*eJournal of Tax Research (2019) vol. 17, no. 1, pp. 118-133*

# European VAT and the digital economy: recent developments

Cristina Trenta[1]

***Abstract***

This article investigates the most recent developments in the field of European value added tax (VAT) law in relation to the digital economy and in particular to the treatment and fiscal consequences of peer-to-peer technologies, consumer-to-consumer models, and gress has been made in the field and to discuss the most recent legislative developments. The article examines practical and theoretical concerns in detail and assesses current regulations through the lens of the rule of law as a cornerstone of European law that must be respected.

**Key words**: European value added tax, digital economy, consumer-to-consumer models, barter transactions, rule of law

[1] Associate Professor of Tax Law, Örebro University, Sweden. The author is thankful to Prof. Dr. Bertil Wiman and the Uppsala Center for Tax Law, supported by Deloitte, EY, KPMG, Mannheimer Swartling, PwC, Skeppsbron Skatt, Svalner, for their financial assistance in the final stages of research.

The OECD has more recently confirmed this view in its recent Interim Report 2018, *Tax Challenges Arising from Digitalisation*, which again references the *International VAT/GST Guidelines*.[22]

The OECD also suggests that a simplified registration and compliance regime should be considered to facilitate application and collection of VAT on imported services from non-resident suppliers.[23]

## 3. PLACE OF SUPPLY

At the time of this writing, the place of supply for e-services is determined according to the destination principle, and services are taxed for VAT purposes in the place where they are consumed.[24] In that respect, Directive 2008/8/EC on the place of supply of services[25] has introduced changes in relation to cross-border services. With effect from 1 January 2015, a general regulation based on a new article 58

In relation to Directive 2017/2455, art 1 establishes that, with effect from 1 January 2019, the previous art. 58 is amended and the place of supply for telecommunications

(B2C). As the digital economy generally blurs the lines between producers and consumers and thrives on consumer-to-consumer transactions (C2C) such as those happening in peer-to-peer fashion, it is easy to see how this is of concern to both commentators and operators in the sector.

Similar concerns are expressed by the European Commission in its Communication entitled *A European Agenda for the Collaborative Economy*.[43] The document touches upon several legal issues concerning what the Commission calls the , taxation and VAT among them. The collaborative economy

> refers to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals[44] ... on a peer-to-peer and occasional basis.[45]

The European Data Protection Working Party considers social networks (SNs) such as Facebook or Snapchat to be collaboration platforms:[46] the abovementioned Communication states that supplies provided by means of collaborative platforms are in principle VAT-taxable transactions, even though the practical application of VAT could prove to be difficult:

> Supplies of goods and services provided by collaborative platforms and through the platforms by their users are in principle VAT taxable transactions. Problems may arise in respect of the qualification of participants as taxable persons, particularly regarding the assessment of economic activities carried out on these, or the existence of a direct link between the supplies and the remuneration in kind.[47]

The EU Commission then not only maintains that these new supplies provided through or by means of collaborative platforms are in principle subject to VAT, but also that supplies that are provided through the platforms by their users are in principle VAT-taxable transactions,[48] as the EU Commission has recently outlined.[49] It must be stressed that social networks connect an unprecedented number of people in real-time: they not only provide a natural transactional platform, often across national borders, but some of them have established formally structured marketplaces. While eBay or Etsy are the examples that readily come to mind, it should be noted that Facebook manages its own

[43] European Commission, *A European Agenda for the Collaborative Economy*, communication from the

ones, and the problems faced in categorising them satisfactorily and unequivocally. While it is possible for an internet operator to act as an intermediary and *facilitate* transactions between third parties, even though the new paradigms are moving away from human intervention and towards algorithmic match-making and disintermediation,[66] this very operator is potentially playing multiple and sometimes competing roles in the transaction.

Not only may providers give access to, host, broadcast, or index content originating from them or from known or unknown third parties, but distribution protocols such as peer-to-peer completely undermine the fundamental concepts on which taxation rests: that a transaction has a clearly traceable origin and destination, that the parties involved can be identified and play one, and only one, specific role, and that a clear geographical boundary can be established.[67]

The approach taken by the OECD is to focus more on the specific activities of intermediaries, and address those empirically, rather than on providing a systematic way to categorise them,[68] a difficult and ultimately fruitless task as these continue evolving as part of the consolidation and maturation of the digital economy.[69] The approach may nonetheless exacerbate the effects of the administrative burden introduced by article 242A: it remains unclear how to identify who falls inside and who outside the definition of a taxable person facilitating transactions by means of a platform, and who thus has to bear the VAT duties applicable to such taxable persons.

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

The identification and categorisation of internet intermediaries (or facilitators ) is not the only issue introduced with article 242A: its formulation opens up a potential lack of coordination between the general EU legislative framework on e-commerce and the EU VAT Directive regulating e-services.

In order to support the Digital Single Market and see it flourish, the EU has included in the Directive on Certain Legal Aspects of Information Society Services, the so-called Directive on electronic commerce ,[70] ] ɹ ᵐmtim ɻ oaci

Furthermore, the Directive on electronic commerce has clearly introduced for these

ECJ in the *Hong Kong Trade Development Council* case.[79] This highlights a problem in applying the VAT literature to this area as certain types of transactions carried out in the digital economy, for example those happening in peer-to-peer fashion, become irrelevant for consumption tax purposes since they lack the basic characteristic of being carried out for consideration, at least in the traditional form of payment of money.

Academic literature has defined tax uncertainty