from the taxable basis.\textsuperscript{1197} Furthermore, the cost quality varies depending on the time span underlying the calculations. Management accounting procedures relate to past and future data and can be provided monthly, weekly or daily.\textsuperscript{1198} For management accounting purposes, it is recommended not to determine actual costs, as these can only be measured with a certain delay. Total costs which are used to determine the sales prices are often required more quickly and are dependent

\footnotesize{\textsuperscript{1192} Colin Drury (n 1118) pp 29, 49, 52 and 76 (key word: direct cost tracing).
\textsuperscript{1193} Colin Drury (n 1118) pp 29, 39, 49 and 76.
\textsuperscript{1194} Colin Drury (n 1118) p 260; similar: Adolf Coenenberg, Thomas Fischer and Thomas Günther (n 1135) p 180.
\textsuperscript{1195} Michel Charifzadeh and Andreas Taschner (n 1118) p 70.
\textsuperscript{1196} In this context, see the discussion concerning the subjective value of consideration and the references to pertinent ECJ case law on pp 121 et seqq and pp 249 et seqq.
\textsuperscript{1197} This would be consistent with the calculation for deemed supplies: Joachim Englisch (n 261) para 255.
\textsuperscript{1198} By contrast, financial accounting principles are designed to report about the past in annually or semi-annually intervals: Colin Drury (n 1118) pp 6–7; see also: Michel Charifzadeh and Andreas Taschner (n 1118) p 16.}
on period related costs.\textsuperscript{1199} For bartered electronically supplied services, online businesses have to declare the relevant costs in the correct tax declaration period. Since the CJEU does not allow the declaration of lump sums,\textsuperscript{1200} the reported costs must be actual costs. With increasing improvements of costing techniques, it seems possible to calculate the appropriate costs per transaction. Whether the correct costs can be determined or not, however, is highly dependent on the identified cost object.

The determination of costs as a tax assessment base for VAT bartering requires a cost calculation. The use of internal information to obtain the tax base is not necessarily a completely new or strange approach. The taxable base of deemed supplies of services\textsuperscript{1201} and pro-rata input tax deductions have to be calculated on certain estimations as well and while the ECJ does not follow a consistent line, an economic perspective is emphasized.\textsuperscript{1202} Furthermore, every time a sales price is available, this is the taxable base for VAT. This price is often developed according to internal price calculations, too. The distinction between selling products and bartering is that prices are not explicitly indicated. It can be assumed that in both cases customers accept the prices of the goods or services received. The question of whether a profit margin should be added to the costs of suppliers under bartering only arises later. But even if the court were to find that the taxable basis of

\begin{itemize}
\item \textsuperscript{1199} Cost allocation systems shall not calculate with actual costs. The use of actual costs results in delayed cost calculations. Shorter intervals for allocation, however, lead to more inaccurate cost information as the share of overheads rise. Consequently, average rates over a time span of a year are more illustrative. Such an approach involves under- or over-recovery of overheads and causes a further factor of inaccuracy: Colin Drury (n 1118) pp 64–67 and 272; Alnoor Bhimani et al (n 1133) pp 131–132; VAT laws have to deal with these inaccuracies. However, it may be conceivable to integrate adjustments in the yearly tax declaration.
\item \textsuperscript{1200} On this point see as well: Joachim Englisch (n 12) (883).
\end{itemize}
barter transactions should be the normal selling price of a good or service, it would be possible to calculate such a value using ABC systems. So far, the ECJ case law has concerned the valuation of goods for resale. Therefore, it was easy to determine the suppliers’ costs for barter transactions. However, if this approach is consistently developed and applied to self-produced goods and services, the costs must be calculated.

Finally, it is suggested to consult internal cost calculations for VAT purposes. The changed business environment and the digital developments have challenged not only EU VAT law but also management accounting principles. Cost calculation according to ABC systems makes it possible to allocate overheads appropriately to individual VAT transactions. Thus, all VAT protagonists are sure that VAT must be levied on the B2C online barter transactions and as the taxable base can be reliably determined, it is also clear how much tax revenue should be collected. In order to ensure similar cost accounting systems and manageable collection costs, the EU legislator should provide guidance in form of soft law on how to calculate ABC costs. No new legislation is required.\textsuperscript{1203} However, as no calculation system can do without estimates, the CJEU has to accept that the determination of costs as a taxable basis entails little inaccuracy.\textsuperscript{1204} The only difference from monetary consideration is the additional margin rate, which distinguishes costs from final prices.

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\textsuperscript{1203} Joachim Englisch calls for legal clarification within the EU VAT Directive or the EU VAT Implementing Regulation (to not tax “free” supplies of online services): Joachim Englisch (n 109) p 1516; the decisions should not be taken by the court but by the legislator: Joachim Englisch (n 12) (885).

\textsuperscript{1204} Recently, the CJEU allowed extrapolation methods to calculate subsequent VAT payments in connection with VAT fraud: CJEU of 21.11.2018 – C-648/16, Fontana, ECLI:EU:C:2018:932; Fraudsters do not have the same position in the VAT system as \textit{bona fide} traders, so the decision cannot be generalized. Nevertheless, the CJEU has recognized certain imputed inaccuracies by recognizing extrapolation methods. This could be seen as a starting point for the necessary calculations in the area of “free” B2C barter transactions. Concerning the Fontana case see e.g.: Paole Centore, \textit{CJEU Judgment Fontana C-648/16}, in \textit{CJEU: Recent Developments in Value Added Tax 2018} (Michael Lang et al eds, 2019) pp 183–188 or Marcos Álvarez Suso, \textit{The increasing role of the CJEU in determining procedural issues when deciding VAT cases – One recent example: the indirect calculation of the VAT due}, in \textit{Value Added Tax 2018} (Michael Lang et al eds, 2019) pp 223–236 (see for an analysis of the Fontana case: pp 231–236).
\end{footnotesize}
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III. Summary: The Concept of EU VAT as a General Consumption Tax Suitable for Digitalization

The digital age has brought different challenges to EU VAT as a general consumption tax. It is generally accepted that three categories of these are manageable within the traditional limits of the tax. In this context, no adjustments to the outlined concept of EU VAT consumption are necessary.

First of all, trade in services becomes more important. This includes the development of novel services, mainly based on internet technologies. Furthermore, traditional supplies of goods are now provided as services as goods dematerialize. This is supported by an increased market potential for sharing rather than buying, emanating from both businesses and consumers. These changes fall under the EU VAT concept of consumption, as the tax also defines supplies of services as consumption. Furthermore, the new digital opportunities transform distribution channels. However, the tax is designed as an all-stage tax and problems only arise at subsequent levels (e.g., the categorization into different kinds of services or the determination of bundles of products).\footnote{See pp 183 et seqq.}

Secondly, private consumers change their behaviour and increasingly interact in markets. This phenomenon is commonly known as the “shared economy” and is closely linked to the trend to replace supplies of goods with services. However, the sharing economy attaches importance to the adaptation of consumers and their changing interaction in markets. A high percentage of interactions can be described as sharing instead of buying respectively sharing after buying (\textit{airbnb}-model). The sharing economy is not a hybrid model that is contextualized between production and consumption, but merely an additional step in the supply chain. It was commercialized especially through the interaction of online marketplaces: Today, sharing is mostly professional. Assuming that consumers meet the requirements of Article 9 of the EU VAT Directive, sharing can lead to taxable transactions. The assessment as to whether the interaction of private consumers in markets falls under the EU VAT concept of consumption must be made on a case-by-case analysis on the basis of the general rules. This allows different kinds of transactions to be distinguished: the players in the sharing economy can render taxable transactions against payment (e.g., cost-sharing agreements), barter transactions or non-taxable free supplies. In the case of barter transactions, the criterion of a direct link must be carefully examined. Furthermore, free services will be taxable only if these are
rendered to related parties, otherwise these transactions do not fall within the scope of Article 26 of the EU VAT Directive. In short, the shared economy can be subsumed under the general rules of EU VAT law.\textsuperscript{1206}

Whether the transactions provided under the label of the shared economy are taxable and therefore covered by the EU VAT concept of consumption, depends to a large extent on the suppliers’ VAT status. If the supplier acts within the limits of a private consumer, there will be no VAT consequences. However, facilitated by the interaction of marketplaces, an increased market interaction among private consumers can be observed. These people are sometimes called \textit{prosumers} which is a misleading concept as no \textit{prosumers} (a mixture of consumers and suppliers) exist. If a protagonist meets the conditions of Article 9 of the EU VAT Directive, the integration of a further taxable person will add a step to the supply chain. The two common kinds of VAT protagonists are not mixed. The criteria of Article 9 of the EU VAT Directive must be examined on a case-by-case basis, with an emphasis on frequency and professionalism. Private persons can meet the requirements of taxable persons in all categories of the shared economy (transactions for consideration, barter transactions and free supplies). However, if a person only renders free supplies, he cannot be a taxable person. Additionally, the relationship between a \textit{prosumer} and an online marketplace could be interpreted as an employer-employee relationship. The provision of services is therefore not taxed at the level of private individuals (employees). However, such an interpretation depends heavily on the contractual conditions of the online marketplaces and has not yet been clarified.\textsuperscript{1207}

Thirdly, supplies are not only taxable when they are paid with an official means of payment, but are also subject to EU VAT as soon as they are paid with a bidirectional virtual currency system. Money is a central concept of the EU VAT system which enables exchanges in marketplaces. Simultaneously, private expenditure is a proxy for consumption. The traditional payment instrument is the legal tender of a country. Electronic money systems are the online version of classical legal tender and cause no further VAT problems. Additionally, the CJEU equated \textit{Bitcoins} (as one of the representatives of bidirectional virtual currency systems) with legal tender in order to cover these new digital developments. This treatment may be extended to all similar bidirectional virtual currency systems but not to closed virtual currency schemes or unidirectional flows of virtual money. The court

\textsuperscript{1206} See pp 190 et seqq.
\textsuperscript{1207} See pp 195 et seqq.
decided to apply the economic concept of money (a store of value that enables the transfer of purchasing power into the future; a generally accepted standardized numerical unit of account to represent prices, values and debts; a medium of exchange). Bitcoins do not fulfil the legal characteristics of money (the economic features plus three additional features: a central management, legal tender status, available on physical carries). However, the CJEU judgment does not take account of the legal characteristics of money. One could even argue that these are no longer suitable for the digital economy. In line with this finding, the mining (creation of Bitcoins) is irrelevant for the purpose of the EU VAT system. By contrast, subsequently arising problems like bookkeeping or the determination of the taxable amount are not solved satisfactorily.\textsuperscript{1208}

The last challenge discussed focuses on multi-sided online business models and the question of whether private people exchange personal data as consideration for seemingly “free” services of online businesses. This question has not yet been adequately resolved. Therefore, it is not clear whether these issues are covered by the EU VAT concept of consumption. Unlike Bitcoins, personal data are no money as the information does neither fulfil the legal nor the economic characteristics of money.\textsuperscript{1209} However, it is reasoned that the seemingly “free” online services can be bartered against the rights to use and exploit customers’ personal data. A case-by-case analysis is necessary. This outcome implies that these open issues can also be subsumed under the concept of EU VAT consumption. Again, there is no need to align the concept of EU VAT consumption.

Multi-sided online businesses (taxable persons) will only supply either B2B electronic services according to Article 24 of the EU VAT Directive or electronically supplied services under Article 58 paragraph 1 lit c) of the directive if they receive a consideration. Without doubts, these supplies result in consumption within the meaning of EU VAT law.\textsuperscript{1210} By concentrating on private users, these can either provide ancillary services for the optimal use of online services or provide self-standing services. The first kind of support does not constitute a separate service and has no further VAT consequences. The users provide input in order to make the optimum use of the received online services possible. Online business services would then be free of charge and would not be covered by the EU VAT

\textsuperscript{1208} See pp 202 et seqq.
\textsuperscript{1209} See pp 212 et seqq.
\textsuperscript{1210} See pp 215 et seqq.
Directive. Where the services provided by the users go beyond any supporting function, the user provides independent services. These services are classified as a transfer of the right to exploit personal data according to Article 25 lit b) of the EU VAT Directive. In many cases, these self-standing services are rendered instead of supportive ones. However, a case-by-case analysis is important. Most data are not implicit in the provision of online services, but necessary for targeted advertising. The exploitation rights constitute benefits for the online businesses within the established limits of EU VAT consumption. The provision of the exploitation rights is ensured by the acceptance of the conditions of the online companies. It is important to note that exploitation rights are provided and not a set of data. The user must not contribute a predetermined set of data. The content and the value of the data are irrelevant.

In most cases, users act privately and do not meet the prerequisites of Article 9 of the EU VAT Directive. Thus, the users potentially render non-taxable C2B supplies. The granting of data exploitation rights is linked to an increased market interaction as these rights are granted to many online businesses. Similar to the shared economy, the trichotomy of a private, taxable and employee status was investigated. According to the analysis of pertinent ECJ case law, most users cannot be characterized as taxable persons. Despite the broad definition of taxable persons, most internet users do not meet the criteria as the granting of exploitation rights does not constitute an economic activity. Personal data may be used for private and business purposes, but in view of the overall picture, users generally do not use their personal data for commercial purposes. As already mentioned, a case-by-case analysis is necessary. Users can, however, become taxable persons with their involvement on online platforms such as youtube or instagram. Furthermore, it is unlikely that users are employees of online businesses. Most decisively may be the fact that users are not required to provide certain data.

So far, it can be said that online businesses provide services which are exchanged with other services provided by private consumers. If the two services were exchanged directly in the context of reciprocal performances, a B2C barter transaction would take place. In this case, only one taxable transaction takes place: It is an electronically supplied service rendered to a

1211 See pp 218 et seqq.
1212 See pp 219 et seqq.
1213 See pp 224 et seqq.
1214 See pp 232 et seqq.
private user. The corresponding C2B supply, which is provided by the users, is a non-taxable transaction. A B2B barter transaction only exists when a user is a taxable person. If the consideration of the online suppliers’ transaction is a consideration in kind, it must be assessed in accordance with the general rules focusing on the direct link and legal relationship requirements. In daily application, an individual case examination is necessary.

The starting point of the underlying discussion was a German civil law judgment, which is indicative but not decisive for EU VAT. The German court attested a synallagmatic relationship between the exchange of “free” online services for exploitation rights. Critics of this development concentrate on the principle of neutrality and the idea that traditional marketing measures are not taxed, so that targeted advertising on online platforms should not be taxed either. However, the two situations are not comparable because users of online platforms provide their own services.

Taxation of a possible barter transaction depends on a direct link between the two supplied services. Such a direct link is obviously given when the user can decide whether he wants to pay for the online services or transfer the data exploitation rights. The consideration in kind can therefore also be expressed in monetary terms. The exploitation rights have to be transferred as otherwise the online services cannot be used. The two services are then directly linked. The value of the exploitation right is always the same, regardless of how much data is provided. It is a lump-sum payment. Furthermore, the absence of the possibility to transfer the tax amount to the consumer is inherent in all barter transactions. The online companies can adapt the value of their own electronic services and enable indirect shifts. The consideration in kind also expresses personal financial capability and reflects consumption in terms of EU VAT. Furthermore, registration with the online company is not necessary. Identification of consumers in order to be able to determine whether these receive advantages is possible with and without registration due to the technical requirements for online communication. This complies with the pertinent ECJ case law in *Mohr* and *Landboden-Agrardienste*. If a direct link between the two services is confirmed, taxation will take place. Legal relationships are based on the terms an conditions of the online business.  

In the situation a direct link between “free” electronically supplied services and the granting of data exploitation rights is denied or the provision of only ancillary services by the users is asserted, the services by the online

1215 See pp 234 et seqq.
providers are rendered without any consideration. Such supplies are not taxed. A discussion on whether Article 26 of the EU VAT Directive should be aligned with Article 16 of the directive concluded that an extension of Article 26 would be contrary to the EU VAT concept of consumption. Extending the scope of Article 26 would lead to a similar taxation of all free transactions of goods and services de lege ferenda. Compliance costs would be reduced and simplification would be reached. However, this would cause serious consequences for the offline world, as the scope of the EU VAT concept is broadened. Furthermore, the taxation of free supplies is contrary to the EU VAT proxies for consumption as users do not give up any financial resources. If free goods and services were treated equally, Article 16 of the EU VAT Directive should be restricted instead of broadening Article 26. Therefore, the treatment of “free” online services is still problematic, as taxability must be assessed on a case-by-case basis.\textsuperscript{1216}

Regarding taxable barter transactions, it has been clarified that there is a consideration in kind for the “free” electronically supplied services. Consideration must be determined according to the subjective value of transactions. The subjective value must not be estimated according to objective standards. If the taxable amount cannot be easily expressed and clearly quantified, the underlying transaction will be not taxable. Where electronically supplied services are offered either for money or for exploitation rights, the alternative monetary consideration constitutes the (maximum) taxable amount. Where this is not the case, pertinent ECJ case law stipulates that the taxable amount must be assessed from the supplier’s point of view. In the present cases, the costs for rendering the “free” electronically supplied services are decisive. This approach is often criticized and the use of the market value of data exploitation rights or the data themselves is suggested as an alternative. However, irrespective of whether these values exist, they are objective values that must not be consulted. Indeed, the cost approach is in some conflict with the concept of EU VAT as a general consumption tax. At the very least, consumers’ expenditures may be expressed by consumers’ costs and not by suppliers’ costs. Additionally, the scholarly literature points out that the suppliers’ full costs can hardly be determined as they consist of high fixed costs and low marginal costs. Furthermore, rejected objective estimates appear necessary due to the application of accounting systems. However, pertinent ECJ case law points out that techni-

\textsuperscript{1216} See pp 246 et seqq.
cal difficulties do not hinder the determination of a taxable base and therefore suppliers’ costs must be assessed.\textsuperscript{1217}

It should be clear that suppliers’ costs need to be calculated in order to determine the taxable base for the bartered electronically supplied services. There are no input prices as for merchandise articles. Thus, as in the case of self-produced goods, the costs of “production” must also be calculated for services. In order to create common rules for the calculation, cost accounting according to IAS/IFRS standards was discussed. Such rules would lead to a high degree of harmonization and the newly designed IFRS 15 deals with contracts which are similar to EU VAT barter transactions (so-called contracts for non-cash consideration). However, the standards use the fair market value or stand-alone selling prices. Hence, this approach is not suitable for EU VAT law as the two values are not supported by ECJ case law or cannot be determined.\textsuperscript{1218}

Against this background, it was shown that the costs of online companies for “free” electronically supplied services can be determined on the basis of internal information from management accounting. While management accounting systems are not completely harmonized, the underlying principles are coordinated by standardized software solutions, among other things. Cost information is a reliable source and may be more accurate than external data because it is also the basis for internal business decisions. It is suggested that these cost calculation methods are used to determine the costs of the EU VAT barter transactions concerned. In order to establish a best possible harmonized practice, it is further suggested to provide guidelines that facilitate application. Best practice can be activity-based costing which has been developed especially for service companies and which can handle high indirect costs. Furthermore, technical developments enable real-time assessments which allow precise cost calculations, but estimations are not avoidable. However, the two-stage process of ABC cost calculation provides the most accurate values as high-quality proxies are used. It is possible to calculate the costs according to each transaction. It should be noted that estimates can never be completely avoided by costing. However, these are also inherent to the sales prices, as these are based on cost calculations as well. The difference between the use of sales prices and suppliers’ costs is the calculated or actually realized profit margin and the fact that customers explicitly agreed on sales prices.\textsuperscript{1219}

\textsuperscript{1217} See pp 249 et seqq.
\textsuperscript{1218} See pp 261 et seqq.
\textsuperscript{1219} See pp 264 et seqq.
All this means that the challenges arising from the megatrend of digitalization can be dealt within the established concept of consumption under EU VAT law. No major adjustments are required. For bartered electronically supplied services, it is necessary to take an economic perspective, accepting that cost calculations always involve some degree of estimation. Given the purpose of achieving general taxation of consumption, this still appears as the least bad option.
Conclusion

Digitalization changes the way businesses interact in markets and especially with their customers. Although this situation calls into question the established notions of VAT as a general tax on private consumption, the basic idea of VAT is still valid. It is shown that new product ranges, the shared economy, new means of payment and multi-sided online businesses can be reconciled with the concept of EU VAT as a general consumption tax.

EU VAT is a general tax on consumption. However, the underlying concept is not defined in the EU VAT Directive, which focuses rather on the technical design of the tax. Accordingly, the tax is an indirect, all-stage and non-cumulative general consumption tax.\textsuperscript{1220} Consumers cannot escape taxation as the tax is a broad-based tax covering all kinds of consumption.\textsuperscript{1221} The ECJ has clarified the notion of consumption in its case law \textit{Mohr} and \textit{Landboden-Agrardienste} and has linked it to the passing on of a benefit to an identifiable customer. Both cases concerned the potential consumption of services that was denied because the purchasing public authorities acted in the common interest and not in their own interest.\textsuperscript{1222} It is questionable whether the doctrine – the transfer of a benefit to an identifiable individual – can be applied to the consumption of goods. There is no CJEU judgment on this issue and a British court, for example, has already rejected the application of the doctrine to the transfer of weapons to a public authority for destruction in return for payment. The wording of the definition of goods within the EU VAT Directive requires taxation in such a situation. Based on the idea of equal treatment, it would be desirable to apply the ideas of \textit{Mohr} and \textit{Landboden-Agrardienste} not only to the consumption of services, but also to the consumption of goods, at least as far as the public sector is concerned. However, the wording of the EU VAT Directive does not support equal treatment.\textsuperscript{1223}

The EU VAT system is based on transactions that are proxies for consumption to avoid taxation of literal consumption. This approach supports the basic idea of absorbing the consumers’ personal financial capability. In

\begin{footnotesize}
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  \item \textsuperscript{1220} See pp 96 et seqq.
  \item \textsuperscript{1221} See pp 107 et seqq.
  \item \textsuperscript{1222} See pp 111 et seqq.
  \item \textsuperscript{1223} See pp 116 et seqq.
\end{itemize}
\end{footnotesize}
other words, the idea is that money (income or wealth) is used to buy goods and services, i.e. for consumption. Furthermore, transactions indicate the subjective value private individuals attach to their consumption. Objective benchmarks to assess the value of consumption are only used under exceptional circumstances. If it is not possible to express the consideration in monetary terms, the transaction will not be taxed. The same applies to transactions without consideration.\textsuperscript{1224} The application of proxies in order to tax consumption leads to inaccuracies. Therefore, proxies need to be accepted and complemented with special rules. Through taxing transactions, private consumption is linked to a point in time. For VAT purposes, however, it is irrelevant whether consumption actually takes place. Thus, the concept of EU VAT as a tax on general consumption has an anticipatory character. An exception to this general statement is the adjustment of initial input tax deduction which introduces a “duration criterion” into the concept of EU VAT consumption. The adjustments are based on the assumption that durable goods can still be consumed privately after years of business use.\textsuperscript{1225}

The concept of VAT as a general (private) consumption tax combined with the technical design of EU VAT involves a differentiation between productive use and final consumption. EU VAT is a tax on (only) private consumption. However, taxable persons charge VAT on their B2B and B2C transactions, whereas a private consumer who carries out transactions (C2B or C2C) must not worry about collecting VAT. To relieve taxable persons of the burden of VAT, they are allowed to deduct their input VAT. A broad-based character of EU VAT as a tax on final consumption is ensured by a wide definition of taxable persons and a residual concept of private individuals.\textsuperscript{1226} Furthermore, the ECJ has established the concept of transactions in its case law due to the lack of a definition of transactions in the EU VAT Directive. Accordingly, a supply of goods or services must be directly linked to its consideration. An indirect relationship is not enough. Additionally, transactions must be based on a legal relationship. Voluntary payments are therefore not taxed according to the EU VAT Directive.\textsuperscript{1227}

The concept of EU VAT (as a general consumption tax) is limited by the use of transactions (as a proxy for private consumption), since not each kind of consumption is taxed. In addition to this restriction, the ECJ has

\begin{footnotesize}
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\item \textsuperscript{1224} See pp 121 et seqq.
\item \textsuperscript{1225} See pp 121 et seqq.
\item \textsuperscript{1226} See pp 133 et seqq.
\item \textsuperscript{1227} See pp 148 et seqq.
\end{enumerate}
\end{footnotesize}
made further adjustments to the concept of a general consumption tax based on the EU VAT Directive. One restriction concerns illegal transactions. In general, the concept of EU VAT consumption does not differentiate between legal and illegal transactions. However, transactions that cannot be traded on a market (because they are prohibited) are considered as *res extra commercium*. In other words, illegal transactions which compete with legal trade are taxed.

The fact that the EU VAT system anticipates consumption leads to some challenges that have not yet been fully resolved. In this regard, unused consumption possibilities must be distinguished from non-taxable compensation payments. Unused and returned goods are not taxed. However, services cannot be returned in the same way as goods. The CJEU emphasized in *Air France-KLM* that services which were purchased but never used afterwards are to be taxed. In *MEO*, this basic idea was confirmed, but the underlying situation was slightly different: the service contracts were terminated, but the originally agreed amount had to be paid in full. From an economic perspective, the two situations can be reconciled. In *Société thermale d'Eugénie-les-Bains*, on the other hand, the ECJ decided that a cancelled reservation of a hotel room and the retention of the deposit (which was less than the fully agreed price) was a non-taxable compensation payment. So, when the consumer does not benefit from a contract because he has terminated it and only has to pay part of it, it appears to be a non-taxable payment. This establishes opportunities for tax planning: while a payment of 99% of the original amount is not taxable, a full payment would be taxed.

Due to a lack of consideration, free supplies do not fall within the scope of the EU VAT Directive. Under some circumstances, however, the proxy transaction must be supplemented by special rules. For example, Articles 16 and 26 of the EU VAT Directive extend the scope of the directive to cover certain kinds of private consumption for which no consideration is given. The situations mostly concern the private use of business assets for which input tax deduction was granted. Thus, input VAT deductions are neutralized by simulating transactions for consideration. However, it must be noted that the scope of Article 16 of the EU VAT Directive for transactions supplies of goods is much broader than that of Article 26 which refers to

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1228 See pp 153 et seqq.
1229 See pp 156 et seqq.
1230 See pp 159 et seqq.
deemed transactions of services. The Kuwait Petroleum ruling has made all free shipments of goods subject to VAT. Recently, however, the CJEU has again restricted the taxation of all free transactions of goods from an economic point of view. This restriction includes the fact that free supplies of goods are not covered by Article 16 as long as payments for the goods within the supply chain were rendered.

When comparing theoretical concepts of consumption, no uniform concept could be identified. The concept of consumption under EU VAT law is similar, but not equivalent to other theoretical concepts of consumption, which in turn differ slightly between the disciplines. These concepts are based on the idea of exchanging consumable goods and services for money by private individuals to avoid a direct link to actual consumption. Thus, all concepts apply a model that succeeds in approximating consumption in its literal meaning. The concept of consumption in macroeconomics and EU VAT both focus on a value added. While macroeconomics focus on the GDP as a measure of value added for the economy as a whole, EU VAT legislation focuses on a single taxable transaction. An important difference between GDP calculations and the EU VAT system is that the former is based on production whereas the latter requires the goods and services produced to be transferred in a market transaction. Furthermore, the GDP conceptually disregards the underground economy whereas EU VAT theoretically includes almost all illegal transactions. Last but not least, imputed values used in the context of the GDP concept are to some extent comparable with deemed supplies.

Microeconomics and marketing research explore why customers consume while EU VAT law just asks whether a benefit is received by the consumers. The latter is therefore more concerned with the outcome of a transaction than with the reason for consumption. Furthermore, both non-tax disciplines are strongly affected by psychological streams which do not apply for EU VAT laws. The disciplines of microeconomics and marketing both analyze the role of the consumer’s budget in relation to realized demand. EU VAT law is also dependent on private expenditures actually spent for goods or services. But, for example, the concept of consumer surplus is not known under EU VAT laws which mainly depend on subjective values. Any fictitious values which express the willingness of consumers to pay are not considered. Furthermore, marketing refers to a dy-

1231 See pp 167 et seqq.
1232 See pp 171 et seqq.
1233 See pp 51 et seqq.
namic and multi-phase consumption concept which is not limited to the pure act of purchasing. Such influence is not considered under the EU VAT concept of consumption which is a static and single-level notion.1234

Concerning taxation, the reference point of consumption is not just inherent to general consumption taxes and specific excise duties. In the area of direct taxes, discussions are also held about consumption. Hybrid taxes challenge a clear categorization into established structures of direct and indirect taxes. It seems that only minor changes in the scope and technical design of the taxes blur the boundaries between the two kinds of taxes. Depreciations, for example, which are known from income taxes, can also be applied under VAT. These are then referred to as income style VAT. The EU VAT system, however, is not a hybrid one.1235

Specific excise duties also tax consumption. Compared to the EU VAT system, the scope of EU excise taxes is narrower. Excises list single products to be taxed. They are mostly levied only at one stage, while EU VAT is an all-stage tax. Both taxes, however, are levied indirectly and aim to absorb the financial capacity of private consumers by linking them to the use of income or wealth. Another difference is the kind of proxies. The EU VAT applies market transactions for taxation purposes. On the other hand, excise duties are linked to consumption as the manipulation of taxable products which expresses itself in such a way that it is impossible to define the products as taxable anymore. This difference can be seen, for example, in the destruction of taxable goods. This is not subject to EU excise law but it is taxed under EU VAT law.1236

The digital age challenges the traditional concept of EU VAT consumption in different ways. Three of these challenges are generally considered to be manageable under the outlined concept of EU VAT as a general tax on consumption, namely an increased trade in services, the emergence of the sharing economy and the invention of virtual currencies.

Concerning the development of an intensified trade in services, it is part of the EU VAT concept of consumption as long as an advantage is transferred to an identifiable individual. This applies regardless of whether these services are dematerialized goods or entirely new kinds of services.1237 Secondly, private individuals increasingly interact in markets and share products due to changing consumer behaviour. This trend is

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1234 See pp 57 et seqq and pp 64 et seqq.
1235 See pp 70 et seqq.
1236 See pp 79 et seqq.
1237 See pp 183 et seqq.
called the “sharing economy”. Often referred to as a hybrid model, it turns out that the sharing economy is an additional step in the supply chain. The kinds of supplies performed in the sharing economy range from transactions based on monetary consideration to consideration in kind and free supplies. As private individuals increasingly operate in markets, they may become taxable persons. Depending on a case-by-case analysis, the underlying transactions are therefore covered by the scope of the EU VAT Directive. In some constellations it may happen that the private individual is not classified as a taxable person but as an employee of the intermediary marketplace. When such a relationship can be identified, the “sharing” transactions of the individual are not taxable as he is not an independent party within the supply chain then. In a nutshell, the question whether the sharing economy is part of the EU VAT concept of consumption must be analyzed according to the general rules of the EU VAT Directive. No new rules or interpretations are needed.\textsuperscript{1238}

Questions relating to virtual currencies, which in the past were not taken uniformly into account within the framework of EU VAT legislation, have been regulated by CJEU case law – at least as far as the concept of consumption is concerned. In \textit{Hedqvist}, the court decided to treat \textit{Bitcoins}, a bidirectional virtual currency system, like legal tender. Thus, it is irrelevant whether goods and services are paid with “real” money or \textit{Bitcoins}. This treatment could be applied to similar schemes, too. The possibility of using \textit{Bitcoins} like legal tender underlies an economic concept of money. Furthermore, this treatment underlines the central importance of the concept of money in EU VAT law as money in particular enables the exchange of consumable goods and services on markets and simultaneously enables the absorption of the financial capacity of consumers. However, closed virtual currency schemes (irrelevant for VAT purposes) and unidirectional flows of virtual money (treated as pre-payments) are not comparable to \textit{Bitcoins} and cannot be defined as legal tender.\textsuperscript{1239}

“Free” services rendered by multi-sided online businesses, by contrast, have not yet been fully brought into line with the EU VAT consumption concept. The decisive factor here is the agreement of private consumers that their personal data may be exploited by online businesses. Personal data cannot be classified as a means of payment as it is possible with \textit{Bitcoins}. The data lack the legal and the economic characteristics of mon-

\textsuperscript{1238} See pp 189 et seqq.
\textsuperscript{1239} See pp 202 et seqq.
Instead, it is argued that the “free” online services are bartered against the exploitation rights on the personal data of customers. As it is the case of transactions in the shared economy, a case-by-case analysis is necessary in order to distinguish between out of scope actions and taxable transactions.

In detail, the (simplified) multi-sided online business model includes two kinds of supplies. Firstly, there is identified a transaction between an online business and another business that wants to broadcast ads. This relationship is clearly subject to tax. Secondly, a multi-sided online business provides further advantages to users in the form of social media or other electronically supplied services. Consumers do not have to pay money but provide personal data. In some situations, these data are merely ancillary services for the best enjoyment of the online business services. In this case, there will be no VAT consequences. Under other circumstances, so that the exploitation rights go beyond the optimal use of the electronically supplied services, the private users render services themselves. It is important to note that not the personal data itself but the exploitation rights are the services which are rendered according to Article 25 lit b) of the EU VAT Directive. In most cases the private users do not meet the requirements of Article 9 of the EU VAT Directive, which is why the identified services are still rendered by private individuals. The provision of exploitation rights is associated with an increased market interaction but in most cases this does not constitute an economic activity. Some individuals, such as youtuber or instagrammer, can, however, be identified as taxable persons. By contrast, no employer-employee relationship could be identified between the users and the online businesses.

The online businesses render barter transactions when their own services and the transfer of the exploitation rights on personal data by the users are directly linked and this exchange is based on a legal relationship. Reciprocal services exist when the user can decide whether he pays money for the electronically supplied services or grants the exploitation rights on his data. Such rare cases have the advantage that consideration in kind can easily be expressed in monetary units. Even if the online services can only be used when the exploitation rights are transferred, a direct link can be confirmed. It is further not decisive whether a personal registration is necessary. However, whether "free" services are provided for or without con-

1240 See pp 212 et seqq.
1241 See pp 215 et seqq.
1242 See pp 224 et seqq.
sideration is always based on a case-by-case decision. The absent possibility of shifting the tax to the consumer is inherent in all barter transactions and does not conflict with the concept of VAT as a general consumption tax.\footnote{1243 See pp 234 et seqq.}

It was pointed out that the decision as to whether a private user renders a service himself or whether there is a direct link between an online service and exploitation rights on personal data must be based on a case-by-case analysis. This of course increases collection costs of VAT. It was therefore examined whether aligning Article 26 of the EU VAT Directive with the wording of Article 16 of the directive would solve this issue. Such a measure would also make services actually provided free of charge subject to EU VAT. Consequently, it would no longer be necessary to distinguish between out of scope and taxable transactions. Collection costs would be reduced. Such an extension of the scope of the EU VAT Directive would, however, be contradictory to the concept of VAT as a general consumption tax. The absorption of the financial capacity of consumers would no longer be the decisive factor for taxation in many cases in the online and offline world. Instead, when free supplies of goods and services are to be treated equally, the scope of Article 16 of the EU VAT Directive should be restricted.\footnote{1244 See pp 246 et seqq.}

A further restriction is based on the taxation of barter transactions: The consideration in kind must be able to be expressed in monetary terms. If the taxable amount cannot be easily and unambiguously identified, the underlying transaction is not taxable. While barter transactions can easily be measured in monetary terms when the users can decide whether to pay for the services or to transfer the exploitation rights on his personal data. These situations are rare. The ECJ case law therefore points out that the costs of suppliers for their own services constitute the taxable basis for B2C barter transactions. Any suggestions to apply an open market value or prices for data must be evaluated negatively as they represent objective values. The taxable amount must correspond to the subjective value underlying a particular transaction. So far, the calculation of the costs has been largely questioned.\footnote{1245 See pp 249 et seqq.}

An interdisciplinary analysis has shown that the costs of the suppliers can be evaluated and thus taxation of the B2C online barter transactions can take place. As multi-sided online businesses render “self-created” ser-
vices, no cost prices for intermediate goods or services are available. The costs must be calculated. Cost accounting according to IAS/IFRS standards does not offer a solution, as they are mostly based on objective standards.\textsuperscript{1246} By contrast, internal cost accounting using ABC methods may provide tax accountants with the relevant information to calculate the cost base for “free” online services bartered for exploitation rights. Of course, costing is associated with a certain leeway which can, however, be limited through the application of high-quality ABC-based proxies. Furthermore, even when sales prices are used as a taxable basis, these are also based on cost calculations and as such are subject to a certain degree of simplification. The use of proxies is not new for EU VAT law, as the concept of consumption indicates. However, in order to not increase collection costs too much, it is proposed to publish calculation standards which should lead to a certain degree of harmonization between Member States.\textsuperscript{1247}

All in all, digital trends challenge the traditional concept of consumption, but the issues can be all addressed within the context of the EU VAT Directive. There is no need for new concepts or major changes in interpretation. It is sufficient to look, for example, at multi-sided online business models from an economic perspective, which is what the ECJ has also advocated in its case law. It appears that the ECJ itself has recently adapted the EU VAT system to economic reality. The digital age itself may be responsible for this development.

Despite this positive assessment of the concept of consumption under EU VAT laws, it is still necessary to consider cases in which the users of “free” online services are no private individuals but taxable persons. Then B2B barter transactions may be on the agenda, posing further challenges as two taxable transactions need to be valued. Mixtures of consideration in monetary units and consideration in kind cause subsequent issues. In addition, more advanced multi-sided online business models must be compared with the concept of consumption. Furthermore, determining whether situations of economic life are relevant transactions within the meaning of EU VAT laws is only the first step in the VAT collection process. Once taxable transactions are found to exist in theory, issues related to tax collection must be addressed. However, the analysis carried out paves the way for precisely these further steps.

This academic work has shown that the challenges posed by the megatrend of digitalization can be overcome even if sometimes an economic

\textsuperscript{1246} See pp 261 et seqq.
\textsuperscript{1247} See pp 264 et seqq.
perspective must be adopted and a certain level of estimates accepted. In view of the problems discussed, but also in light of the issues which are still to be examined, it should also be possible to tax the digital world sufficiently as long as the concept of EU VAT as a general consumption tax is invoked.
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298


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