

# European VAT and the digital economy: recent developments

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## *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 barter transactions. The article's aim is to assess whether progress 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

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## 1. INTRODUCTION

The creation of the European Digital Single Market is one of the European Union's main priorities,<sup>1</sup> and the European Commission considers the value added tax (VAT) to be one of the core elements of the Digital Single Market to be addressed in the coming years.<sup>2</sup> The Organisation for Economic Co-operation and Development (OECD) has shared similar interests in its 2015 Final Report on Action 1 of the Base Erosion and Profit Shifting project, *Addressing the Tax Challenges of the Digital Economy*.<sup>3</sup>

This article examines in detail three main VAT-related, digital economy issues as mentioned in the OECD BEPS Action 1 documents, specifically peer-to-peer technologies,<sup>4</sup> consumer-to-consumer models,<sup>5</sup> and whether certain transactions can be characterised as barter transactions or free supplies.<sup>6</sup>

If it is true that from a business perspective the digital economy presents a potential for economic growth, it is also true that the legislative frameworks regulating it, when they even exist, often lack clarity and are a source of uncertainty. The fact cannot be underestimated that the introduction of inefficient legislation in the field could make compliance more difficult and hence more costly for economic operators conducting an economic activity over the internet, and produce social and economic damage in the long run. In this context, the article investigates in detail recent developments in relation to VAT law and design in the EU, and tests the current VAT legislation through the lens of the rule of law principle as a cornerstone of EU law that must be respected, with the goal of identifying areas for reform and improvement of these rules in order to further the European digital economy and taxation debate.

## 2. THE DEBATE ON THE DIGITAL ECONOMY

The issue of taxing e-commerce is certainly not new in the field of VAT.<sup>7</sup> The European Commission first defined e-commerce more than 20 years ago, in a 1997 document titled *A European Initiative in Electronic Commerce*.<sup>8</sup> Indirect taxation, and particularly VAT, was identified in that report as a relevant issue in the context of e-commerce.<sup>9</sup> At the international level, the OECD's own Committee for Fiscal Affairs approached the

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<sup>1</sup> European Commission, *A Digital Single Market Strategy for Europe*, communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2015) 192 final, Brussels, 6 May 2015.

<sup>2</sup> Ibid 8 [2.5]. See also European Commission, *A Fair and Efficient Tax System in the European Union for the Digital Single Market*, communication from the Commission to the European Parliament and the Council, COM(2017) 547 final, Brussels, 21 September 2017.

<sup>3</sup> OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing, 2013); OECD, *Addressing the Tax Challenges of the Digital Economy* (OECD Publishing, 2014); OECD, *Action 1 – 2015 Final Report: Addressing the Tax Challenges of the Digital Economy*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing, 2015).

<sup>4</sup> OECD, *Action 1 – 2015 Final Report: Addressing the Tax Challenges of the Digital Economy*, above n 3, 56 [4.2.1.3].

<sup>5</sup> Ibid 56 [4.2.1.3].

<sup>6</sup> Ibid 104 [7.4].

<sup>7</sup> Christiana H J I Panayi, *Advanced Issues in International and European Tax Law* (Hart Publishing, 2015) 52.

<sup>8</sup> European Commission, *A European Initiative in Electronic Commerce*, communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, COM(97) 157 final, Brussels, 16 April 1997.

<sup>9</sup> Ibid 19 [57].

field in 1998 with its report *Electronic Commerce: Taxation Framework Conditions*.<sup>10</sup> The OECD document again stressed the role of consumption taxation as crucial to the development of e-commerce and the internet as a whole.

More recently, in October 2013, the European Commission established the Commission High Level Expert Group on Taxation of the Digital Economy (Expert Group).<sup>11</sup> The Expert Group was tasked with providing suggestions aimed at improving the tax framework for the digital sector in Europe through EU-level initiatives. A final report was published in May 2014.<sup>12</sup> No significant changes to the VAT system were put forward for consideration in the document, but the Expert Group nonetheless remarked that the EU VAT system already in place needed to be reinforced, supporting VAT neutrality in the digital economy<sup>13</sup> and the destination principle, not only within the EU but also at the international level.<sup>14</sup> Additionally, the Expert Group encouraged a review of the VAT rate structure, something the EU Commission had already considered in its 2011 Communication on the future of VAT.<sup>15</sup> That document maintained that similar goods and services should be subject to the same VAT rate. Furthermore, technological changes should be taken into account for that specific purpose.<sup>16</sup>

At the international level, following the introduction by the OECD of its Base Erosion and Profit Shifting (BEPS) project,<sup>17</sup> the Action Plan under that project identified 15 different areas of intervention,<sup>18</sup> Action 1 of which relates to the digital economy, with the specific aim of understanding the tax challenges in this field.

The final report issued by the OECD stressed the importance of the destination principle in business-to-consumer (B2C) transactions for VAT purposes, especially in cross-border B2C supplies of services.<sup>19</sup> This is consistent with the OECD's own *International VAT/GST Guidelines*,<sup>20</sup> which consider the destination principle 'a global standard to address issues of double taxation and unintended non-taxation resulting from inconsistencies in the application of VAT to international trade'.<sup>21</sup>

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<sup>10</sup> Committee on Fiscal Affairs, *Electronic Commerce: Taxation Framework Conditions*, report presented to Ministers at the OECD Ministerial Conference, 'A Borderless World: Realising the Potential of Electronic Commerce', Ottawa, 8 October 1998 (Ottawa Framework), <https://www.oecd.org/ctp/consumption/1923256.pdf>.

<sup>11</sup> European Commission, Decision of 22.10.2013 setting up the Commission Expert Group on Taxation of the Digital Economy, C(2013) 7082 final, Brussels, 22 October 2013.

<sup>12</sup> European Commission, Expert Group on Taxation of the Digital Economy, *Report of the Commission Expert Group on Taxation of the Digital Economy* (28 May 2014).

<sup>13</sup> *Ibid* 36.

<sup>14</sup> *Ibid* 37.

<sup>15</sup> European Commission, *Towards a Simpler, More Robust and Efficient VAT System Tailored to the Single Market*, communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Future of VAT, COM(2011)851 final, Brussels, 6 December 2011.

<sup>16</sup> *Ibid* 11 [5.2.2].

<sup>17</sup> OECD, *Addressing Base Erosion and Profit Shifting* (12 February 2013).

<sup>18</sup> OECD, *Action Plan on Base Erosion and Profit Shifting*, above n 3.

<sup>19</sup> OECD, *Action 1 – 2015 Final Report: Addressing the Tax Challenges of the Digital Economy*, above n 3, 126.

<sup>20</sup> OECD, *International VAT/GST Guidelines* (12 April 2017) 38.

<sup>21</sup> OECD, *Action 1 – 2015 Final Report: Addressing the Tax Challenges of the Digital Economy*, above n 3, 126.

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*.<sup>22</sup>

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.<sup>23</sup>

### 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.<sup>24</sup> In that respect, Directive 2008/8/EC on the place of supply of services<sup>25</sup> has introduced changes in relation to cross-border services. With effect from 1 January 2015, a general regulation based on a new article 58<sup>26</sup> has been introduced for B2C e-services, broadcasting and telecommunication services that relies on a customer location criterion based on the full destination principle. This rule finds general application unless a Member State has adopted the effective-use-and-enjoyment principle.<sup>27</sup> Thus, starting January 2015, telecommunications, broadcasting and electronic services are as a rule taxed in the customer's state of location. This applies regardless of the status of the customer as a taxable or non-taxable person, and regardless of whether the supplier is an EU or a non-EU operator.<sup>28</sup> A new VAT Directive, 2017/2455, was introduced, effective 5 December 2017, amending Directive 2006/112/EC and Directive 2009/132/EC<sup>29</sup> in respect to the VAT obligations for supplies of services and distance sales of goods.<sup>30</sup> More recent EU legislation contains a number of provisions regulating cross-border trade and specifically distance sales thresholds from 2021 onwards.<sup>31</sup> The aim of the new rules is to facilitate the collection of VAT when consumers buy goods and services online.<sup>32</sup>

<sup>22</sup> OECD, *Tax Challenges Arising from Digitalisation – Interim Report 2018*, Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project (2018) 17.

<sup>23</sup> OECD, *Action 1 – 2015 Final Report: Addressing the Tax Challenges of the Digital Economy*, above n 3, 126-127. See also OECD, *Tax Challenges Arising from Digitalisation – Interim Report 2018*, above n 22, 103.

<sup>24</sup> See European Commission, Expert Group on Taxation of the Digital Economy, above n 12, Executive Summary, Conclusions of the Commission Expert Group.

<sup>25</sup> European Union, Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the Place of Supply of Services, OJ L 44, 20 February 2008, 11-22.

<sup>26</sup> European Union, Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax, OJ L 347, 11 December 2006, 1-118. See new art 58.

<sup>27</sup> *Ibid*, new art 59a.

<sup>28</sup> European Commission, 'Telecommunications, Broadcasting and Electronic Services, Rules Applicable Since 2015', [https://ec.europa.eu/taxation\\_customs/business/vat/telecommunications-broadcasting-electronic-services-archived\\_en](https://ec.europa.eu/taxation_customs/business/vat/telecommunications-broadcasting-electronic-services-archived_en) (accessed 12 June 2019).

<sup>29</sup> European Union, Council Directive 2009/132/EC of 19 October 2009 Determining the Scope of Article 143(b) and (c) of Directive 2006/112/EC as regards Exemption from Value Added Tax on the Final Importation of Certain Goods, OJ L 292, 10 November 2009, 5-30.

<sup>30</sup> European Union, Council Directive (EU) 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards Certain Value Added Tax Obligations for Supplies of Services and Distance Sales of Goods, OJ L 348, 29 December 2017, 7-22.

<sup>31</sup> Patrick Wille, 'European Union: The Correct Interpretation of the Thresholds for Distance Sales' (2018) 29(1) *International VAT Monitor* 4.

<sup>32</sup> Council of the European Union, 'VAT on Electronic Commerce: New Rules Adopted', *press release* 734/17 (5 December 2017).

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 services, radio and television broadcasting services, and electronically supplied services provided to a non-taxable person will be the place where that person is established or usually resides.<sup>33</sup> This new provision does not apply if a supplier established in a Member State provides services to non-taxable persons established in a different Member State, and the value of these supplies does not exceed EUR 10,000, or the equivalent in national currency, in both the current and preceding calendar year.<sup>34</sup>

The change in the rules concerning the place of supply has been assessed in different ways by various commentators. Some authors argue that the new EU VAT rules introduced with Directive 2008/8/EC may cause difficulties in the phase of implementation.<sup>35</sup> Others maintain that business-to-business (B2B) and B2C transactions are now treated very similarly, as the destination principle applies to both, and that the competitive advantage of companies located in states with low VAT rates<sup>36</sup> has been mitigated. EU commentators generally support this development, as the destination principle should effectively be applied to supplies to taxable as well as non-taxable persons since such treatment better follows the principle of VAT neutrality,<sup>37</sup> but have also raised concerns about the implicit difficulties in thoroughly adopting the destination principle and the consequent application of the VAT rate of the state of consumption. This also both increases the burden of navigating the complexity of the European VAT system and shifts more of that burden to private enterprises, as suppliers are required to correctly apply the very different VAT rates of 28 Member States,<sup>38</sup> from Luxembourg's 17 per cent to Hungary's 27 per cent.<sup>39</sup>

It has to be said that the current situation is still unsatisfactory when it comes to regulating new models such as peer-to-peer<sup>40</sup> or barter-like transactions: the latest changes to EU VAT Directive 2017/2455 that consider the digital economy do not include any specific provisions for these matters.<sup>41</sup> The VAT regulations need clarification, especially in respect to the specific rules of classification that make the taxable status of an individual peer relevant for VAT.<sup>42</sup> This is a consequence of the VAT Directive's own treatment of the place of supply as regulating only transactions among business operators (B2B) and between business operators and private consumers

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<sup>33</sup> European Union, Council Directive (EU) 2017/2455, above n 30, art 58(1).

<sup>34</sup> Gaspar Lopes Dias and Locif Choulak, 'Luxembourg: Bill Implementing Amendments to EU VAT Directive Regarding Certain VAT Obligations Applicable to Supply of Services and Distance Selling of Goods – Adopted', Luxembourg – VAT and Sales Tax, IBFD Online (12 February 2018).

<sup>35</sup> Peter Sanderson, 'Den Digitaliserade Ekonomin' (2014) 10 *Svensk Skattetidning* 721.

<sup>36</sup> Claudio La Valva, 'Il Nuovo Regime della Territorialità dell'Iva Nei Servizi Digitali: La Prospettiva Italiana' in Lorenzo Del Federico and Concetta Ricci (eds), *La Digital Economy nel Sistema Tributario Italiano ed Europeo* (Amon, 2015) 15.

<sup>37</sup> Björn Westberg, 'European Union: Taxation of the Digital Economy - An EU Perspective' (2014) 54(12) *European Taxation* 541, 542-543.

<sup>38</sup> Sophie Claessens and Ine Lejeune, 'European Union: Taxation of B2C TBE Services under EU VAT from 2015' (2014) 25(1) *International VAT Monitor* 7.

<sup>39</sup> European Commission, 'VAT Rates Applied in the Member States of the European Union, Situation at 1st July 2018', Taxud.c.1(2018).

<sup>40</sup> Cristina Trenta, *Rethinking EU VAT for P2P Distribution* (Kluwer Law International, 2015).

<sup>41</sup> OECD, *Action 1 – 2015 Final Report: Addressing the Tax Challenges of the Digital Economy*, above n 3, 104 [7.4].

<sup>42</sup> Ivo Grlica, 'European Union: How the Sharing Economy Is Challenging the EU VAT System' (2017) 28(2) *International VAT Monitor* 124.

(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*.<sup>43</sup> The document touches upon several legal issues concerning what the Commission calls the ‘collaborative economy’, taxation and VAT among them. The collaborative economy

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

The European Data Protection Working Party considers social networks (SNs) such as Facebook or Snapchat to be collaboration platforms:<sup>46</sup> 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.<sup>47</sup>

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,<sup>48</sup> as the EU Commission has recently outlined.<sup>49</sup> 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

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<sup>43</sup> European Commission, *A European Agenda for the Collaborative Economy*, communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2016) 356 final, Brussels, 2 June 2016.

<sup>44</sup> *Ibid* 3 [1].

<sup>45</sup> *Ibid* 7 [2.1].

<sup>46</sup> European Union, Article 29 Data Protection Working Party, ‘Opinion 5/2009 on Online Social Networking’, 01189/09/EN WP 163, adopted on 12 June 2009, 6 [3.1.1].

<sup>47</sup> *Ibid*.

<sup>48</sup> European Commission, *A European Agenda for the Collaborative Economy*, above n 43, 14 [2.5].

<sup>49</sup> European Commission, *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2016) 288 final, Brussels, 25 May 2016, 2 [2].

marketplace, accessible to its 2 billion users,<sup>50</sup> and many online videogames have long been running flourishing parallel markets.<sup>51</sup>

When online platforms perform as marketplaces, not only is the provider of a social network such as Facebook a provider of the service and hence a taxable person for VAT purposes, but so are also the recipients of these services.<sup>52</sup> For example, users registered on Facebook may in turn become providers through their use of the social network as a platform for the marketing and sale of products or services.<sup>53</sup> In such situations, when the sale of products or services is involved, users also may become taxable persons for VAT purposes, as they normally would in a traditional marketplace. A street market or the Facebook market should be, from the perspective of VAT, just two markets. In this context social networks function only as the platform enabling the market to exist.<sup>54</sup>

The European Commission also maintains that a characteristic of these new supplies is that they are often provided by private individuals offering assets or services on an occasional peer-to-peer basis, among consumers/users themselves.<sup>55</sup> This is in line with the OECD's BEPS report stating that the reliance on consumer-to-consumer or C2C transactions is a defining characteristic of the digital economy.<sup>56</sup>

Nevertheless, EU legislation does not provide guidance as to how to draw a distinction between what could be termed peer or amateur providers and professional service providers.<sup>57</sup> This is indeed a new scenario, which EU VAT legislators are not only unprepared for, but may also be unaware of entirely. While scholars argue that the current VAT framework does not regulate distribution based on user participation,<sup>58</sup> traditional VAT rules are found to be inadequate<sup>59</sup> to both describe and regulate phenomena such as co-production, barter-type transactions,<sup>60</sup> and peer-to-peer dealings. Alternative approaches should be considered to fill the regulatory gap and capture, where appropriate, those peer modes of production forming part of the digital economy

<sup>50</sup> Josh Constine, 'Facebook Now Has 2 Billion Monthly Users... and Responsibility', *TechCrunch* (27 June 2017), <https://techcrunch.com/2017/06/27/facebook-2-billion-users/> (accessed on 12 June 2019).

<sup>51</sup> Fox Van Allen, 'Congressional Report Says You "May" Owe Taxes On Your WoW Income', *Engadget* (19 June 2013), <https://www.engadget.com/2013/06/19/congressional-report-says-you-may-owe-taxes-on-your-wow-income/> (accessed on 12 June 2019). See also Leandra Lederman, "'Stranger Than Fiction": Taxing Virtual Worlds' (2007) 82(6) *New York University Law Review* 1620.

<sup>52</sup> Cristina Trenta, 'EU Regulation 2016/679: The Age of Consent and Possible VAT Consequences When Accessing Information Society Services' (2018) 68(3) *Skattenytt* 90.

<sup>53</sup> Pedro Alberto De Miguel Asensio, 'Social Networking Sites: An Overview of Applicable Law Issues' (2011) XX *Annali Italiani del Diritto d'Autore, della Cultura e dello Spettacolo (AIDA)* 3; Juan C Yelmo, José M del Álamo and Rubén Trapero, 'Privacy and Data Protection in a User-Centric Business Model for Telecommunications Services' in Simone Fischer-Hübner et al (eds), *The Future of Identity in the Information Society* (Springer, 2008) 447.

<sup>54</sup> European Union, Article 29 Data Protection Working Party, above n 46, 4-5 [2]; Gerald C Kane et al, 'What's Different About Social Media Networks? A Framework and Research Agenda' (2014) 38(1) *MIS Quarterly* 274.

<sup>55</sup> European Commission, *A European Agenda for the Collaborative Economy*, above n 43, 5 [2.1].

<sup>56</sup> OECD, *Action 1 – 2015 Final Report: Addressing the Tax Challenges of the Digital Economy*, above n 3, 56 [4.2.1.3].

<sup>57</sup> European Commission, *A European Agenda for the Collaborative Economy*, above n 43, 5 [2.1].

<sup>58</sup> Giorgio Beretta, 'European Union: The European Agenda for the Collaborative Economy and Taxation' (2016) 56(9) *European Taxation* 400.

<sup>59</sup> Trenta, *Rethinking EU VAT*, above n 40.

<sup>60</sup> Cristina Trenta, 'Internet Search Engines – A VAT Analysis' in Marie Lamensch, Edoardo Traversa and Servaas van Thiel (eds), *Value Added Tax and the Digital Economy: The 2015 EU Rules and Broader Issues* (Kluwer Law International, 2016) 117.

that currently escape taxation<sup>61</sup> so that their economic value added is brought back into national tax revenue streams.

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

Directive 2017/2455 introduces a further change also applicable to e-services in its article 242A, entering into effect from 1 January 2021. This provision prescribes additional administrative requirements for taxable persons who facilitate the supply of goods or services to a non-taxable person within the Community by means of a platform. The taxable persons are required to keep ‘sufficiently detailed’ records of these transactions, which will result in an increase of their administrative burden:

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

In 2018, the VAT Expert Group stated a need for the meaning of the expression ‘facilitate’ to be clarified<sup>62</sup> and for a stricter definition of the terminology to be provided as part of the implementing measures within the Council Implementing Regulation (EU) No 282/2011.<sup>63</sup> The VAT Expert Group maintains that issues may arise in respect to when a situation fulfils the conditions for a taxable person to be considered as facilitating sales through the use of an ‘electronic interface’. Very similar concerns have been shared by the Group on the Future of VAT<sup>64</sup> and it must be said that these preoccupations are not without merit. Another problem lies in the intrinsic difficulty in defining the role of internet-based intermediaries using traditional categories. In its report entitled *The Economic and Social Role of Internet Intermediaries*,<sup>65</sup> the OECD has stressed how different the profile of internet economic operators is from traditional

<sup>61</sup> Maya Bacache et al, ‘Taxation and the Digital Economy: A Survey of Theoretical Models’, Technical Report, Paris School of Economics, Toulouse School of Economics and Telecom Paris Tech (2015) 30.

<sup>62</sup> European Commission, VAT Expert Group, ‘Council Directive EU 2017/2455 of 5 December 2017 Amending Directive 2006/112/EC and Directive 2009/132/EC As Regards Certain Value Added Tax Obligations for Supplies of Services and Distance Sales of Goods Article 2, Points (1) to (11) – General Provisions with Effect from 1 January 2021, Need for Implementing Provisions’, VEG No. 67, 18th Meeting, 5 February 2018, taxud.c.1(2018)588112, Brussels (29 January 2018), <https://circabc.europa.eu/sd/a/a48776a4-54cc-47b1-a05e-022b6de585ed/67%20%20-%20Dir%20EU%202017%202455%20-%20General%20provisions%20EN.pdf>.

<sup>63</sup> European Union, 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 March 2011, 1-22.

<sup>64</sup> European Commission, Group on the Future of VAT, ‘Council Directive EU 2017/2455 of 5 December 2017 Amending Directive 2006/112/EC and Directive 2009/132/EC As Regards Certain Value Added Tax Obligations for Supplies of Services and Distance Sales of Goods, Article 2, Points (1) to (11) – General Provisions with Effect from 1 January 2021, Need for Implementing Provisions’, GFV No. 61, 19th Meeting, 22 January 2018, taxud.c.1(2018)263510, Brussels (15 January 2018), <https://circabc.europa.eu/sd/a/65e5f279-1438-469f-9ac2-38349d2d67df/GFV%20061%20Dir%20EU%202017%202455%20Art%20%201%201%20-%20General%20provisions%20EN.pdf>.

<sup>65</sup> Karine Perset, *The Economic and Social Role of Internet Intermediaries* (OECD Publishing, 2010).



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,<sup>66</sup> 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.<sup>67</sup>

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,<sup>68</sup> a difficult and ultimately fruitless task as these continue evolving as part of the consolidation and maturation of the digital economy.<sup>69</sup> 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’,<sup>70</sup> an exemption from liability for intermediaries as information society service providers.<sup>71</sup> When these natural or legal persons play a technical role as a mere conduit for third party information,<sup>72</sup> or for the intermediary activities of data caching,<sup>73</sup> or for hosting information,<sup>74</sup> a limitation of liability applies.

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<sup>66</sup> Ibid 10.

<sup>67</sup> Trenta, *Rethinking EU VAT*, above n 40.

<sup>68</sup> Perset, above n 65, 11.

<sup>69</sup> Ibid 14.

<sup>70</sup> European Union, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), OJ L 178, 17 July 2000, 1-16.

<sup>71</sup> Ibid. See Recital 40: ‘[b]oth existing and emerging disparities in Member States’ legislation and case-law concerning liability of service providers acting as intermediaries prevent the smooth functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition’.

<sup>72</sup> Ibid art 12.

<sup>73</sup> Ibid art 13.

<sup>74</sup> Ibid art 14.

Furthermore, the Directive on electronic commerce has clearly introduced for these intermediaries a general prohibition in respect to the obligation to monitor the data which they cache, store, or transmit. Article 15 maintains that

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

The provision has been examined in detail by the European Court of Justice in the *Netlog* case.<sup>75</sup> The Court stated in that case that article 15

prohibits national authorities from adopting measures which would require a hosting service provider to carry out general monitoring of the information that it stores... In that regard, the Court has already ruled that that prohibition applies in particular to national measures which would require an intermediary provider, such as a hosting service provider, to actively monitor all the data of each of its customers... Furthermore, such a general monitoring obligation would be incompatible with Article 3 of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly.<sup>76</sup>

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

## 6. THE PROBLEM WITH CONSIDERATION

The European Commission has stated on more than one occasion that the ongoing digitalisation of the economy has created challenges for taxation policies. Tax legislation needs updating to keep abreast of the phenomenon<sup>77</sup> and still ensure fairness and support economic growth.<sup>78</sup>

Article 2 of the VAT Directive maintains that the supply of services for consideration will be subject to VAT. This fundamental VAT principle has been reinforced by the

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<sup>75</sup> *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, Case C-360/10, ECLI:EU:C:2012:85 (16 February 2012).

<sup>76</sup> *Ibid* [33]-[34].

<sup>77</sup> European Commission, *On the Follow-Up to the Action Plan on VAT Towards a Single EU VAT Area, Time to Act*, communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, COM(2017) 566 final, Brussels, 4 October 2017, 4 [2.1.1].

<sup>78</sup> European Commission, *A Fair and Efficient Tax System*, above n 2, 3.

ECJ in the *Hong Kong Trade Development Council* case.<sup>79</sup> 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.

In its response to a question relating to the VAT treatment of the sharing economy,<sup>80</sup> the VAT Committee has suggested that services provided by individuals through sharing economy platforms may in principle constitute economic activities and hence cause such individuals to constitute taxable persons. A case-by-case assessment would be necessary to ascertain whether or not such transactions fall within or outside the scope of VAT, an inevitable additional step required by the wide difference in the nature of transactions whenever supplies of goods or services are exchanged against other goods or services, and where consideration in money is absent.<sup>81</sup>

The latest changes to the EU VAT legislation leave the issue unresolved. The application of article 2 of the VAT Directive implies that free supplies do not fall within its scope, but this provision is very often at odds with the hybrid, ‘fuzzy’ nature of current digital services. Its strict interpretation ends up excluding *a priori* large parts of the digital economy from the scope of VAT. In this context, in the case of much of the digital economy, value is often generated through types of transactions<sup>82</sup> that are not taxed, or are very difficult to tax, under existing VAT rules.<sup>83</sup> For example, many of the services available on the internet are offered for free upon subscription: when dealing with such genuinely ‘free’ supplies (i.e., supplies in kind with no monetary consideration), taxation remains a problematic issue under the current VAT consumption system, even when the more recent changes introduced by Directive 2017/2455 are considered.

Nonetheless, it can be argued that the EU framework sees consideration in kind as a legitimate concept within its VAT perspective. This is clearly spelled out in the modified expression contained in article 2(a) of the Second Directive, which substituted ‘consideration’ for ‘payment’.<sup>84</sup> The logical corollary of this assumption is that operations for which consideration is paid in kind are not different from those for which consideration is paid in money, if it is possible to determine a monetary value for what is expressed in kind.<sup>85</sup> The ECJ has recently reiterated this principle in its ruling for the *Serebryannay* case, discussing how barter contracts fall within the scope of VAT:

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<sup>79</sup> *Staatssecretaris van Financiën v Hong-Kong Trade Development Council*, Case 89/81, ECLI:EU:C:1982:121 (1 April 1982), [11].

<sup>80</sup> European Commission, Value Added Tax Committee, ‘Question Concerning the Application of EU VAT Provisions’, taxud.c.1(2015)4370160, Brussels, 22 September 2015.

<sup>81</sup> *Ibid* 11 [3.3].

<sup>82</sup> Trenta, *Rethinking EU VAT*, above n 40.

<sup>83</sup> Bacache et al, above n 61, 30.

<sup>84</sup> European Union, Directive 2006/112/EC, above n 26, art 2(1)(a) and (c).

<sup>85</sup> *Staatssecretaris van Financiën v Association coopérative ‘Coöperatieve Aardappelenbewaarpplaats GA’*, Case 154/80, ECLI:EU:C:1981:38, [13].

Barter contracts, under which the consideration is by definition in kind, and transactions for which the consideration is in money are, economically and commercially speaking, two identical situations.<sup>86</sup>

The VAT Directive, not differently from the Sixth Directive, recognises that consideration can take many forms and not just a monetary one. This is seen, for example, in the case of a reciprocal supply of goods, a reciprocal performance, or the refraining from performing some acts. The ECJ maintains that the mere fact that consideration might be in kind does not change its legal status,<sup>87</sup> as the VAT Directive does not differentiate between alternative forms of consideration:

No distinction between consideration in money and consideration in kind is drawn... for those provisions to apply it is sufficient if the consideration is capable of being expressed in money... Since the two situations are, economically and commercially speaking, identical, the Sixth Directive treats the two kinds of consideration in the same way.<sup>88</sup>

As things stand today, this remains an interpretation that finds commentators divided.<sup>89</sup> Observers are left with either the laborious case-by-case assessment work suggested by the VAT Committee, made worse by even more confusing recent legislation, or with considering the digital economy a treacherous and unfair playground that cannot or should not be regulated, two opposing views that do not help solving the practical problems of operators nor the policy preoccupations of the EU.

## 7. CONCLUSIONS

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

Further to this analysis, it can also briefly be noted that the European academic debate has so far manifestly missed a rather important point. The discussion on VAT has centred by and large on a narrowly-focused assessment or re-assessment of the role of the destination vs. origin principle of VAT. However, '[t]he tax challenges raised by the digital economy include, but are not limited to, base erosion and profit shifting':<sup>90</sup> as digital technology becomes a commodity, phenomena such as peer-to-peer<sup>91</sup> or co-creation<sup>92</sup> activities are reshaping the traditional economic and social landscape. It is

<sup>86</sup> *Serebryannay vek EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalna agentsia za prihodite*, Case C-283/12, ECLI:EU:C:2013:599 (26 September 2013), [39].

<sup>87</sup> *Goldsmiths (Jewellers) Ltd v Commissioners of Customs and Excise*, Case C-330/95, ECLI:EU:C:1997:339. See also A. Comelli, 'Corrispettivo in natura: rimborso dell'IVA in caso di mancato pagamento totale o parziale', *GT – Rivista di giurisprudenza tributaria*, no. 3, 1998, p. 226.

<sup>88</sup> *Ibid* [23].

<sup>89</sup> Björn Westberg, 'European Value Added Taxation of the Digital Economy' in Karina Kim Egholm Elgaard, Dennis Ramsdahl Jensen and Henrik Stensgaard (eds), *Momsloven 50 år: Festschrift i anledning af 50 års jubilæet for Danmarks første momslov* (Ex Tuto, 2017) 219.

<sup>90</sup> Jinyan Li, 'Protecting the Tax Base in the Digital Economy', Papers on Selected Topics in Protecting the Tax Base of Developing Countries No. 9, United Nations (2014).

<sup>91</sup> Trenta, *Rethinking EU VAT*, above n 40.

<sup>92</sup> Don Tapscott and Anthony D Williams, *Wikinomics: How Mass Collaboration Changes Everything* (Portfolio, 2010).

then even more unfortunate that this broadening is seldom if at all ever considered either in national or European tax commentary when discussing VAT.

A worrying trend is emerging that simply treats the digital economy, and the role of VAT within it, as if it were a new, rebranded version of e-commerce, going through the same motions and reprising conversations from the late 1990s when mainstream commercial exploitation of the internet began and when the actors on the scene could be neatly and unequivocally identified in their roles of suppliers, distributors, and consumers.<sup>93</sup> Today's digital economy presents a far more nuanced and complex landscape. Traditional staples of tax law, such as the destination vs. origin principle, or the place of supply, are severely challenged by what people can now do efficiently, anonymously, and at scale, through technology.

The European Economic and Social Committee (EESC) in 2017 released an opinion discussing the 'Taxation of the Collaborative Economy – Analysis of Possible Tax Policies Faced with the Growth of the Collaborative Economy'.<sup>94</sup> The document argues that fiscal systems and tax regimes should be adapted to the changes brought on by the digital economy, with existing rules and principles adjusted for fairness, efficiency, and the equitable tax treatment of all economic operators. Tax legislation should not allow any disparity to exist between conventional forms of commerce and digital-based ones.

Peer-to-peer transactions are usually non-monetary, but at least theoretically they should be subject to VAT and the destination principle should find application.<sup>95</sup> In practice, many of these transactions present challenges to the concepts of territoriality or tax jurisdiction, as they see the participation in varying capacity of large numbers of anonymous individuals from many different parts of the world. Identifying individual responsibilities and contributions, which also vary through time and can be reconfigured easily and effortlessly via software, is a daunting enterprise.<sup>96</sup> As the EESC correctly observes, ascertaining the basic requirements of VAT could potentially be impossible in certain cases.

Services in the digital economy that do not require monetary payment but rely on the exchange of other benefits, such as for example a person's data and preferences, require a closer examination. The legal framework in this area is indeed presently unclear. The EESC maintains it would be important for the Commission to address and regulate these issues by introducing simplified rules so that VAT could present a more coherent application to the collaborative digital economy.<sup>97</sup> That technology should be neutral in respect to taxation is a long-standing OECD principle, first established in 1988 and confirmed in 2011.<sup>98</sup> Hence, it does not matter whether the business model relies on traditional organisational models or on newer constructs, since

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<sup>93</sup> Bacache et al, above n 61, 34.

<sup>94</sup> Council of the European Union, 'Opinion of the European Economic and Social Committee – Taxation of the Collaborative Economy – Analysis of Possible Tax Policies Faced with the Growth of the Collaborative Economy (Exploratory Opinion Requested by the Estonian Presidency)', 13925/17 FISC 247, Brussels, 6 November 2017.

<sup>95</sup> Ibid.

<sup>96</sup> Trenta, *Rethinking EU VAT*, above n 40.

<sup>97</sup> Council of the European Union, 'Opinion of the European Economic and Social Committee', above n 94.

<sup>98</sup> Ottawa Framework, above n 10. See also OECD, 'International VAT/GST Guidelines, Guidelines on Neutrality', Committee on Fiscal Affairs Working Party No. 9 on Consumption Taxes (2011).

taxation should seek to be neutral and equitable between new forms of electronic commerce and between conventional and electronic forms of commerce. Business decisions should be motivated by economic rather than tax considerations.<sup>99</sup>

In 1998, the EU Commission stated very similar principles in its preparatory work on *Electronic Commerce and Indirect Taxation*: legal certainty, simplicity, and keeping the burdens of compliance to a minimum were to be considered cornerstones in the field of VAT and e-commerce:

in order to allow electronic commerce to develop, it is vital for tax systems to provide legal certainty (so that tax obligations are clear, transparent and predictable)... Legal certainty enables commerce to be conducted in an environment where the rules are clear and consistent reducing the risks of unforeseen tax liabilities and disputes... Simplicity is necessary to keep the burdens of compliance to a minimum.<sup>100</sup>

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

Moreover, the EU VAT landscape does not ensure fiscal certainty for those economic operators working within the digital economy when they facilitate transactions by means of a platform: the text of article 242A unfortunately lacks the necessary clarity. The present situation could even be represented as having a human rights profile: the European Court of Human Rights has maintained that the law must be pronounced with sufficient clarity to ‘permit a taxpayer to regulate his conduct so that he would be aware of the consequences of the actions’.<sup>101</sup> It is worth remembering that article 6 of the Treaty on European Union<sup>102</sup> maintains that:

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

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<sup>99</sup> Ottawa Framework, above n 10, 4.

<sup>100</sup> European Commission, *Electronic Commerce and Indirect Taxation*, communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, COM(1998) 374 final, Brussels, 17 June 1998, 2 [1].

<sup>101</sup> European Court of Human Rights, *The Association of Jehovah’s Witnesses v France*, Application No. 8916/05 (30 June 2011). Commented on, and partially translated in, Philip Baker, ‘Some Recent Decisions of the European Court of Human Rights on Tax Matters’ (2012) 52(6) *European Taxation* 308.

<sup>102</sup> Consolidated Version of the *Treaty on European Union* (TEU), 2010 OJ C 83/01, art 2: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’.

Academic literature has defined ‘tax uncertainty’ as the uncertainty that arises because of new, unclear tax legislation coming into force,<sup>103</sup> stating that taxable persons have not only the right to know fiscal norms exist, but also the right to understand how these govern their business operations.<sup>104</sup> The increasing importance of the digital economy is clearly a factor impacting this clarity, as business models mutate and technology subverts long-standing assumptions, thus making the tax treatment of new economic transactions unexplored territory.<sup>105</sup>

The European Commission has also reminded Member States that the rule of law is one of the common values of the Union,<sup>106</sup> in accordance with article 2 of the TEU.<sup>107</sup> The principle is also imbued in the Charter of the Fundamental Rights, the Preamble to which states that ‘the Union... is based on the principles of democracy and the rule of law’.<sup>108</sup> Legal certainty and the predictability of EU legislation, hence including that of EU VAT law, are principles enshrined in the EU system by the rule of law: the ECJ’s own jurisprudence has repeatedly reaffirmed these fundamental criteria<sup>109</sup> and the necessity for precisely and clearly formulated norms.<sup>110</sup>

In the *Amministrazione delle Finanze dello Stato v Srl Meridionale Industria* case, the ECJ ruled that ‘the effect of community legislation must be clear and predictable for those who are subject to it’.<sup>111</sup> This principle is necessary since ‘rules imposing charges on the taxpayer must be clear and precise so that he may know without ambiguity what are his rights and obligations and may take steps accordingly’.<sup>112</sup>

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

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<sup>103</sup> Jan Sanders, ‘Recent VAT Implementations and the Rule of Law’ (2018) 29(1) *International VAT Monitor* 23.

<sup>104</sup> *Ibid.*

<sup>105</sup> Ernesto Zangari, Antonella Caiumi and Thomas Hemmelgarn, ‘Tax Uncertainty: Economic Evidence and Policy Responses’, European Commission, Taxation Papers, Working Paper No. 67 (2017) 9 [2].

<sup>106</sup> European Commission, *A New EU Framework to Strengthen the Rule of Law*, Communication from the Commission to the European parliament and the Council, COM(2014) 158 final, Brussels, 11 March 2014, 4 [2].

<sup>107</sup> TEU, above n 102, art 2.

<sup>108</sup> *Charter of Fundamental Rights of the European Union*, OJ C 326, 26 October 2012, 391-407.

<sup>109</sup> Juha Raitio, ‘The Principle of Legal Certainty as a General Principle of EU Law’ in Ulf Bernitz, Joachim Nergelius and Cecilia Cardner (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International, 2008) 58, quoting *SA Sermes v Directeur des services des douanes de Strasbourg*, Case C-323/88, ECLI:EU:C:1990:299.

<sup>110</sup> Raitio, above n 109, 59.

<sup>111</sup> *Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and Others*, Joined Cases 212 to 217/80, ECLI:EU:C:1981:270 (12 November 1981), [10].

<sup>112</sup> *Administration des douanes v Société anonyme Grand Frères and Société anonyme Garancini*, Case 169/80, ECLI:EU:C:1981:171 (9 July 1981), [17]. See also Des Taylor, ‘The European Union’s Approach to Legal Non-Retroactivity: Are There Problems for International Businesses?’ (2003) 8 *International Trade and Business Law Annual* 275, 280.

The current EU VAT system continues to struggle to keep up with the frantic pace of the digital economy,<sup>113</sup> producing either weak, unnecessary, or harmful legislation, or no legislation at all, even in the presence of well-established phenomena such as co-production or peer-to-peer activities. It is probably time to extend the reach of the VAT and permit further investigations to consider new and possibly unprecedented approaches: in the words of the Commission, ‘the time to act has now come’<sup>114</sup> for an efficient tax system in the EU Digital Single Market.

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<sup>113</sup> European Commission, *On the Follow-Up to the Action Plan on VAT Towards a Single EU VAT Area, Time to Act*, above n 77, 3 [1]. See also European Commission, *On an Action Plan on VAT – Towards a Single EU VAT Area – Time to Decide*, communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, COM(2016) 148 final, Brussels, 7 April 2016.

<sup>114</sup> European Commission, *A Fair and Efficient Tax System*, above n 2, 3.