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The Sharing Economy – from a VAT perspective

The relationship between the concept of "taxable person" and Airbnb hosts & Uber drivers

Recent years have seen the ascent of various new access-based business models, all of which are captured under the umbrella term of "the sharing economy". The great strides of digital platforms like Airbnb and Uber have expanded the spectrum of economic opportunities beyond conventional linear employment relations, empowering individuals to make use of otherwise private assets for commercial purposes. Meanwhile, traditional legislation has struggled to keep up with this technology-driven change. As more and more consumers are able to take on the role historically held by businesses, foundational dichotomous tax categories fall apart, causing legal disruption. It is within this context that the article strives to explore the VAT treatment of the peculiar business models embedded in the sharing economy. In particular, this exposition grapples with the question of how the concept of "taxable person" applies to the individual service providers of Airbnb and Uber.

1 INTRODUCTION

Facilitated by a swiftly evolving digital landscape, the stage has been set for the rise of a multitude of new and innovative business models. Through neglecting ownership in favor of availability, emerging online sharing platforms are setting traditional commercial dynamics in motion, reshaping the commercial reality in a wide range of industries.[1] Although the concept of pooled resources is not completely novel, the rapidly growing phe-

1 OECD, 'The impact of the Growth of the Sharing and Gig Economy on VAT/GST Policy and Administration', *OECD Publishing*, 2021, p. 13; Johanna Mair & Georg Reischauer, 'Capturing the dynamics of the sharing economy: Institutional research on the plural forms and practices of sharing economy organizations', *Technological Forecasting and Social Change*, 23 May 2017, p. 1.

nomenon of "the sharing economy"[2] could, in fact, be characterized as a profound socio-economic trend that is essentially changing the way people live their lives.[3]

Emblematic illustrations of the sharing economy are Uber and Airbnb, both of which offer various new advantages for businesses and consumers alike. By virtue of a strong emphasis on access, consumers are enabled to transform into producers at virtually any moment, in turn allowing the near abundance of private underutilized assets to become subject to economic exploitation. Private vehicles, for instance, sit idle for 95% of their lifespan.[4] Another approximation indicates that 80% of the items in our homes are used less than once a month.[5] By taking advantage of this idling capacity, the usability of private property increases, making its lifespan more valuable. It hardly comes as a surprise then, that the sharing economy has a significant potential to stimulate economic growth, create new employment opportunities as well as promote sustainable development.[6] As a matter of fact, it is currently developing into a considerable segment of the global economy.[7] Based on five key sharing sectors[8], global revenue accrued by the sharing economy is set to rise from $15 billion in 2015 to

2 It is also commonly titled "collaborative economy", "on-demand economy", "peer-to-peer economy", "1099-economy" and "gig-economy" among other synonyms. See for instance Giorgio Beretta, 'The European Agenda for the Collaborative Economy and Taxation', *European Taxation*, vol. 56, no. 9, 2016, p. 400.

3 Robert Vaughan & Raphael Daverio, 'Assessing the size and presence of the collaborative economy in Europe', *Publications Office of the EU*, 2016, p. 7, <https://op.europa.eu/en/publication-detail/-/publication/2acb7619-b544-11e7-837e–01aa75ed71a1>, accessed 30 December 2020; OECD (supra n. 1), p. 13.

4 Niam Yaraghi & Shamika Ravi, 'The Current and Future State of the Sharing Economy', *Brookings India IMPACT Series*, No. 032017, March 2017, p. 4.

5 Sarote Tabcum Jr., 'The Sharing Economy Is Still Growing, And Businesses Should Take Note', *Forbes Los Angeles Business Council*, 4 March 2019, <https://www.forbes.com/sites/forbeslacouncil/2019/03/04/the-sharing-economy-is-still-growing-and-businesses-should-take-note/#9177c794c339>, accessed 30 December 2020.

6 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda for the collaborative economy*, COM(2016) 356 final p. 2; Ivo Grlica, 'How the Sharing Economy Is Challenging the EU VAT System', *International VAT Monitor*, vol. 28, no. 2, 2017, p. 124. Economic benefits and sustainability are also two driving factors in people's motivation to engage in the sharing economy, See Juha Hamari et al, 'The Sharing Economy: Why People Participate in Collaborative Consumption', *Journal of the Association for information Science and Technology*, vol. 67, no. 9, 2016, pp. 2047 & 2054.

7 Yaraghi & Ravi (supra n. 4), p. 4; OECD (supra n. 1), p. 16.

8 Those are accommodation, transportation, music and video streaming, finance, and staffing.

$335 billion by 2025.[9] Similarly, a study conducted in 2019 suggests that the gross value generated by the sharing economy globally will increase from $204 Billion in 2018 to $455 billion by 2023.[10]

Nevertheless, as the upsurge of the sharing economy becomes more eminent, a series of new policy and regulatory issues arise in numerous different sectors. Taxation in general and VAT in particular are areas situated in the limelight of these new legal challenges.[11] The words of Brian Chesky, co-founder of Airbnb, delineate the heart of the matter in a rather intelligible fashion:

> "There were laws created for businesses, and there were laws for people. What the sharing economy did was create a third category: people as businesses… They don't know whether to bucket our activity as person or a business."[12]

Indeed, the peculiar structure of the sharing economy makes the previously conventional boundaries between supplier and consumer, employee and self-employed and professional and private become more inexplicit.[13] Seeing that the EU VAT system is largely rooted in such dichotomies, the rise of the sharing economy elicits significant challenges, not least with respect to the concept of "taxable person".

Against this background, the overarching objective of this article is to analyze the VAT treatment of the unconventional business models fos-

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9 PWC, 'The Sharing Economy', *Consumer Intelligence Series*, 2015, p. 14, <https://www.pwc.com/us/en/industry/entertainment-media/publications/consumer-intelligence-series/assets/pwc-cis-sharing-economy.pdf>, accessed 30 December 2020. Across Europe, the sharing economy was estimated to have generated revenues of €4 billion and facilitated transactions worth €28 billion in 2015, see Vaughan & Daverio (supra n. 3), p. 12. These numbers are predicted to skyrocket to €570 and €83 billion respectively by 2025, see PWC, 'UK's key sharing economy sectors could deliver £140 billion by 2025', 28 June 2016, <https://pwc.blogs.com/press_room/2016/06/uks-key-sharing-economy-sectors-could-deliver-140-billion-by-2025.html>, accessed 30 December 2020.

10 Mastercard and Kaiser Associates, 'The Global Gig Economy: Capitalizing on a ~$500B Opportunity', May 2019, <https://newsroom.mastercard.com/wp-content/uploads/2019/05/Gig-Economy-White-Paper-May-2019.pdf>, accessed 2 June 2021.

11 Giorgio Beretta, 'VAT and the Sharing Economy', *World Tax Journal*, vol. 10, no. 3, 2018, p. 383; European Commission, VAT Expert Group, VEG No 095, *VAT treatment of the platform economy*: *contribution of the VEG*, taxud.c.1(2020)5816454, p. 6; Fernando Matesanz, 'VAT Treatment of the Sharing Economy', *International VAT Monitor*, vol. 32, no. 2, 2021, p. 103.

12 Andy Kessler, 'Brian Chesky: The Sharing Economy and Its Enemies', *The Wall Street Journal*, Opinion, 17 january 2014, para. 4, <https://www.wsj.com/articles/brian-chesky-the-8216sharing-economy8217-and-its-enemies-1390003096>, accessed 30 December 2020.

13 European Commission (supra n. 6), p. 2; Beretta (supra n. 11), p. 383.

tered in the wake of an increasingly sailent sharing economy. More specifically, the present article seeks to scrutinize the relationship between the concept of "taxable person" and Airbnb hosts and Uber drivers. Following the general background sketched in this introductory part, section 2 provides a brief outline of the sharing economy as meant throughout this article. Section 3 contains an analysis of the essential features composing the notion of taxable person, which subsequently in section 4 will be applied to the sharing economy. Last but not least, a few concluding remarks will be made for the sake of winding it all up in section 5.

2 WHAT IS "THE SHARING ECONOMY"?

The sharing economy is an informal definition that applies to various new economic business models. Broadly speaking, the foundation of the sharing economy revolves around private individuals sharing assets or services between each other, generally via digital platforms.[14] It is far from a unilateral phenomenon though, as sharing activities can be facilitated through an array of different avenues, including conventional sharing, lending, renting, bartering, trading, gifting and swapping.[15] Among these, four categories of transactions are often distinguished: for profit, for free, through barter and through cost-sharing arrangements.[16]

In contrast to more traditional business models, transactions in the sharing economy usually do not entail a change of ownership.[17] Typically, assets are initially purchased and intended for private use and are only at a later stage made available on the market for temporary use of others.[18] By accentuating access rather than ownership, the sharing economy allows

14 Fransesco Cannas, 'Sharing economy: Everyone can be an entrepreneur for two days … but what about a VAT taxable person?', *World Journal of VAT/GST LAW*, vol. 6, no. 2, 2017, p. 83; Matesanz (supra n. 11), p. 103. Critics have however deemed the term "sharing economy" deceptive, arguing that it is primarily economic self-interest rather than sharing that forms the backbone of it, see Giana Eckhardt & Fleura Bardhi, 'The Sharing Economy Isn't About Sharing at All', *Harvard Business Review*, 28 January 2015, <https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all>, accessed 11 October 2020. For a nuanced discussion of both sides of the argument, see Juliet Schor, 'Debating the Sharing Economy', *Journal of Self-Governance and Management Economics*, vol. 4, no. 3, 2016, pp. 7–22.

15 Giorgio Beretta, 'The Taxation of the "Sharing Economy"', *Bulletin for International Taxation*, vol. 70, no. 11, 2016, p. 2.

16 Carrie Brandon Elliot, 'Taxation of the Sharing Economy: Recurring Issues', *Bulletin for International Taxation*, vol. 72, no. 4a/special issue, 2018, p. 1; Beretta (supra n. 11), p. 389.

17 European Commission (supra n. 6), p. 3.

18 Cannas (supra n. 14), p. 84.

individuals to commercialize personal property that might otherwise be idle or underexploited. Private individuals are thus enabled to utilize the untapped capacity of personal resources like cars and spare rooms in a more efficient manner.[19] While technological advancement accounts for the lion's share of the progress that has made the sharing economy possible, economic, political and societal changes have also contributed.[20]

The significance of the sharing economy has also been recognized at the EU level. Among other things, the European Commission has observed that the sharing economy might considerably bolster growth and competitiveness.[21] According to the European Commission, the sharing economy can be defined as meaning:

> "[…] business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills — these can be private individuals offering services on an occasional basis ('peers') or service providers acting in their professional capacity ("professional services providers"); (ii) users of these; and (iii) intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them ('collaborative platforms')"[22]

Among the industries in which the sharing economy has become prevalent, evidence indicates that peer-to-peer transportation and peer-to-peer accommodation constitute the largest ones in terms of revenue and total transaction value respectively.[23] Uber and Airbnb are in turn two of the

19 Beretta (supra n. 15), p. 1.

20 Myriam Ertz et al, 'An analysis of the origins of collaborative consumption and its implication for marketing', *Academy of Marketing Studies Journal*, vol. 21, no. 1, 2017, p. 1; OECD (supra n. 1), pp. 18–19.

21 European Commission (supra n. 6), p. 2; The impact and treatment of the sharing economy is also strongly connected to Europe's Digital Single Market Strategy, see European Commission, VAT Expert Group (supra n. 11), p. 5.

22 European Commission (supra n. 6), p. 3. See also European Commission, VAT Expert Group, VEG No 090, *VAT treatment of the platform economy*, taxud.c.1(2020)2365654, pp. 3–4.

23 Vaughan & Daverio (supra n. 3), p. 13. In Europe during 2015, peer-to-peer transportation accounted for 47% of platform revenues, while peer-to-peer accommodation made up 54% of the value of transactions. Together, these two sectors facilitated revenues and transaction values of roughly 70% of online sharing platforms. Similarly, in 2018, the gross volume generated globally by transportation-based services and asset-sharing platforms (which includes accommodation) was found to be approximately 58% and 30% respectively, see Mastercard and Kaiser Associates (supra n. 10), p. 6.

most prominent actors within those sectors. The business model of Uber conveniently allows anyone to become a driver from whom nearby people quickly can request rides, while Airbnb connects individuals who are seeking to hire out their dwellings with people searching for a spare room to stay at. At present, Uber is operating in approximately 80 countries and 800 metropolitan areas worldwide.[24] Meanwhile, Airbnb has 5.6 million active listings in over 220 countries and regions.[25]

While the flourishing progress of the sharing economy has undoubtedly offered new opportunities for businesses and consumers alike, a large number of new legal question marks have simultaneously surfaced across various different legal domains. The field of VAT is by no means an anomaly from this. The difficulties chiefly stem from the fact that under the sharing economy, someone can essentially step into the shoes of a provider and a consumer at the same time. Indeed, users of sharing platforms can act in both a private and a professional capacity, by exploiting assets for either personal or commercial reasons, thereby stretching the boundaries of those traditionally separate classifications.[26] Airbnb hosts and Uber drivers are textbook examples of this incertitude, sporadically employing otherwise residential properties and private vehicles for economic ends. The blurred lines between the private and the professional may lead to uncertainty over the current legislative framework, especially when coupled with the fragmentation resulting from conflicting approaches at the national level. By extension, this could impede the growth of the sharing economy in Europe, possibly hindering its benefits to wholly come to fruition.[27] One area in which this intricacy is particularly pronounced is the concept of "taxable person".

24 'Uber countries 2021', <https://worldpopulationreview.com/country-rankings/uber-countries>, accessed 4 June 2021.

25 'Fast Facts', <https://news.airbnb.com/about-us/>, accessed 4 June 2021.

26 European Commission (supra n. 6), pp. 2 & 11; Grlica (supra n. 6), pp. 125–127; Beretta (supra n. 11) p. 383; Cannas (supra n. 14), p. 82.

27 European Commission (supra n. 6), p. 2.

3 TAXABLE PERSON

3.1 General

The notion of "taxable person" embodies the subjective scope of EU VAT.[28] This is evident by Article 2 of the VAT Directive, pursuant to which the supply of goods and services for consideration within the territory of a Member State by a *taxable person acting as such* is subject to VAT. The qualification as a taxable person is in other words a prerequisite for a transaction to fall within the scope of the VAT Directive. Therefore, it is one of the fundamental pillars of EU VAT.[29] The definition of a taxable person can be found in Article 9(1) para. 1. According to this provision, a taxable person shall mean any person who independently carries out in any place any economic activity, whatever the purpose or result of that activity. Based on this definition, the CJEU has consistently underscored the extensive scope of Article 9(1).[30] A broad approach is consistent with the aim of a neutral VAT system.[31] It can also be said to be the ultimate consequence of the theory that VAT should be levied solely on private consumption.[32] Moreover, the CJEU has repeatedly held that Article 9(1) is objective in nature, meaning that the activity is considered per se without regard to its purpose or result.[33]

There are two basic criteria that need to be fulfilled in order to obtain the status of a taxable person: (1) carrying out an economic activity and (2) doing so independently. These conditions will be explored in the following sections, starting with the former.

3.2 Economic activity

Economic activity is defined in Article 9(1) para. 2. In its first sentence, a non-exhaustive list of economic activities is provided. It encompasses all activities of producers and traders, as well as persons supplying services. In addition, the last sentence of Article 9(1) para. 2 provides more guid-

28 Aleksandra Bal, 'The Vague Concept of "Taxable Person" in EU VAT Law', *International VAT Monitor*, vol. 24, no. 5, 2013, p. 294.

29 Eleonor Kristoffersson & Pernilla Rendahl, *Textbook on EU VAT*, 2nd ed., Iustus Förlag, Uppsala, 2019, p. 41.

30 See for instance Judgement of 4 December 1990, *Van Tiem*, C-186/89, EU:C:1990:429, para. 17 with further references.

31 Kristoffersson & Rendahl (supra n. 29), p. 40.

32 Terra & Kajus, *Guide to the European VAT Directives: Volumes 1&2*, 2019, ch. 9.1.1.

33 See for instance Judgement of 26 June 2007, *Hutchison 3G*, C-369/04, EU:C:2007:382, para. 29; Judgement of 19 July 2012, *Rēdlihs*, C-263/11, EU:C:2012:497, para. 28.

ance, pursuant to which the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis in particular shall constitute an economic activity. In view of the occasional nature of sharing activities, the standard of "continuing basis" is of great importance when evaluating the VAT treatment of the sharing economy, wherefore the attention will primarily be devoted to this particular component of economic activity.

At first glance, the condition of continuity may lead one to believe that occasional activities are excluded from the imposition of VAT. This line of reasoning might be amplified further by reading Article 9(1) in conjunction with Article 12(1). Through the latter provision, Members States are given the possibility to qualify any person as a taxable person who, on an occasional basis, engages in transactions corresponding to the activities referred to in Article 9(1) para. 2. Given that the circumstances under which occasional activities become subject to VAT are specified separately in the VAT Directive, it could by contrary inference be presumed that, if the option in Article 12(1) has not been utilized, occasional activities are precluded from VAT. This interpretation *a contrario* was also articulated by the CJEU in *Enkler*. By comparing Article 9(1) to Article 12(1), the court asserted that the concept of economic activity in the former provision does not encompass activities performed on an occasional basis.[34]

Nonetheless, in *Wellcome Trust*, where a large number of shares were sold by a charitable trust in one lot over the course of one day, Advocate General Lenz put forward the following in his opinion:

> "in assessing an activity, it is neither the scope nor the duration which is conclusive, but solely the question whether that activity is an economic activity […] The fact that the shares were sold over the course of one day has no bearing on the assessment of that sale for purposes of value added tax."[35]

The CJEU subsequently concurred with the Advocate General's proposition, adding that a large sale of shares could just as well be carried out by a private investor and, by using the scale of a transaction as a deciding factor,

34 Judgement of 26 September 1996, *Enkler*, C-230/94, EU:C:1996:352, para. 20. It should be noted that although the case was decided under the Sixth Directive, the provisions in question are materially identical under the current VAT Directive, see *Rēdlihs* (supra n. 33), para. 23. See also recital 1 and 3 in the preamble of the VAT Directive.

35 Opinion of Advocate General Lenz delivered on 7 December 1995, *Wellcome Trust*, C-155/94, EU:C:1995:426, para. 32.

the existence of an economic activity would be determined on the basis of the investor's skill and experience.[36] Based on this, it could be inferred that one does not have to enter into a series of transactions to achieve the status of a taxable person.[37] Moreover, the fact that a transaction is completed in one day does not necessarily mean that it is limited to that day. Conversely, it could pertain to an ongoing timespan.[38]

The CJEU has shed more light on how occasional activities can constitute economic activities in the context of exploitation of property. Noteworthily, In *Van Tiem*, an activity consisting of the acquisition and immediate granting of building rights for a time period of 18 years in return for annual payment has been treated as an economic activity, despite the fact that the transfer of building rights was regarded as a single transaction under national legislation.[39] Furthermore, in *Enkler* alluded to above, a motor caravan was throughout three financial years hired out primarily for private purposes, albeit also twice to third parties.[40] In determining whether this activity was carried out for the purposes of gaining income therefrom on a continuing basis, the CJEU put emphasis on the nature of the property,[41] and differentiated between property that is suitable solely for economic exploitation, which could typically be classified as an economic activity without further examination, and property that is capable of being used for both economic and private purposes, where all circumstances in which it is used must be taken into account.[42] Although the court did not take an explicit stance on whether the conditions in Article 9(1) were satisfied, they did not seem to find the presence of an economic activity to be inconceivable, in spite of the negligible extent to which the motor caravan was hired out to third parties. It could therefore be deduced

36 Judgement of 20 June 1996, *Wellcome Trust*, C-155/94, EU:C:1996:243, para. 37.

37 Bal (supra n. 28), p. 295.

38 Cannas (supra n. 14), p. 93. Although the transaction took place on just one day, thorough preparatory work and assistance of investment advisers was necessary for its completion, see Bal (supra n. 28), p. 295.

39 *Van Tiem* (supra n. 30), para. 20.

40 *Enkler* (supra n. 34), para. 12. Allegedly, Mrs Enkler used it herself for 79 days while her husband used it for 40 days. The third parties used it for 18 days.

41 Ibid., para. 26.

42 Ibid., para. 27.

that the threshold for taxability may not be very high when it comes to exploitation of private property.[43]

Another quintessential judgement on this topic is *Słaby and Kuć*, a case in which the CJEU pronounced on whether the occasional sale of land plots could amount to an economic activity. Repeating *Wellcome Trust*, the CJEU affirmed that the number and scale of the sales are not in themselves decisive.[44] This also applies, perhaps somewhat surprisingly, regardless of whether the option in Article 12(1) has been used or not,[45] something that further undermines the *a contrario* interpretation of that provision. What is decisive however, and this may be the crucial takeaway from the case, is if active steps are taken to market property by mobilizing resources similar to those deployed by a producer, a trader or a person supplying services within the meaning of the second paragraph of Article 9(1).[46] Such measures do not usually appertain to the management of personal property.[47] In other words, the management of private property essentially becomes an economic activity for VAT purposes by commencing these active steps.[48]

The framework of "active steps" has been further built upon in subsequent case law. In *Rēdlihs*, where a force majeure sale of timber had been effected in order to mitigate losses induced by a storm,[49] the CJEU echoed *Słaby and Kuć* in that those supplies must be considered an economic activity if the person concerned takes active steps in forestry management by mobilizing resources similar to those deployed by a producer, trader, or a person supplying services within the meaning of Article 9(1).[50] Likewise, the precedent of "active steps" was regarded as a relevant assessment

43 Peter Melz, 'Who Is a Taxable Person to VAT?', in Krister Andersson, Peter Melz & Christer Silfverberg ed., *Liber amicorum Sven-Olof Lodin*, Series on international taxation, vol. 27, Norstedts Juridik, Stockholm; Kluwer Law International, The Hague, 2001, p. 164.

44 Judgement of 15 September 2011, *Slaby and Kuć*, C-180/10 and C-181/10, EU:C:2011:589, para. 37. From this followed that the circumstances more specific to the case at hand, such as trying to increase the overall price by dividing the land into plots prior to the disposal, were not decisive either, see para. 38. Advocate General Mazák however stressed that this particular factor demonstrated an intention of repeatedly transacting sales of plots and thus of obtaining income therefrom on a continuing basis, see opinion of Advocate General Mazák delivered on 12 april 2011, C-180/10 and C-181/10, EU:C:2011:240, paras. 24 and 43.

45 *Slaby and Kuć* (supra n. 44), para. 46.

46 Ibid., para. 39.

47 Ibid., para. 41.

48 Cannas (supra n. 14), p. 95.

49 *Rēdlihs* (supra n. 33), paras. 13–20.

50 Ibid., para. 36.

criterion in *Kezić*.[51] In addition, Advocate General Wathelet recapitulated it in his opinion regarding *Kostov*. Premised on the decisions in *Słaby and Kuć* and *Rēdlihs*, he drew the conclusion that the VAT Directive does not in principle contain any exclusion for occasional activities carried out by a taxable person, as long as those activities do not fall within the private sphere.[52] According to him, an otherwise interpretation would have the effect of chipping away at the principles of neutrality, equal treatment of economic transactions as well as the settled case law conferring a wide scope on the application of VAT.[53] The court subsequently clarified the scope of Article 12(1), stating that Article 12(1) should not be understood as meaning that a person who carries out an economic activity permanently (self-employed bailiff in this case) and simultaneously an activity occasionally (partaking in an auction in this case) cannot be qualified as a taxable person regarding the latter activity as well. Hence, Article 12(1) applies exclusively to persons who are not already taxable persons in terms of their predominant activities.[54]

A final judgement touching on this theme is *Fuchs*, whereby the question arose if the supply of electricity to a public power grid via solar panels installed on the roof of the home of the individual concerned was an economic activity. The CJEU answered the question positively,[55] a finding that was undercut neither by the fact that the amount of electricity produced never exceeded the amount of electricity consumed by the operator's household, nor by the fact that the operator was merely trying to reduce his electricity bill.[56] Unlike *Słaby and Kuć*, the court did not reckon whether any active marketing steps necessarily had been initiated.[57] One may hence derive that not too many steps are required in order to attain the

51 Judgement of 9 July 2015, *Kezić*, C-331/14, EU:C:2015:456, para. 24.

52 Opinion of Advocate General Wathelet delivered on 28 February 2013, *Kostov*, C-62/12, EU:C:2013:129, para. 53.

53 Ibid., para. 54.

54 Judgement of 13 June 2013, *Kostov*, C-62/12, EU:C:2013:391, paras. 28–31. See also Terra & Kajus (supra n. 32), ch. 9.2.2.

55 Judgement of 20 June 2013, *Fuchs*, C-219/12, EU:C:2013:413, paras. 28, 33 & 37.

56 Ibid., paras. 29–32.

57 Ad Van Doesum et al, *Fundamentals of EU VAT Law*, Kluwer Law International, Alphen aan den Rijn, 2016, p. 65.

status of a taxable person.[58] More broadly, it appears as though the concept of economic activity might have been expanded even further.[59]

In light of the foregoing, there seem to be some contradictions. On the one hand, the wording of the VAT Directive and *a contrario* interpretation by the CJEU in *Enkler* convey the impression that occasional activities are subject to VAT only if Member States choose to incorporate the possibility afforded to them in Article 12(1). On the other hand, the duration of activities was found inconsequential in *Wellcome Trust*. This was then reinforced in *Slaby and Kuć*, partly by reiterating the precedent of *Wellcome Trust*, partly by enabling exploitation of private property to be covered by Article 9(1) provided that active marketing steps have been taken. On the face of it, these two positions look to be virtually irreconcilable. Notably, Advocate General Wathelet opted to address this alleged paradox in his opinion in *Kostov*. He called attention to the fact that in *Enkler*, the conflict had to do with the distinction between business and private activities rather than the concept of occasional activities, why the court did not use the latter to answer the question at hand.[60] Be that as it may, the court in *Slaby and Kuć* employed the private-economic dichotomy irrespective of whether Article 12(1) had been used or not.[61]

Whether the notion of economic activity necessitates a certain continuity is also a point of contention in the legal doctrine. Leaning on some of the above-mentioned case law, Terra and Kajus have rejected the a contrario interpretation of Article 12(1) and dismissed the idea that economic activity generally is conditional upon a certain frequency.[62] They have pointed to the fact that the expression "continuing basis" in Article 9(1) refers only to a particular set of economic activities, namely the exploitation of property. It also applies to the income acquired from an activity, rather than that activity itself.[63] Contrariwise, other scholars have submitted that incidental supplies are in principle excluded from the imposition of VAT, arguing that Article 12(1) may in fact be redundant if occasional supplies

58 Giorgio Beretta, European VAT and the Sharing Economy, Kluwer Law International, Alphen aan den Rijn, 2019, p. 91; Beretta (supra n. 11) p. 409.

59 Van Doesum et al (supra n. 57), p. 65. See also Michael Van de Leur, 'Watch Out, You May Be a Taxable Person!', *International VAT Monitor*, vol. 24, no. 5, 2013, p. 279.

60 Advocate General Wathelet (supra n. 52), para. 45.

61 *Slaby and Kuć* (supra n. 44), 35–46.

62 Terra & Kajus (supra n. 32), ch. 9.2.1 & 9.2.2.

63 Ibid., ch. 9.2.1.

by default are to be treated as economic activities within the meaning of Article 9(1) as well.[64] At the same time though, they have also emphasized that continuity is less imperative for certain forms of exploitation, like the grant of building rights in *Van Tiem*, as suchlike transactions instead facilitate persistence through obtaining consideration continuously.[65]

Notwithstanding this divergence, it is clear that each case has to be evaluated on its own merit, taking into account all relevant facts available.[66] Under the aegis of such individual case-by-case examination, *Slaby and Kuć* indicates that what is ultimately decisive, as concerns both the condition of continuity as well as the boundary between private and economic exploitation, is whether active steps have been taken to market property by mobilizing resources similar to those deployed by a producer, a trader, or a person supplying services within the meaning of the second paragraph of Article 9(1). Judging from the validation in later cases, the scheme of "active steps" appears to be rather well-established. It essentially confirms that the fact that an activity is carried out on an occasional basis does not in itself remove that activity from the scope of VAT.

3.3 Independence

In order to be treated as a taxable person, the economic activity has to be performed independently according to Article 9(1). Article 10 clarifies that the criterion of independence precludes employed persons from VAT. The removal of employees from the scope of VAT is borne by practical motives, keeping countless of employees outside of the administrative encumbrance of the VAT system.[67] Article 10 thereto excludes other persons in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee. Whether such legal ties exist is determined on the basis of working conditions, remuneration and the employer's liability. Hence, employees alone

64 Van Doesum et al (supra n. 57), p. 60–61; Beretta (supra n. 11), p. 405; Beretta (supra n. 58), p. 84.

65 Van Doesum et al (supra n. 57), p. 63–64; Beretta (supra n. 11), p. 406; Beretta (supra n. 58), p. 86.

66 *Enkler* (supra n. 34), para. 27; *Rēdlihs* (supra n. 33), para 33; *Fuchs* (supra n. 55), para. 19.

67 Melz (supra n. 43), pp. 160 & 162.

are not excluded. Instead, a more substantive outlook is called for, having due regard for whether someone de facto acts independently.[68]

The CJEU has had the opportunity to further elaborate on the meaning of "independence" on various occasions. In spite of being exposed to disciplinary control under the oversight of public authorities and the renumeration being determined by statute, Dutch notaries and bailiffs were in *Commission v. Netherlands* found to be independent by the CJEU.[69] In particular, the court reasoned in the following way:

> "Notaries and bailiffs, however, are not bound to the public authorities as employees since they are not integrated into the public administration. They carry out their activities on their own account and on their own responsibility; they are free, subject to certain limits imposed by statute, to arrange how they shall perform their work and they themselves receive the emoluments which make up their income."[70]

Along the same lines, in *Ayuntamiento de Sevilla*, the CJEU deemed Spanish tax collectors to be operating independently,[71] notwithstanding that they were appointed by and liable to instructions and disciplinary supervision of a municipality.[72] Notably, the tax collectors themselves organized the staff, the equipment and the materials needed for pursuing their activities.[73] In addition, the economic risk was borne by the tax collectors inasmuch as the profit was contingent not only upon the amount of tax collected, but also upon the expenses incurred on staff and equipment in relation to their activity.[74] To whom the economic risk is allocated was also paramount in *Van der Steen*. In this case, the CJEU ruled that a person who was the sole shareholder, the sole manager and the sole staff member of a company could not be considered a taxable person since the company paid him a fixed monthly salary and an annual holiday payment. As such, he

68 Beretta (supra n. 11), p. 94. In a similar spirit, Abdoelkariem and Prinsen believe that Article 10 also applies to situations other than the employer-employee relationship, see Rahiela Abdoelkariem & Frank Prinsen, 'The Interaction between Head Office, Branch and VAT Grouping: New Challenges Ahead for the European Union', *International VAT Monitor*, vol. 26, no. 4, 2015, p. 207.

69 Judgement of 26 March 1987, *Commission v. Netherlands*, C-235/85, EU:C:1987:161, paras. 14–15.

70 Ibid., para. 14.

71 Judgement of 25 July 1991, *Ayuntamiento de Sevilla*, C-202/90, EU:C:1991:332, para. 16.

72 Ibid., para. 12.

73 Ibid., para. 11.

74 Ibid., para. 13.

relied on the company to determine his renumeration, thus not carrying the economic risk.[75]

Drawing on the case law regarding independence, Terra and Kajus has capsuled the assessment into three concrete parameters distinguishing an independent activity: (1) the activity is performed by a person not organically integrated into an enterprise or an administration, (2) there is sufficient organizational freedom when it comes to the human and material resources that are used in the conduct of the activity, and (3) the parties in question bear the economic risk intrinsic in the activity.[76]

3.4 VAT registration thresholds

In Articles 281–292 of the VAT Directive, a special scheme for small enterprises is prescribed. Although, strictly speaking, the special scheme does not have any direct bearing on the qualification of taxable person, it is still worthy of inspection due to its high practical significance within the bounds of the sharing economy. Registration thresholds basically stipulate a lower level of economic activity, usually with annual turnover as the benchmark, beneath which businesses may choose to omit VAT registration and effectively have their supplies exempted provided that they do not deduct input VAT.[77]

The principal goal of registration thresholds is to decrease the administrative burden for small businesses to comply with the common VAT rules.[78] At the same time, the registration thresholds differ considerably among Member States,[79] an asymmetry that causes substantial market distortions and is undesirable from the perspective of neutrality.[80] As a study in the UK has shown, VAT registration thresholds, in particular high ones, generate clusters of businesses situated just underneath the turnover level required due to the competitive edge in terms of VAT costs and savings

75 Judgement of 18 Octobter 2007, *Van der Steen*, C-355/06, EU:C:2007:615, paras. 22–26.

76 Terra & Kajus (supra n. 32), ch. 9.4.

77 Fabiola Annacondia, 'VAT Registration Thresholds in Europe', *International VAT Monitor*, vol. 30. no. 6, 2020, p. 275; Van Doesum et al (supra n. 57), p. 550; Beretta (supra n. 11), p. 414; Beretta (supra n. 58), p. 102.

78 Beretta (supra n. 58), p. 103.

79 Annacondia (supra n. 77), p. 275.

80 Beretta (supra n. 11), p. 414; Beretta (supra n. 58), p. 103. See also European Commission, *Green Paper on the Future of VAT: Toward a simpler, more robust and efficient VAT system*, COM(2010) 695 Final, p. 17.

resulting therefrom, thereby distorting behavior and disincentivizing economic growth.[81]

4 APPLYING THE CONCEPT OF "TAXABLE PERSON" TO THE SHARING ECONOMY

4.1 Economic activity in the context of the sharing economy

Considering that the occasional renting out of property constitutes the bedrock of the sharing economy, it is by no means surprising that the standard of "continuing basis" induces a multitude of problems as concerns users providing services through sharing platforms. Reminiscent of the motor caravan in *Enkler* or the solar panels in *Fuchs*, the overarching issue is the blurred lines between the private and the economic domain.

First off, recalling the opinion of Advocate General Lenz in *Wellcome Trust*, the duration of an activity is evidently not decisive for the assessment of economic activity. Applied to the sharing economy, an Airbnb host by way of example, apparently the number of times and the time frame during which an apartment is hired out is immaterial.[82] In place of such aspects, in alignment with *Enkler*, the nature of the property is what is important. In this respect, assets that are exclusively suited for economic exploitation must be separated from assets that can be used for private purposes as well. As far as Uber drivers and Airbnb hosts are concerned, strictly commercial vehicles and buildings earmarked under cadastral rules as business property would fall within the former category.[83] However, an apartment made accessible through Airbnb or a vehicle used for passenger rides via Uber would, by their nature, presumably more often have the capability of being used for private and business purposes alike.[84] Under such condi-

81 Office of Tax Simplification, *Value Added Tax: Routes to Simplification. Presented to Parliament pursuant to Section 186(4)(b) of Finance Act 2016*, 2017, pp. 3 & 6–7, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/657213/Value_added_tax_routes_to_simplification_web.pdf>, accessed 30 December 2020. See also James Mirrlees et al, *Tax by design*, Oxford University press, London, 2011, <https://www.ifs.org.uk/docs/taxbydesign.pdf>, p. 178, accessed 30 December 2020; European Commission, *Proposal for a Council Directive. amending Directive 2006/112/EC on the common system of value added tax as regards the special scheme for small enterprises*, COM(2018) 21 final; Beretta, (supra n. 58), p. 103.

82 See also Cannas (supra n. 14), p. 93.

83 Beretta (supra n. 11), p. 410; Beretta (supra n. 58), p. 93.

84 European Commission, Value Added Tax Committee, *Working paper 878*, taxud.c.1(2015)4370160, p. 6; Grlica (supra n. 6), p. 128.

tions, the more complex examination of all relevant circumstances specific to the particular case has to take place in order to determine if an activity is carried through with the purpose of gaining income on a continuous basis. In this connection, the European Commission has submitted that the mere registration on a sharing platform in general signifies some continuity.[85] Using Article 12(1), *Slaby and Kuć* and *Kostov* as the frame of reference, the European Commission stressed the wide meaning of economic activity, deducing therefrom that supplies made through the medium of the sharing economy might involve economic activities notwithstanding whether they are delivered continuously or occasionally. In particular, the European Commission gave prominence to the notion of "active steps" set forth in *Slaby and Kuć*, stating that a person subscribing to an online sharing platforms arguably takes those steps and, as a result, could be assimilated to a taxable person.[86]

The stance advocated by the European Commission is, however, somewhat controversial. On the one hand, as critics have underlined, it strikes one as being too excessive as well as disconnected from economic reality.[87] Given that professional producers and traders commonly employ their own independent marketing and distribution channels and, as such, have the ability to supply goods and services without having to resort to online sharing platforms, it is not obvious that a mere subscription can simply be equated with active marketing measures similar to those of commercial actors.[88] Indeed, one could argue that something more must be added to the equation. For instance, Uber drivers are often obliged to enter certain courses and acclimate their vehicles in accordance with legal transportation rules before they are permitted to provide car rides through the platform. Such actions could conceivably be looked at as active steps in the prospect of carrying out economic activities.[89] Furthermore, the application of the European Commission's position might be restrained in Member States that have not made use of Article 12(1). In this regard, Grlica points to Slovenia, whose omission to incorporate Article 12(1) has brought about explicit guidelines principally excluding providers of one-

85 European Commission (supra n. 84), p. 6. See also Matesanz (supra n. 11), p. 104.

86 Ibid.

87 Grlica (supra n. 6), pp. 128 & 130.

88 Ibid., pp. 130–131.

89 Cannas (supra n. 14), p. 95.

time supplies from being assorted as taxable persons.[90] Beyond that, it appears as though joining an online sharing platform could be done for many reasons other than economic ones. The most obvious instance is someone signing up to use it entirely in the capacity of a consumer, neither offering any car rides nor renting out any rooms. By the same token, one could easily imagine someone subscribing simply to gather information about the platform.

On the other hand, as proponents of the European Commission's approach has accentuated, completely excluding occasional activities from VAT would not be compatible with the precept of neutrality. Likewise, the possibility for an activity to be designated to the private domain appears quite narrow.[91] *Slaby and Kuć* as well as *Kostov* point right in that direction. By extension, it may be difficult for individual providers to avoid the definitions of economic activity and taxable person, especially given the very broad understanding the CJEU has of those concepts.[92] Adding to that is the fact that *Fuchs* left the impression that not that many steps are needed to qualify as a taxable person. In that vein, one can safely infer that the criterion of economic activity is easily attainable by a myriad of individual suppliers in the sharing economy. Even so, it is hardly unequivocal that merely subscribing to a sharing platform in and of itself insinuates continuity.

All things considered, it remains ultimately unclear at which point individual providers can be viewed as exercising economic activities. This uncertainty is largely an outcome of the CJEU's guidance primarily consisting of an overall evaluation of all circumstances on a case-by-case basis. While the precedent of "active steps" proceeded to concretize the assessment to some degree, in what way or manner that precedent should be applied to the sharing economy is far from crystal-clear. The absence of any lucid directions as far as what kind of circumstances are pertinent and how exactly those are supposed to be gauged in relation to the sharing economy

90 Grlica (supra n. 6), p. 128.

91 Beretta (supra n. 58), p. 88.

92 Katerina Pantazatou, 'Taxation of the Sharing Economy in the European Union' in Nestor Davidson et al ed., *The Cambridge Handbook of Law and Regulation of the Sharing Economy* (forthcoming), Cambridge University Press, Cambridge, 2018, p. 7. To a similar effect, see Van de Leur (supra n. 59), p. 279.

has led some authors to express concerns over legal certainty.[93] Indeed, the more circumstances that are in play, the greater the prospects of diverging inferences. As a matter of fact, the VAT Expert Group has cautioned that differences in VAT treatment could occur in the case of users renting their spare rooms to travelers searching for accommodation[94] (i.e. the Airbnb case). More practically feasible guidelines specifically targeting the sharing economy could serve to resolve part of this ambiguity.[95]

Others have gone farther and even argued for an amendment of Article 9(1), enlarging the concept of taxable person to additionally encapsulate the discontinuous supply of services.[96] However, in light of the CJEU's case law, the scope of taxable person has already at present been given a sufficiently broad meaning as to encompass discontinuous activities. By extension, it is already wide enough to cover those activities carried out by individual suppliers like Airbnb hosts and Uber drivers.[97] As such, totally revising Article 9(1) to accommodate the sharing economy comes across as rather superfluous. Instead, less profound tweaks more adequately targeting the existing shortcomings seem more worthwhile. Since one of the central tenets of the sharing economy revolves around the alternation of assets between private and business use, it is currently no effortless task to accurately determine the extent to which input VAT deduction is allowed for individual providers. In dealing with this obstacle, Beretta has promoted the insertion of fixed percentages for input deduction established at the EU level for each of the assets typically used in the accommodation and transport services. This way, the calculation of the deductible amount

93 Grlica (supra n. 6), p. 131. See also Bal (supra n. 28), who essentially makes the same point about legal certainty in connection to the concept of "taxable person" more generally, although she also peripherally touches on the sharing economy by reviewing two cases concerning Ebay sellers and car collectors.

94 European Commission, VAT Expert Group, VEG no 081, *VAT treatment of the sharing economy*, taxud.c.1(2019)2026442, p. 8.

95 See also Grlica (supra n. 6), p. 131. To a similar effect, the VAT Expert Group has recently expressed support for the idea of clarifying the application of Article 9(1) in terms of more qualitative criteria, see European Commission, VAT Expert Group (supra n. 11), p. 10. However, Beretta does not see the need for any further guidelines clarifying the application of Article 9(1) to the sharing economy, as he deems the case law broad but consistent, see Beretta (supra n. 58), p. 109. Correspondingly, Matesanz does not promote this solution either, arguing that the dynamic nature of the CJEU's jurisprudence would make such guidance outdated in a few years, see Matesanz (supra n. 11), p. 104.

96 Cannas (supra n. 14), p. 96.

97 See also Beretta (supra n. 58), p. 109.

would be simplified. Being an EU-wide measure, the amount of input deduction would not differ among Member States either, ensuring equal competitive conditions. Through its uniform nature, it could also enhance legal certainty.[98] In that spirit, it looks by all accounts like a step in the right direction.

4.2 Independence in the context of the sharing economy

The relationship between sharing platforms and individual suppliers bears *prima facie* the resemblance of an autonomous character. The platform supplies its users with intermediation services, while the individual service provider alone provides the underlying service to the final consumer. The perception that the platform does not have a finger in the underlying transaction between the provider and the recipient is embraced in the platforms' terms of service, with both Airbnb and Uber depicting the individual suppliers as independent third parties.[99] Given the background of such terms of use, the European Commission concluded that individual service providers for the most part act independently. However, the European Commission also underscored the importance of the economic reality,[100] in particular if it repudiates the terms of service. In the event that the association between platforms and their users fundamentally has the earmarks of employer and employee, the issue of whether users operate in an independent fashion must be investigated thoroughly.[101] The analysis has to be done on a case-by-case basis, taking into account the influence that the platform exerts over its users.[102] Drawing on the wording of Article 10 and the specifications thereof from the related case law, Beretta has proposed evaluating the business models of the sharing economy in assent with a functional analysis, containing the following criteria: non-exclusionary

98 Ibid., p. 110.

99 'Terms of Service', <https://www.airbnb.com/help/article/2908/terms-of-service#EUTOS>, accessed 28 December 2020; 'Terms and Conditions', <https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=great-britain&lang=en-gb>, accessed 28 December 2020.

100 The approach of "substance over form" has consistently guided the CJEU in its judgements, see for instance Judgement of 8 February 1990, *SAFE*, C-320/88, EU:C:1990:61, para. 9; Judgement of 20 June 2013, *Newey*, C-653/11, EU:C:2013:409, para. 52.

101 European Commission (supra n. 84), p. 7; Beretta (supra n. 11), p. 412; Beretta (supra n. 58), p. 96.

102 Beretta (supra n. 58), pp. 98–99.

membership, organizational autonomy, economic risk, regulatory autonomy, remuneration independence, personal liability.[103]

Looking at the economic realities of Airbnb and Uber through the lens of such assessment, both Airbnb hosts and Uber drivers seem to meet the first three conditions. Neither Airbnb hosts nor Uber drivers are forced to supply their services through the medium of only those platforms. Rather, memberships in multiple platforms are permitted. By virtue of executing the activities themselves as well as employing their own assets (residential properties and private vehicles), they could also be said to enjoy organizational autonomy in the sense of having a satisfactory degree of human and material resources to undertake the economic activities at issue.[104] Moreover, they typically carry the economic risk implicated in the supply of the underlying service.[105] On the flipside though, Airbnb and Uber enforce some disciplinary actions in the form of deactivation of accounts in so far certain terms have been breached,[106] casting doubt upon the users' regulatory autonomy.[107] Although the existence of disciplinary control is not alone conclusive in light of *Commission v. Netherlands* and *Ayuntamiento de Sevilla*, the platforms of Airbnb and Uber thereto provide some insurance coverage,[108] denoting a certain lack of personal liability for their users.[109] However, what critically distinguishes Airbnb hosts from Uber drivers is that the former enjoy independence in terms of the renumer-

103 Ibid.

104 Beretta (supra n. 58), p. 99. By the same token, as Advocate General Tesauro drew attention to in *Ayuntamiento de Sevilla*, having the option to freely choose working hours is an indication of organizational freedom, something that both Airbnb hosts and Uber drivers are able to do, see Opinion of Advocate General Tesauro delivered on 4 June 1991, *Ayuntamiento de Sevilla*, C202/90, EU:C:1991:332, para. 6.

105 Lily Zechner, 'How to Treat the Ride-Hailing Company Uber for VAT Purposes', *International VAT monitor*, vol. 30, no. 6, 2019, p. 262; Beretta (supra n. 58), p. 99.

106 'Can Airbnb deactivate my account?', <https://www.airbnb.com/help/article/432/can-airbnb-deactivate-my-account>, accessed 29 December 2020; 'Understanding why drivers and delivery people lose account access', <https://www.uber.com/us/en/drive/safety/deactivations/?_ga=2.38916067.178509294.1609240146-747432068.1607800530>, accessed 29 December 2020.

107 Beretta (supra n. 58), p. 99.

108 'How you're protected while hosting' <https://www.airbnb.com/resources/hosting-homes/a/how-youre-protected-while-hosting-235>, accessed 29 December 2020; 'Auto insurance to help protect you', <https://www.uber.com/us/en/drive/insurance/>, accessed 29 December 2020.

109 Beretta (supra n. 58), p. 99.

ation as they are able to freely stipulate the prices,[110] while the latter are bound to the pricing set by Uber.[111] Overall then, against the backdrop of the greater bulk of the conditions mentioned, Airbnb hosts by and large display attributes delineating that of independent actors,[112] whereas the characterization of Uber drivers is tougher to pinpoint.[113]

Devoid of any clear guidance as to the pigeonholing of Uber drivers, one may glance at the arguments advanced in a sprinkling of non-VAT rulings within the EU.[114] As a cautionary note however, it must be emphasized that such judgements, in the capacity of non-VAT cases, do not render any categorical directions for European VAT. At the same time, they should not be downright swept aside either. In fact, The European Commission has deemed such cases useful when considering the potential VAT repercussions of relevant supplies.[115] In *Uber Systems Spain*, the CJEU classified the intermediation service of Uber as a service in the field of transport rather than merely an information society service, inter alia highlighting that Uber exercises decisive influence over the services provided by the

110 'How to earn money on Airbnb', <https://www.airbnb.com/resources/hosting-homes/a/how-to-earn-money-on-airbnb-282>, accessed 29 December 2020; Beretta (supra n. 58), p. 99; Zechner (supra n. 105) p. 263.

111 The price is set by an algorithm used by the platform, see 'How are fares calculated?', <https://help.uber.com/riders/article/how-are-fares-calculated/?nodeId=d2d43bbc-f4bb-4882-b8bb-4bd8acf03a9d>, accessed 29 December 2020; 'Get a price estimate for your trip' <https://help.uber.com/riders/article/get-a-price-estimate-for-your-trip?nodeId=cc1efc16-df15-47f3-8057-61c2b75ea529>, accessed 29 December 2020; Beretta (supra n. 58), p. 99; Zechner (supra n. 105), p. 262.

112 As a matter of fact, the Spanish Commercial Courts has recognized Airbnb, along with BlaBlaCar, as sheer intermediaries between the providers and recipients who are not embroiled in the underlying service, see the cases cited in Beretta (supra n. 11), pp. 412–413 Albeit obviously not authoritative for European VAT purposes, national decisions could still figure as somewhat of a pointer.

113 Beretta (supra n. 58), p. 99. For a different opinion, see Zechner (supra n. 105), pp. 261–262, who deems Uber drivers to be independent, mainly because they bear the economic risk and because they themselves decide how often, for how long and at what times they want to drive.

114 The dilemma of classifying Uber drivers is also epitomized by the fact that in the US, different authorities has come to conflicting verdicts as to the categorization of employees vis-a-vis independent contractors, see Rory Cellan-Jones, 'Uber dealt another blow over driver status', *BBC News Technology*, 10 September 2015, <https://www.bbc.com/news/technology-34207838>, accessed 29 December 2020.

115 European Commission, Value Added Tax Committee, *Working Paper 947*, taxud.c.1(2018)1735106 – EN, 3 April 2018, Brussels, p. 4; European Commission, VAT Expert Group (supra n. 22) pp. 3–4; European Commission, VAT Expert Group (supra n. 11), p. 8.

drivers.[116] In this connection, Advocate General Szpunar stressed that even though Uber's control is not exerted within the confines of a normal employer-employee relationship, Uber still handles the economically vital aspects of the transport service.[117] Since the drivers' activities exist purely because of the platform, he ultimately concluded that Uber is not simply an intermediary between drivers and passengers.[118] By contrast, in a similar judgement but in the field of accommodation, the CJEU arrived at the opposite conclusion. Since the underlying service of accommodation is not influenced by the platform itself, the CJEU categorized the intermediation service provided by Airbnb as an information society service.[119] Consequently, although the aforementioned cases do not concern VAT as such, they illustrate that the level of control that the platforms exercise over the individual service providers is not necessarily comparable as between Uber and Airbnb.[120]

Inasmuch as the economic reality would unveil a relationship of employment, the supply between Uber and the driver would be immaterial for VAT purposes. Instead, Uber would be responsible for charging VAT on the underlying supply.[121] This would make Uber unable to recover the

116 Judgement of 20 December 2017, *Uber Systems Spain*, C-434/15, EU:C:2017:981, paras. 37–41 & 48. The elements creating that decisive influence included Uber determining the maximum fare, Uber receiving the payment from the rider before being forwarded to the driver and Uber having a certain control over the drivers, their conduct and the quality of the vehicles, see para. 39. See also judgement of 10 April 2016, *Uber France SAS*, C-320/16, EU:C:2018:221, p. 19–24 & 27.

117 Opinion of Advocate General Szpunar delivered on 11 May 2017, *Uber Systems Spain*, C-434/15, EU:C:2017:364, paras. 51–52.

118 Ibid., para. 56. Similarly, in a UK case, the employment tribunal did not find Uber's terms of service to at all resemble the practical reality, describing the supposed independent contract between driver and passenger as "pure fiction", see Employment Tribunals, 28 October 2016, No. 2202551/2015, Aslam, Farrar & Others v. Uber B.V., Uber London Ltd and Uber Britannia Ltd, paras. 89–92. This verdict was maintained on appeal, see Employment Appeal Tribunal, 10 November 2017, Appeal No. UKEAT/0056/17/DA, Uber B.V et al. v. Aslam et al., para. 103–126. It has been estimated that Uber faces a retroactive charge of 1.5 billion pounds counting back to 2012, should they be culpable for paying VAT on the underlying service in the UK, see Meg Bernhard, 'Uber Case in U.K. Could Become Model for How to Tax Gig Economy', *Bloomberg Tax*, 31 March 2020 <https://news.bloombergtax.com/daily-tax-report-international/uber-case-in-u-k-could-become-model-for-how-to-tax-gig-economy>, accessed 30 December 2020.

119 Judgement of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112.

120 Ibid., paras. 65–68; European Commission, VAT Expert Group (supra n. 22), p. 4.

121 Grlica (supra n. 6), pp. 127–128; Beretta (supra n. 11), p. 413; Beretta (supra n. 58), pp. 100–101.

input VAT on the drivers' acquisitions, considering that the assets used in sharing activities most often belong to the users. The incapacity to deduct input VAT holds true for the drivers as well, since their status as taxable persons would be lost as a function of them being treated as employees. As a result, a tax cascade effect would emerge, an event that visibly contravenes the cornerstone of neutrality.[122] Along the same lines, the absence of VAT imposition on the drivers could lend them a competitive edge over providers of competing services who do not use these sharing platforms, possibly giving rise to distortions of competition.[123] Notwithstanding that the label of employment may be a more adequate reflection of the connection between the Uber platform and the Uber drivers, such characterization might therefore bring fourth some drawbacks on a more systematic level.

4.3 VAT registration thresholds in the context of the sharing economy

Owing to a generally quite low annual turnover, many individual service providers in the sharing economy fall short of the registration thresholds, allowing them to make de facto exempt supplies. This gives sharing economy actors an upper hand in terms of VAT costs and savings over their ownership-oriented counterparts who are active within the same industries.[124] A comparison between the conventional hotel business and Airbnb in London can serve as a concrete depiction of the advantage the latter enjoys. As reported by the Financial Times in 2017, property tax and VAT can add up to 17% of the price of an ordinary hotel room in London, while the VAT-proportion of the price of Airbnb bookings sometimes amounts to just a trivial 0,6%. This discrepancy can account for approximately a third of the additional expenditure of using a traditional hotel in London.[125] The competitive leverage on prices resulting from this diverging VAT treatment seems hard to justify, especially since it essentially stems from a mere difference in business models.[126]

122 Beretta (supra n. 11), p. 413; Beretta (supra n. 58), p. 101.

123 European Commission (supra n. 84), p. 7.

124 Grlica (supra n. 6), p. 129; Beretta (supra n. 11), p. 415; Beretta (supra n. 58), p. 104.

125 Vanessa Holder, 'Airbnb's edge on room prices depends on tax advantages', *Financial Times*, 2 January 2017, <https://www.ft.com/content/73102c20-c60e–11e6-9043-7e34c07b46ef>, accessed 30 December 2020.

126 Grlica (supra n. 6), p. 129.

With the aim of safeguarding fiscal neutrality and equality, the EU VAT system has to enable traditional businesses to compete with the sharing economy on equal footing, irrespective of variations in business models.[127] Although this requires constraints on the market distortions that the VAT registration thresholds give rise to, there is a trade-off to be made; administration and compliance costs being on the other side of the coin.[128] In an effort to strike a more appropriate balance between simplicity and neutrality, the introduction of EU-wide maximum and minimum thresholds has in the VAT literature been suggested.[129] To the same end, it has been recommended to make the thresholds mandatory rather than optional.[130] These adjustments could alleviate some of the lopsidedness arising from the very diverse range of thresholds among Member States, smoothing the path for a more neutral treatment. Indeed, changing the current design of the registration thresholds into a single, common and mandatory one would likely bolster fair competition between the sharing economy and brick-and-mortar businesses both domestically and between Member States, without necessarily compromising the administrative motives underpinning it.[131]

5 CONCLUSIONS

The purpose of this article has been to analyze the application of the concept of "taxable person" to Airbnb hosts and Uber drivers. Looking at the criterion of economic activity, it does not seem to preclude occasional activities per se, even when also bearing Article 12(1) in mind. Rather strikingly, as *Wellcome Trust* and *Van Tiem* demonstrate, an economic activity can be completed in just a single day and, as far as exploitation of property is concerned, entail only a one-time transaction. Rather than fixating too narrowly on the number and duration of activities, one's eyes should be directed towards the nature of the property at hand; identifying whether

127 Beretta (supra n. 11), p. 415; Beretta (supra n. 58), p. 105. Partially in line with this, the European Commission has proposed the introduction of a common maximum threshold of EUR 85 000, see European Commission, *Proposal for a Council Directive. amending Directive 2006/112/EC on the common system of value added tax as regards the special scheme for small enterprises*, COM(2018) 21 final.

128 Mirrlees et al (supra n. 81), p. 178.

129 Cannas (supra n. 14), p. 97; Beretta (supra n. 58), p. 112.

130 Beretta (supra n. 58), p. 105 & 112.

131 Beretta (supra n. 58), p. 112; European Commission, (supra n. 80), p. 17.

it belongs primarily to the private or economic domain. The dichotomy between the private and the economic is a delicate one to uphold in the context of the sharing economy. Indeed, the usage of assets such as apartments and cars often varies over time, eroding formerly patent borderlines. What complicates it further is the shortage of guidelines sufficiently tailored for the sharing economy. The lack thereof makes it hard to categorically designate Airbnb rentals and Uber rides to either category. Instead, emanating from *Enkler*, all details of the specific case have to be contemplated in order to discern the purpose for which an asset is used. Under the auspices of such blanket case-by-case assessment however, it springs from *Slaby and Kuć* that a pivotal factor is whether active marketing steps have been taken by mobilizing resources tantamount to those generally deployed by taxable persons. As attested by the broad scope of the concept of taxable person and its roots of neutrality, taking those active marketing steps gives every indication of being quite an easy task to do. Pair that with the fact that the CJEU in *Fuchs* seemed to denote an even lower requirements for the fulfillment of an economic activity, and a broad spectrum of sharing economy actors will most likely be covered by Article 9(1). Accordingly, although not without its hurdles, it is certainly possible to shoehorn the sharing economy into the current scope of Article 9(1). What is harder to determine under the existing framework is the degree to which Airbnb hosts and Uber drivers can deduct input VAT paid in the course of their economic activities. In step with Beretta's recommendation, a simplified mechanism for input VAT deduction could potentially mitigate this incertitude.

In regards to the requisite of independence, it is evident that not only employees in a narrow sense, but also those who assume a position comparable to that of employed persons are excluded from the concept of taxable person. Judging by the economic reality as opposed to contractual fiction, Airbnb hosts do in fact come across as independent vis-a-vis the platform, whereas the circumstances surrounding Uber drivers are more dubious, showing signs of both independence and employment. That being said, the room for recharacterizing Uber drivers is restricted by neutrality concerns inasmuch as neither the platform nor the drivers would be able to deduct input VAT on the acquisitions of the vehicles.

Finally yet importantly, VAT registration thresholds are as a practical matter highly relevant within the ambit of the sharing economy. This is because the incidental nature of sharing activities makes it so individual service providers like Airbnb hosts and Uber drivers not seldom fail to achieve

the annual turnover required to exceed the thresholds, putting them in a favorable competitive position over traditional ventures. Not only that, the thresholds are also optional and vary significantly across Member States, not really paving the way for an equal level playing field. Albeit justified by simplification grounds, the current configuration of the thresholds is probably not optimal from a neutrality standpoint. Making the registration thresholds more commensurate across EU could be one way of achieving a better balance between these two seemingly opposing needs.

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