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# **The scope of the EU VAT Directive: Transactions carried out via Video Sharing Websites**

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## **Abstract.**

Video Sharing Websites constitute a rather peculiar situation. On one hand, they are considered as part of what the Commission perceives as online sharing economy: users are eligible to derive income from monetizing their audiovisual content. On the other hand, their business model is reminiscent of what is described as “free -economy”: access to the audiovisual content is prima facie provided without any monetary consideration. While the Commission has published guidelines, in an effort to map the potential issues regarding the VAT Treatment of persons who conduct activities via sharing economy online platforms, its assessment focalized more on “digitalized” traditional activities. This inquiry is dedicated to raising the issues concerning the qualification as “supplies of goods or services for consideration”, of activities carried out via Video Sharing Websites, and of their provider as “taxable person”, for the purposes of EU VAT, in the light of the EU VAT Directive and the CJEU’s interpretation of these concepts.

## **List of Abbreviations**

<b>Ad server</b>	Advertising server
<b>Ad unit</b>	Advertisement unit
<b>AG</b>	Advocate General
<b>Art.</b>	Article/Articles
<b>B2B</b>	Business to Business
<b>CJEU</b>	Court of Justice of the European Union
<b>The Court</b>	-//-
<b>Commission</b>	European Commission
<b>CPE</b>	Cost-per-Engagement
<b>CPC</b>	Cost-per-Click
<b>CPM</b>	Cost-per-thousand impressions
<b>EU</b>	European/ European Union
<b>EUVD</b>	European Vat Directive (Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006)
<b>NMCVC</b>	Non-monetary Customer Valued Contributions
<b>Pag.</b>	Page/Pages
<b>Par.</b>	Paragraph/Paragraphs
<b>Subpar.</b>	Subparagraph
<b>Subs.</b>	Subsequently

<b>VAT</b>	Value-added-tax
<b>WoM</b>	Word-of-Mouth
<b>eWoM</b>	electronic Word-of-Mouth

# 1. INTRODUCTION

## 1.1. Background.

It is an undeniable fact that the digitalization of the economy has taken the world by storm.<sup>1</sup> The rise of online platforms, such as *Uber* and *Airbnb*, has established a new playing field for businesses and individuals alike. The rapid development of alternative online marketplaces is now forcing traditional operators to shift their business models to adapt to the new status- quo, while giving birth to a new age of entrepreneurs, who benefit from their digital infrastructure and networking to perform commercial activities that would otherwise be unable to conduct.<sup>2</sup>

This phenomenon has been grasped by the European Commission (henceforth the Commission), which has defined it as “collaborative” or “sharing economy”. Within the latter’s notion fall all undertaking models which exhibit the defining element of establishing an online open marketplace which permits the “*temporary usage of goods or services*” that are commonly provided by private individuals (peers) to users, on an irregular basis. Within that context, online platforms are regarded as intermediaries, since they provide the means necessary for establishing a transactional relationship between peers and users.<sup>3</sup> Hence, they have been ascribed the term “collaborative” or “sharing” economy platforms.<sup>4</sup>

The range of goods or services that are provided via sharing economy platforms is very broad. It extends from transportation or accommodation, all the way up to credit and finance services. Otherwise traditional activities have now been digitalized and rendered effortlessly accessible by the public<sup>5</sup>.

Nevertheless, a rather intriguing aspect of the digital economy concerns the sharing of audiovisual material through online platforms. The latter, commonly referred to as Video Sharing Websites<sup>6</sup> (henceforth VSW), such as *Youtube*, *Vimeo* or *TwitchTv*, enable users to watch and share audiovisual content uploaded by other users, while being eligible to upload content of their own.<sup>7</sup>

What renders them relatively unique compared to others is the fact that ordinarily, the user’s service is provided for free. In addition, benefiting from the platform’s

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<sup>1</sup> 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, pag. 1.

<sup>2</sup> I. Grlica, *How the Sharing Economy Is Challenging the EU VAT System*, 28 Intl. VAT Monitor 2 (2017), Journals IBFD. Introduction.

<sup>3</sup> 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, pag. 3

<sup>4</sup> Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy, Introduction, page. 2/12

<sup>5</sup> Grlica, *How the Sharing Economy Is Challenging the EU VAT System*, 28 Intl. VAT Monitor 2 (2017), Journals IBFD Chapter 6.

<sup>6</sup> As defined by Yourdictionary.

<sup>7</sup> As defined by the website for technologic terminology Techterms .

infrastructure also comes at no cost for the users.<sup>8</sup> However, several websites have introduced mechanisms that permit users to generate income from their content, usually referred to as “*partnership programs*”. This procedure is generally defined as “*monetization*”, and it encompasses both direct (where access to the content is conditional upon payment) and indirect (via the placement of advertisement banners) means of gaining revenue.<sup>9</sup> Given their predominant position in the economy and their vast popularity amongst the general masses, the monetization mechanism enabled considerable number of users to become afternoon entrepreneurs. In fact, several of them have reached such a level of success, that allows them to generate millions in revenue on an annual basis.<sup>10</sup>

## **1.2 Purpose.**

The importance of the sharing economy has been acknowledged and discussed by the European Commission on its working document “*A Single Digital Market Strategy for Europe*”<sup>11</sup>. On the field of the European Value Added Tax, the Commission through the VAT Committee, has issued the Working Paper No. 878, regarding the VAT treatment of the provision of goods or services via sharing economy platforms.<sup>12</sup>

While the Commission has provided for a descriptive assessment of the potential VAT implications of the sharing economy, the author holds the view that the aspect of VSW was apparently absent from that analysis. Albeit acknowledging that these platforms constitute a part of the overall sharing economy sector, it did not discuss the issues regarding the classification of peers as taxable persons for VAT within that specific context. On the contrary, it seemingly used as basis for that assessment digitalized “traditional activities”, such as transportation or accommodation services,<sup>13</sup> which, by virtue of their nature, should be differentiated from those relating to audiovisual content.

Therefore, the purpose of the current paper is to assess whether activities conducted via VSWs can qualify as “supplies of goods or services for consideration” for VAT purposes, and if their provider (peer) can acquire the legal status of “taxable person” for VAT, while bringing up the issues relating to these concepts, as developed and interpreted by the Court of Justice of the European Union (henceforth the CJEU) in its jurisprudence. Whether the two concepts are now clear in relation to VSWs activities

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<sup>8</sup> Users are a click away for accessing and watching the hosted audiovisual content

<sup>9</sup> See for instance the Youtube and Twitchtv partnership programs

<sup>10</sup> As listed by Forbes in 2015

<sup>11</sup> Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions A Digital Single Market Strategy for Europe {SWD(2015) 100 final}, also Commission Staff Working Document A Digital Single Market Strategy for Europe - Analysis and Evidence Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Single Market Strategy for Europe, SWD(2015) 100 final.

<sup>12</sup> Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy

<sup>13</sup> Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy, see footnotes no 4,13,21,29,38.



is discussed and the case law of the CJEU is assessed critically in light of this discussion.

### 1.3 Method and Materials.

The legal research method that will be employed for the purposes of this analysis is the legal dogmatic method. In order to provide for an answer to the issues arising from this paper, it is of necessity to consider and analyze the law as it currently stands, and as it is established by written or unwritten sources such as European Law, international law, principles and doctrines, jurisprudence, and academic literature.<sup>14</sup>

Therefore, the main axis of this paper's analysis shall be comprised of the EU VAT Directive as it currently stands, as well as the CJEU's jurisprudence on the VAT concepts of "supply of goods or services for consideration" and "taxable person". In addition, opinions of Advocate Generals (henceforth AG) of the CJEU alongside academic literature on these concepts shall be employed, as they will provide for a useful tool to crystallize their notions.<sup>15</sup>

Given the nature of the VSWs as sharing economy platforms, the Commission's publications on the subject of online economy shall be taken into account. While non-legally binding in nature, they constitute the main commentaries on the VAT treatment of the new phenomenon on a European Union level. Additionally, academic literature on said subject shall be considered and used as a basis for reflection and criticism of the Commission's views.

Taking into account the contemporary nature of the online economy, resorting to sources extrinsic to the field of tax law, such as academic literature on the fields of advertising, business, and marketing, as well as online sources (VSW and Adserver websites, online dictionaries, online magazines and databases) is necessary for the purposes of this inquiry. Comprehending the function of said economy will facilitate the analysis of the activities which take place within the former's context, from the perspective of the EU VAT.

This thesis is structured around transactional scenarios, which will henceforth be referred to as models. As such, it is influenced by methods familiar to law and economics researches.<sup>16</sup>

These models will serve as a factual framework to compliment the legal analysis, and to clarify the complex function of VSWs. Their concept has been developed on the basis of the Commission's depiction of the function of sharing economy platforms.<sup>17</sup> In

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<sup>14</sup> Douma, S, *Legal Research in International and EU Tax Law* (Kluwer 2014) pag. 18.

<sup>15</sup> For instance *W M van Tiem v Staatssecretaris van Financiën* [1989] Court of Justice of the European Union (Court of Justice of the European Union). C-186/89 ECLI:EU:C:1990:429, Opinion Of Advocate General Lenz, ECR I-4363 regarding the prerequisite of continuity in an activity's conduct.

<sup>16</sup> Q. Jiang & Y. Yuan, *Legal Research in International and EU TaxLaw*, 54 Eur. Taxn. 10 (2014), Journals IBFD, Chapter 3, pag. 7

<sup>17</sup> Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy pag. 4/12-8/12.

addition, it was influenced by the way several VSW describe the transactions that take place within their framework, in their relevant contractual terms and conditions of use<sup>18</sup>. The latter will additionally be employed for the clarification of the relationship between peers and VSWs.

#### **1.4. Delimitation.**

The VAT treatment of the supply of services by the VSW to either the provider or the recipient of the audiovisual material will not be discussed, to the extent that they do not apt to this paper's core analysis. Any transactions that involve payments, conducted by either the VSW or by an affiliated or unaffiliated credit platform will be excluded from this analysis. While the VSW are considered to per se possess the role of an intermediary in the transactions between user and customer<sup>19</sup>, the position of the VSW for VAT purposes will be mentioned, but not thoroughly analyzed.

To conclude with, this paper is selective with regards to the case-law of the CJEU. Thus, the cases that bear the most doctrinal significance to the subject matter will be employed, as well as those which the Commission has denoted as being the most relevant when addressing the VAT implications of transactions that take place within the sharing economy's environment.

#### **1.5 Outline.**

The first part of this thesis (Chapter 2) is dedicated to laying down the general characteristics of the EU VAT, and a general overview of the subjective and objective scope of application of the EUVD, while providing for the necessary analysis of the concepts of "supply for consideration" and "taxable person" for VAT. The interim chapter will include a general description of the transactional models, which the author deems necessary for understanding the basic functions of transactions effected via a VSW.

The penultimate chapter (Chapter 4) of this analysis will deal with the assessment of the reward based models, i.e. where the peer is providing services against monetary remuneration. Prior to the final chapter's analysis, the issues revolving around the notion of these concepts will be addressed.

The ultimate chapter (Chapter 5) is focused on analyzing the possibility of a peer being engaged in barter transactions for VAT purposes, when he initially provides audiovisual content without monetary consideration. A conclusion of this paper will follow, in which the author will briefly recapture the issues that arose during the course of this inquiry, while providing for the author's final thoughts on potential solutions.

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<sup>18</sup> For instance the Terms of service of VSW such as Youtube, Twitchtv.

<sup>19</sup> Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy pag. 3.

## 2. THE SCOPE OF APPLICATION OF THE EUROPEAN VALUE ADDED TAX

### 2.1 General Characteristics

The European Valued Added Tax Directive defines the VAT as a general tax on consumption.<sup>20</sup> The EU VAT is general tax, unlike excises, for instance, that are specific taxes, in the sense that they are levied only on certain goods<sup>21</sup>. As the EUVD stipulates, VAT is levied on all stages of production and distribution, in an exactly proportionate manner, and encompasses all activities that constitute supplies of goods or services for VAT purposes<sup>22</sup>, unless explicitly provided for an exemption or when the transaction falls, by virtue of its nature, outside the scope of its application<sup>23</sup>.

While the EU VAT is a consumption tax, it is not the actual consumption that it is aimed to be taxed. As *Terra* and *Kajus* have argued, consumption taxes do not deal with “the adventures of the product”, i.e. if a beverage has been fully or partially consumed. Rather than that, it is the expenditure that leads to the attainment of that consumption that is relevant. Hence, VAT can be defined as a general tax on the consumption’s expenditure<sup>24</sup>.

Nevertheless, not all activities constitute taxable supplies for VAT purposes. For an activity to fall within the scope of its application, certain prerequisites must be met. Specifically, an activity will be subject to VAT insofar as it qualifies as a supply for consideration (objective scope), and it is conducted by a taxable person (subjective scope)<sup>25</sup>.

### 2.2 The Objective Scope

#### 2.2.1. Supplies of goods or services for consideration

To begin with, pursuant to art. 14 par. 1 of the EUVD, an activity will constitute a supply of goods when the supplier transfers the right to dispose of tangible property as owner.<sup>26</sup> Conversely, an activity that is not classified as a supply of goods will

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<sup>20</sup> Article 1 par.2 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006.

<sup>21</sup> Article 1 of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC.

<sup>22</sup> Article 1 par.2 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006.

<sup>23</sup> A.J. van Doesum & G-J. van Norden, *The Right To Deduct under EU VAT*, 22 Intl. VAT Monitor 5 (2011), Journals IBFD 323-324, accordingly “by virtue of the nature” is to be understood as that the supplies do not qualify as supplies for consideration, effected by a taxable person.

<sup>24</sup> Terra, B. and Kajus, J. (2017). *Introduction to European VAT (Recast), Commentaries on European VAT Directives*. Chapter 7.2.2, 7.2.1. Amsterdam: IBFD Publications. Also Article 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006.

<sup>25</sup> Article 2 par. 1 (a)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006, see also A.M. Bal, *The Vague Concept of “Taxable Person” in EU VAT Law*, 24 Intl. VAT Monitor 5 (2013), Journals IBFD, page 294.

<sup>26</sup> Article 14 par. 1 (a)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006.

constitute a supply of services.<sup>27</sup> Regardless of that classification, the activity must also be carried out for consideration, in order to be regarded as taxable for VAT.

The consideration given in return for the provision of goods or services is established as the basis of assessment of VAT. As the EUVD denotes in article 73, the taxable amount for VAT shall include everything that constitutes “consideration obtained or to be obtained by the supplier, including subsidies” that are directly linked to the price of the supply. Thereby, VAT is calculated based on the amount of the received consideration or, in other words, on the value of that consideration.<sup>28</sup>

It follows that the consideration’s value, is in principle, the subjective one, in the sense that is the consideration actually given in return for a supply, and not the one determined on the basis of objective criteria<sup>29</sup>. Nevertheless, the EUVD does in fact includes provisos that, under circumstances, permit the objective valuation of a transaction. That would be the case, for example, of the application of the open market value to determine the taxable amount for VAT, in case of tax evasion or avoidance.<sup>30</sup>

Therefore, the qualification of a provision of goods or services as a taxable supply for VAT requires that a remuneration is present. This prerequisite was emphasized by the CJEU in the case of *Hong Kong Development*. In that case, the CJEU held that activities that are carried out exclusively for free must be differentiated from those in which a price or consideration has been stipulated. Within the framework of VAT, the latter constitute taxable transactions. Conversely, it follows that the former fall outside the scope of VAT; in the absence of consideration, there is no basis of assessment, hence the activity will not be subject to VAT.<sup>31</sup>

Notwithstanding the aforementioned, activities carried out for free do not necessarily escape VAT. The EUVD explicitly provides that supplies free of charge may, under circumstances, be treated as supplies subject to VAT.<sup>32</sup>

However, within the framework of VAT, the mere presence of a price agreed and paid in return for a provision of goods or services does not suffice for its classification as a

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<sup>27</sup> Article 24 par.1 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006

<sup>28</sup> Article 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006

<sup>29</sup> *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA* [1981] Court of Justice of the European Union (Court of Justice of the European Union) C-154/80, ECLI:EU:C:1981:38, par. 13, *Naturally Yours Cosmetics Ltd and Commissioners of Customs and Excise* [1988] Court of Justice of the European Union (Court of Justice of the European Union) C-230/87 ECLI:EU:C:1988:508 par 16., *Hotel Scandic Gåsabäck* [2005] Court of Justice of the European Union (Court of Justice of the European Union), C-412/03, ECLI:EU:C:2005:47 par. 21

<sup>30</sup> Article 80 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006

<sup>31</sup> *Staatssecretaris van Financiën v Hong-Kong Trade Development Council* [1982] Court of Justice of the European Union (Court of Justice of the European Union) C-89/81, ECLI:EU:C:1982:121 par 10

<sup>32</sup> Articles 16 and 26 par. 1 (b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006

supply for consideration. The CJEU in its settled case law, has developed an additional criterion: the direct link between supply and remuneration.

### 2.2.2. The direct link criterion

The prerequisite of the direct link was firstly developed by the CJEU in the benchmark case of *Coöperatieve Aardappelenbewaarplaats GA*<sup>33</sup>. The latter revolved around the dispute between a Dutch Cooperative and the tax authorities, which consider that in the case of an agricultural cooperative not charging storage fees to its members for a period of two years, the latter was supplying services for consideration. Specifically, the tax authorities held the view that the reduction of the value of the members shares, resulting from the absence of storage charges, constituted consideration given in return for the supply of storage facilities.

The CJEU, in its decision, held that no VAT was due on the cooperatives activities, since no consideration was present. The Court's reasoning against the tax authorities view was based on three criteria: a) the notion of consideration should be defined by community, and not by national, law. b) a direct link needs to be established between the supply and the consideration received and c) the latter must be able to be expressed in money<sup>34</sup>. In subsequent cases, the CJEU proceeded to further elaborate on the notion of the direct link.

In *Apple and Pear*,<sup>35</sup> the Court held that, activities concerning advertisement, promotional or provision of incentives to improve product quality, by a body to fruit growers against a levy that was imposed by a statutory instrument, were not supplies subject to VAT. The Court motivated its decision based on three main arguments: a) the benefits derived from the body's activities accrued to the whole industry and any individual benefit from these activities emanated indirectly from the accrued benefits. b) no relationship existed between the amount paid and the benefit received and c) the levy was regulated by law and it was payable irrespective of the derivation of any benefit.<sup>36</sup>

In the case of *Tolsma*<sup>37</sup>, the Court concluded that a musician, who performs on the street and thereby receives voluntary donations by passers-by, is not supplying services for consideration. Essentially, the Court held that a supply is effected for consideration only if “*there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient*” (italics added).<sup>38</sup>

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<sup>33</sup> *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA* (no.29)

<sup>34</sup> *Ibid*, paras 9 -13

<sup>35</sup> *Apple and Pear Development Council v Commissioners of Customs and Excise* [1988] Court of Justice of the European Union (Court of Justice of the European Union) C-102/86, ECLI:EU:C:1988:120 par.15, also paras 14 and 16.

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

<sup>37</sup> *R J Tolsma and Inspecteur der Omzetbelasting Leeuwarden* [1994] Court of Justice of the European Union (Court of Justice of the European Union) C-16/93, ECLI:EU:C:1994:80

<sup>38</sup> *Ibid* par. 14

Following that judgement, a direct link can only be established if an obligation to pay exists, that stems from a legal relationship between the transactional parties<sup>39</sup>. Furthermore, that relationship must also be reciprocal, in the sense that a reciprocal performance and counter performance, on behalf of the supplier and the recipient, must be evident.

In *Bastova*, the CJEU dismissed the existence of a direct link between the supply of horses to a stable owner that organized horse racing competitions, in return for a monetary prize. In the Court's view, the award of said prize was conditional upon the achievement of a specific result, and not upon the supply of a horse by itself. Therefore, the fact that the stipulated consideration was dependent upon the performance of the provided horse, was deemed by the Court as creating such an uncertainty between the supply of horses and the receipt of consideration in the form of price money, that precluded the manifestation of a direct link.<sup>40</sup>

### **2.2.3 The effects of the level of consideration on the direct link**

It could be inferred from the preceding analysis that the amount of remuneration charged should not have an effect the existence of a direct link between the latter and the supply given in exchange; the value for VAT is, in principle, the subjective one and the direct link is dependent only upon the presence of a legal and reciprocal relationship<sup>41</sup>. However, the CJEU relevant case law appears to be convoluted.

On one hand, in the case of *Hotel Scandic*, the CJEU held that the provision of meals by a hotel to its employees at a price that was below the cost constituted a supply of services for consideration. The fact that an activity might be carried out at a price that exceeds or is below the cost price was irrelevant for its classification as being effected for consideration. Insofar as a price was stipulated, and a legal and reciprocal relationship was manifest, the supply should be subject to VAT.<sup>42</sup>

Furthermore, in the case of *Campsia Estaciones de Servicio*, the CJEU reiterated its findings in *Hotel Scandic*. The CJEU specifically had to elaborate on a dispute revolving the calculation of the taxable amount of VAT in a transaction that took place between interconnected parties, for a price that was lower than the market price. Based

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<sup>39</sup> Deborah Butler, 'The Usefulness Of The 'Direct Link' Test In Determining Consideration For VAT Purposes' (2004) 13 EC TAX REVIEW, Chapter 2: Use of the Direct link Test to determine whether there is any consideration, page 93 par. 8. See also *Serebryannay vek EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' — Varna pri Tsentralno upravlenie na Natsionalna agentsia za prihodite* [2013] Court of Justice of the European Union (Court of Justice of the European Union) C-283/12, ECLI:EU:C:2013:599 par. 37

<sup>40</sup> *Odvolači finanční ředitelství v Pavlína Baštová* [2016] Court of Justice of the European Union (Court of Justice of the European Union) C- 432/15, ECLI:EU:C:2016:855, par. 37

<sup>41</sup> *UAB "Sveda" v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos* C-126/14 ECLI:EU:C:2015:712, Opinion of Advocate General Kokott, delivered on 22 April 2015, ECLI:EU:C:2015:254, *Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele* [2016] C-520/14, Opinion Of Advocate General Kokott, delivered on 23 December 2015, ECLI:EU:C:2015:855, ref. inter alia to the decisions in *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA* (no.29), par. 13, *Hotel Scandic Gåsabäck* (no.29) par. 21.

<sup>42</sup> *Hotel Scandic Gåsabäck* (no.29) paras 22-24.

on the decision in *Hotel Scandic*, the Court held that the fact that the price charged was lower than the market price was immaterial for the classification of the relative activity as being carried out for consideration<sup>43</sup>. In addition, in its recent decision in *Woerden*, the CJEU did not question that a supply of a building at a price of 10% of the incurred costs constituted a supply for consideration for VAT purposes<sup>44</sup>.

On the other hand, in *Commission vs Finland*, a case revolving around the Finnish legal aid scheme, the CJEU dismissed the existence of a direct link between the remuneration given and the supply of legal aid, when the latter was provided by public -instead of private - advisers. The Court motivated its answer based on the fact that the amount of the consideration charged was calculated on the basis of the recipients personal and financial circumstances, and it was insufficient to cover the actual costs of the legal services<sup>45</sup>. The Court reiterated this reasoning in the case of *Borsele*. There, the Court held that a supply of transportation services to students, on behalf of the municipality of *Borsele*, was not a supply for consideration, due to the fact that the price charged was calculated on the basis of their parents financial circumstances<sup>46</sup>.

Furthermore, in the case of *Lajver*, the CJEU delivered a rather ambiguous decision. While reiterating the doctrine laid down in the case of *Hotel Scandic*, it did not preclude that a direct link may be called into question, where the supply of agricultural engineering works by the applicant companies to its members ends up being partially remunerated and the amount of the charged fee was determined by other factors.<sup>47</sup>

Nonetheless, activities carried out for a purely symbolic consideration might per se fall outside the scope of VAT. As the Court held in the case of *Commission vs France*, remuneration of a nominal nature might be regarded more as a concession to the consumer and less as a consideration.<sup>48</sup>

To summarize with, an activity will be classified as a supply of goods or services for consideration, hence be taxable, only if it is carried out in return for direct remuneration. Nevertheless, it must also be carried out by a taxable person, acting as such.

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<sup>43</sup> *Campsa Estaciones de Servicio* [2011] Court of Justice of the European Union (Court of Justice of the European Union) C-285/10, ECLI:EU:C:2011:381, par. 16 paras 25-28.

<sup>44</sup> Roland Ismer, 'Case C-520/14, ECLI:EU:C:2016:334 – Gemeente Borsele; C-263/15, ECLI:EU:C:2016:392 – Lajvér; C-11/15, ECLI:EU:C:2016:470 – Český Rozhlas On The Concept Of Consideration For The Supply Of Services And On The Concept Of Economic Activity By Public Bodies And Entities Receiving Public Funding' (2016) 5 World Journal of VAT/GST Law, 111-120, DOI: 10.1080/20488432.2016.1236532, Conclusion, par.1 footnote n.29, p.119 ref. to *Gemeente Woerden v Staatssecretaris van Financiën* [2016] C-267/15 ECLI:EU:C:2016:466

<sup>45</sup> *Commission of the European Communities v Republic of Finland* (no.45) par. 44 -51.

<sup>46</sup> *Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele* [2016] C-520/14, ECLI:EU:C:2016:334, par. 32-34.

<sup>47</sup> *Lajvér Meliorációs Nonprofit Kft, Lajvér Csapadékvízrendezési Nonprofit Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV)* [2016] Court of Justice of the European Union (Court of Justice of the European Union) C- 263/15, ECLI:EU:C:2016:392 par.42-47.

<sup>48</sup> *Commission of the European Communities v French Republic* [1998] Court of Justice of the European Union (Court of Justice of the European Union) C-50/87, ECLI:EU:C:1988:429, par. 21.

## 2.3. THE SUBJECTIVE SCOPE

### 2.3.1 THE CONCEPT OF TAXABLE PERSON FOR VAT

The concept of taxable persons signifies the subjective scope of the EU VAT. It is an independent concept of EU VAT law, and as such, must be differentiated from similar concepts that might exist in other fields of law, i.e. commercial or civil law. Therefore, its interpretation must be carried out accordingly, so as it ensures the uniform application of the EUVD.<sup>49</sup>

To continue with, the EUVD contains, under the proviso of article 9 par. 1, a definition of the notion of “taxable persons”. According to the latter, “*any person who, independently, carries out, in any place, any economic activity, whatever the purpose or results of that activity*” shall be regarded as a taxable person for VAT purposes.<sup>50</sup> It stems from the wording of the proviso that the notion of taxable person has a very broad definition.<sup>51</sup>

### 2.3.2 Subjective and Territorial Scope

Firstly, there is no restriction as to which kind of “persons” may fall within the scope of VAT. In fact, the CJEU has already held that all persons are eligible to be classified as being taxable persons. Their status as natural or legal, public or private, bears no effect on that classification. Even entities devoid of legal personality can acquire the status of taxable person<sup>52</sup>.

Secondly, the definition of taxable person does not include any territorial limitations to its scope. In other words, the qualification of a person as taxable is not dependent on its status as being a resident or established in a Member State of the European Union; The EU VAT concept of taxable person is a global one<sup>53</sup>.

In any case, a person will qualify as taxable only if it performs economic activities, and does so in an independent manner.<sup>54</sup>

### 2.3.3. Independently

With regards to the requirement that an economic activity must be carried out “independently”, the EUVD stipulates, under article 10, that activities of employed persons or of any other persons that are either contractually bound to an employer or legally tied, in a way that establishes an employer-employee relationship, shall not be

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<sup>49</sup> A.M. Bal, *The Vague Concept of “Taxable Person” in EU VAT Law* (no. 26), see also *Velvet & Steel Immobilien und Handels GmbH v Finanzamt Hamburg-Eimsbüttel*. [2007] (Court of Justice of the European Union) C-455/05, ECLI:EU:C:2007:232, par. 15-16 and the case law cited therein.

<sup>50</sup> Art. 9 par. 1 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006

<sup>51</sup> A.M. Bal, *The Vague Concept of “Taxable Person” in EU VAT Law* (no. 26)

<sup>52</sup> *Gmina Wrocław v Minister Finansów* [2015] (Court of Justice of the European Union), C-276/14 ECLI:EU:C:2015:635 par.28, see also Terra, B. and Kajus, J. (2017). (no. 24) Chapter 9.1.1, Amsterdam: IBFD Publications.

<sup>53</sup> Terra, B. and Kajus, J. (2017)(no. 24). Chapter 9.1.1, Amsterdam: IBFD Publications.

<sup>54</sup> *Gmina Wrocław v Minister Finansów* (no. 52), also Terra, B. and Kajus, J. (2017). *Introduction to European VAT (Recast)* (no. 30)



subject VAT. The existence that “legal tie” is assessed by reference to the working conditions, remuneration and the employer’s liability<sup>55</sup>.

Thus, the Court held in the case of *Wroclaw*, that municipal budgetary entities - bodies governed by public law - were not acting as taxable persons when carrying out economic activities that were appointed to them by a Polish Municipality, to which they were linked to. The Court based its reasoning on the fact that neither did these entities bear any liability regarding damages caused by their activities nor did they performed them in their own name. Quite the contrary, they executed the entrusted activities on behalf and in the name of the Municipality.<sup>56</sup>

On a relative note, in the case of *Heerma*, the Court concluded that when member of a partnership let immovable property to the latter, he carried out an economic activity independently. Even though the member was also manager of the partnership, the Court held that while performing the letting of tangible property, he did so on his own name, on his own behalf and under his own responsibility.<sup>57</sup>

#### **2.3.4. Economic Activities**

Under article 9 par. 1 subpar. 2 of the EUVD, that notion encompasses all activities of producers and traders, as well as persons supplying services. In particular, the exploitation of tangible of intangible property for the purposes of obtaining income on a continuous basis shall constitute an economic activity.<sup>58</sup> It derives from the relative CJEU’s jurisprudence that the notion of economic activity has a very wide scope and is objective in nature.<sup>59</sup> Therefore, any operator may be classified as a taxable person even before conducting taxable output transactions.<sup>60</sup>

#### **i. Preparatory Acts**

According to the CJEU’s settled case law, preparatory expenditure, such as the acquisition of capital assets or services, may fall within the scope of the notion of “economic activity”<sup>61</sup>, even if it does not eventually lead to the realization of said

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<sup>55</sup> Article 10 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006

<sup>56</sup> *Gmina Wroclaw v Minister Finansów* (no. 52) par. 37-39

<sup>57</sup> *Staatssecretaris van Financiën v J. Heerma* [2000] (Court to Justice of the European Union) C-23/98 ECLI:EU:C:2000:46, par. 18.

<sup>58</sup> Art. 9 par. 1 subpar. 2 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006

<sup>59</sup> See for instance the judgements in *Commission of the European Communities v Republic of Finland* [2009] (no. 45) par. 37, *Commission of the European Communities v Kingdom of the Netherlands* [1987] Court of Justice of the European Union (Court of Justice of the European Union) C- 235/85, ECLI:EU:C:1987 paras 6-10, *Landesanstalt für Landwirtschaft v Franz Götz* [2007] Court of Justice of the European Union (Court of Justice of the European Union) C-408/06, ECLI:EU:C:2007:789, par 17-18.

<sup>60</sup> A.M. Bal, *The Vague Concept of “Taxable Person” in EU VAT Law*, (no. 26) Chapter 2.2. Beginning of Activities, page 294.

<sup>61</sup> *DA Rompelman and EA Rompelman-Van Deelen v Minister van Financiën* [1985] Court of Justice of the European Union (Court of Justice of the European Union) C- 268/83, ECLI:EU:C:1985:74, par. 23-25, *Intercommunale voor zeewaterontzilting (INZO) v Belgian State* [1996] Court of Justice of the European Union (Court of Justice of the European Union), C- 110/94, ECLI:EU:C:1996:67, par. 8-9 and 15-17.

output transactions.<sup>62</sup> An otherwise interpretation would lead to operators carrying the burden of the tax during the period between the preparatory act and the first transaction. This situation would be against the aim of the VAT system, which is to completely relieve the operators from the that burden.<sup>63</sup> Nevertheless, the intention to carry out economic activities has not deemed to be sufficient *per se* to ascribe the legal status of “taxable person” to an operator. Hence, the tax authorities may require that objective evidence accompanies the declared intention of the trader.<sup>64</sup>

## ii. The aim to obtain income

As aforesaid, the qualification of activity as economic is dependent on the regular derivation of income. However, that does not presuppose that loss-making activities lack an economic character. Pursuant to art. 9 of the EUVD, the purpose or results of the activity are considered to be immaterial for that classification.<sup>65</sup>

With regards to loss -making activities the CJEU has consistently held that the aim to obtain income is not an interchangeable with the intention to make a profit.<sup>66</sup> In the aforesaid case of *Hotel Scandic*, the Court did not doubt that the activity at hand was economic in nature, even though it did not cover its inherent costs.<sup>67</sup>

In *Enkler*, the CJEU held that an activity consisting of hiring-out of a caravan was an economic one, in spite of the fact that it generated losses<sup>68</sup>. The Court reached that conclusion via comparing the circumstances revolving around the conduct of the activity in question to those surrounding the latter’s common performance. While the result of an activity was disregarded as a non-factor, the same could not be upheld with regards to criteria such as the number of clients or the amount of gains. The latter, *inter alia*, were considered as conclusive indicators for ascertaining the economic nature of the activity at hand.<sup>69</sup>

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<sup>62</sup> *Intercommunale voor zeewaterontzilting (INZO) v Belgian State* [1996] Court of Justice of the European Union (Court of Justice of the European Union), C- 110/94, ECLI:EU:C:1996:67, par. 20-22, *Belgische Staat v Ghent Coal Terminal NV* [1998] Court of Justice of the European Union (Court of Justice of the European Union) C-37/95, ECLI:EU:C:1998:1, par. 19

<sup>63</sup> *ibid* par. 22, also *DA Rompelman and EA Rompelman-Van Deelen v Minister van Financiën* [1985] Court of Justice of the European Union (Court of Justice of the European Union) C- 268/83, ECLI:EU:C:1985:74 par. 23.

<sup>64</sup> *DA Rompelman and EA Rompelman-Van Deelen v Minister van Financiën* [1985] Court of Justice of the European Union (Court of Justice of the European Union) C- 268/83, ECLI:EU:C:1985:74 par. 25,

<sup>65</sup> A.M. Bal, *The Vague Concept of “Taxable Person” in EU VAT Law* (no. 26), pag. 295.

<sup>66</sup> *Finanzamt Freistadt Rohrbach Urfahr v Unabhängiger Finanzsenat Außenstelle Linz* [2013] Court of Justice of the European Union (Court of Justice of the European Union) C-219/12, ECLI:EU:C:2013:413 par. 25, *Lajvér Meliorációs Nonprofit Kft, Lajvér Csapadékvízrendezési Nonprofit Kft* (no.47) par. 35

<sup>67</sup> A.M. Bal, *The Vague Concept of “Taxable Person” in EU VAT Law* (no. 26), pag. 295 referring to the judgement in *Hotel Scandic Gåsabäck* (no 29).

<sup>68</sup> *Ibid*, pag. 295 referring to the decision in *Renate Enkler v Finanzamt Homburg* [1996] Court of Justice of the European Union (Court of Justice of the European Union) C-230/94 ECLI:EU:C:1996:352.

<sup>69</sup> *Renate Enkler v Finanzamt Homburg* [1996] Court of Justice of the European Union (Court of Justice of the European Union) C-230/94 ECLI:EU:C:1996 par. 29.

The reasoning of the CJEU in *Enkler* possesses a significant doctrinal importance, since Court has consistently resorted to its application, when dealing with issues regarding the qualification of an activity as economic for VAT purposes.<sup>70</sup>

On the other hand, the CJEU held in the case of *SPO*, that a political party, when supplying advertising material and performing promotional activities, was not engaging in economic activities subject to VAT, since the activity was not generating any revenue, and thereby the party had to employ other resources to cover the losses incurred by these activities. However, it has been argued that the reasoning of the Court was essentially driven by the absence of market participation on behalf of the political party, and not due to the loss-making results of the disputed activity.<sup>71</sup>

### iii. Duration of The Activities

Under article 12 par. 1 EUVD, Member States may opt for qualifying as taxable any person who engages in transactions corresponding to the activities referred to in article 9 par. 1 subpar. 2 EUVD, but does so on an occasional basis<sup>72</sup>. It could then be assumed, *a contrario*, that the manifestation of continuity in the conduct of the activity is tantamount for the qualification of a person as taxable for VAT.<sup>73</sup>

However, the CJEU held, in the case of *Van Tiem*, that an activity comprising of the immediate acquisition and transfer of building rights was economic.<sup>74</sup> Moreover, In *Wellcome Trust*, Advocate General Lenz argued that the sale of shares that took place in one day might constitute an economic activity. In his opinion, the prerequisite of continuity must not be interpreted as the need for a person to be engaged in a series of activities, in order to be classified as taxable. In his conclusion, he stated that “*it is*

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<sup>70</sup> *Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele* (no. 46) par.29-31, *Ainārs Rēdlihs v Valsts ieņēmumu dienests* [2012] Court of Justice of the European Union (Court of Justice of the European Union) Case C-263/11 ECLI:EU:C:2012:497 par. 32-33, *Finanzamt Freistadt Rohrbach Urfahr v Unabhängiger Finanzsenat Außenstelle Linz* [2013] Court of Justice of the European Union (Court of Justice of the European Union) C-219/12, ECLI:EU:C:2013:413 par. 20-21

<sup>71</sup> A.M. Bal, *The Vague Concept of “Taxable Person” in EU VAT Law* (no. 26), pag. 295 referring to the decision in *Finanzamt Freistadt Rohrbach Urfahr v Unabhängiger Finanzsenat Außenstelle Linz* [2013] Court of Justice of the European Union (Court of Justice of the European Union) C-267/08, ECLI:EU:C:2009:619, par. 21- 25.

<sup>72</sup> Article 12 par. 1 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006.

<sup>73</sup> A.M. Bal, *The Vague Concept of “Taxable Person” in EU VAT Law* (no. 26), pag. 295, Terra, B. and Kajus, J. (2017). *Introduction to European VAT (Recast)* (no.24) Chapter 9.2.2, See also *Hutchison 3G UK Ltd and Others v Commissioners of Customs and Excise* [2007] Court of Justice of the European Union (Court of Justice of the European Union) Case C-369/04 Opinion Of Advocate General Kokott, delivered on 7 September 2006, par. 63 and the case law cited therein. However, in the following paragraphs the AG stated that the frequency of the conduct is immaterial. The fact that the activity was capable of producing revenue continuously sufficed. The “how often” was deemed irrelevant.

<sup>74</sup> *WM van Tiem v Staatssecretaris van Financiën* [1989] Court of Justice of the European Union (Court of Justice of the European Union). C-186/89 ECLI:EU:C:1990:429.

*neither the scope nor the duration which is conclusive, but solely the question whether that activity is an economic activity”.*<sup>75</sup>

That statement was subsequently validated by the CJEU in the cases of *Slaby* and *Kostov*.<sup>76</sup>

In *Slaby*, the Court held that the occasional or unorganized selling of privately owned immovable property designated for development constitutes an economic activity. In the Court’s view, the lack of continuous performance of the relative transactions was immaterial for the qualification of the activity as economic; the number or volume of sales, as well as the time period during which the activities took place, were also disregarded as conclusive indications of the economic nature of the supplies of building land. Insofar as the supplier was not merely exercising a right of ownership and had taken active steps to market his property in a way reminiscent of that of a producer or a trader, his activity constituted a supply of services falling within the scope of application of art. 9 par 1 EUVD.<sup>77</sup>

In *Kostov*, the CJEU proceeded to clarify the scope of application of article 12 par. 1 EUVD. In its decision, the Court concluded that art. 12 par. 1 EUVD must be applied solely to persons who are not classified as taxable persons in respect of their main activities. In the Court’s view, an otherwise interpretation would be inconsistent with the objective of the EUVD to impose the tax in a general and simple manner. Thus, a person already qualified as taxable person regarding his main activities (in this case, a self-employed bailiff), might additionally be qualified as a such, when carrying out an economic activity on an occasional basis, which falls on a field different from that of said main activity (in this case, participating and bidding in an auction).<sup>78</sup>

### **2.3.5 Acting as such**

To conclude with, it stems from art. 9 of the EUVD that transactions fall within the scope of VAT insofar as the person who carries them out acts as a taxable person. Hence, when a person provides goods or services that falls outside its economic activities, that supply does not qualify as taxable. This situation thought has to be distinguished from the interpretation adopted by the Court in *Kostov*. In other words, the term “its economic activities” must not be interpreted as its “normal” activities<sup>79</sup>.

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<sup>75</sup> *Wellcome Trust Ltd v Commissioners of Customs and Excise* [1038] Court of Justice of the European Union (Court of Justice of the European Union). C-155/94 ECLI:EU:C:1996:243 Opinion Of Advocate General Lenartz, delivered on 7 December 1995.

<sup>76</sup> Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 836, VAT treatment of crowdfunding, pag. 6.

<sup>77</sup> *Jaroslav Slaby v Minister Finansów (C-180/10) and Emilian Kuć and Halina Jeziorska-Kuć v Dyrektor Izby Skarbowej w Warszawie (C-181/10)* [2011] Court of Justice of the European Union (Court of Justice of the European Union) C-180/10 and C-181/10 ECLI:EU:C:2011:589, par. 37- 4.

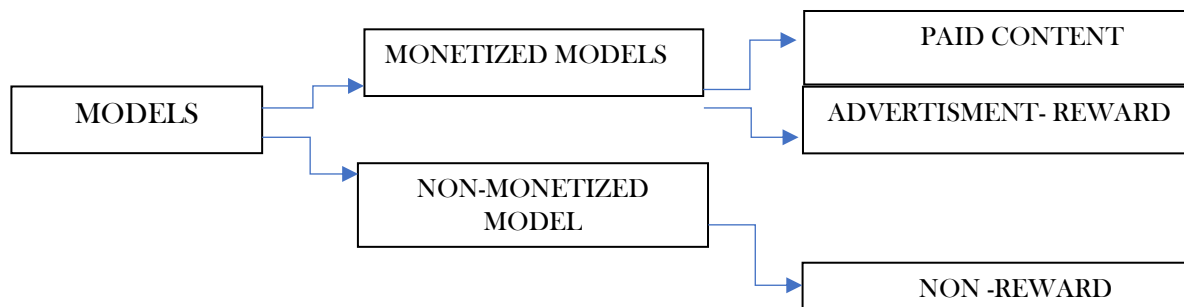
<sup>78</sup> *Galın Kostov v Direktor na Direktsia «Obzhalvane I upravljenje na izpalnenieto» - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* [2012] Court of Justice of the European Union (Court of Justice of the European Union) C-62/12 ECLI:EU:C:2013:391, par. 28 – 30.

<sup>79</sup> A.M. Bal, *The Vague Concept of “Taxable Person” in EU VAT Law*, (no. 26) Chapter 2.6. Acting as such , page 296.

### 3. MODELS

Depending on whether the channel owner derives income from its audiovisual material, the models are divided into two categories, the “monetized” and “non-monetized” ones.

#### GRAPHICAL REPRESENTATION



#### 3.1. Monetized Models

##### 3.1.1. “Paid Content”

In this model, the audiovisual content becomes available only against payment effected by the viewer. Depending on the platform, the channel owner will be able to designate which audiovisual content or bundle of content will be accessible via payment.<sup>80</sup>

Furthermore, a common option is for the channel owner to set up a paid subscription channel plan. In that case, the user will be required to pay a predetermined fee, usually on a monthly or annual basis, which will allow him to subscribe to the relative channel and gain access to its featured content.<sup>81</sup>

##### 3.1.2. “Advertisement - reward”

In this model, the channel owner enters an agreement with the VSW to have advertisement banners placed on his videos, either by the platform itself or by an affiliated advertising server. To that effect, the owner will usually be required to register to that company, via creating an account to its website. Upon registration, an interconnection between the owner’s channel, the hosting digital platform, the advertising server and the potential advertisers will take place.<sup>82</sup>

In exchange for the placement of advertisement banners in his content, the channel owner will receive payments, the amount and frequency of which will be calculated based on measurement types used in the advertising sector. For the purposes of this analysis, the following will be taken into account:

<sup>80</sup> See for instance Youtube, Introduction to Paid Content.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid, also YoutubeHelp, Set up an AdSense account for payments, AdSense, Get Started, How it Works

- **“Cost-per-thousand impressions”(CPM):** <sup>83</sup>

According to the CPM measurement, the advertiser or the publisher (channel owner) will set up a price for one thousand impressions of the advertisement. Each time an advertisement is displayed and viewed by a user (impression), the advertiser has to pay the publisher an amount corresponding to the number of impressions. In other words, if the price per 1000 impressions is set by the advertiser at 10 EUROS, the latter has to pay to the publisher an amount equal to 0.01 EU for one impression or 1.00 EUROS for 100 impressions<sup>84</sup>.

Nevertheless, within the context of digital advertising, not all user views will qualify as impressions. In reality, a distinction exists between viewable and nonviewable impressions.<sup>85</sup>

On one hand, a pageview, also referred to as page impression, occurs when a user “visits” a website. On the other hand, a website page might display more than one advertisements. Hence, one single pageview might result to a single or multiple impressions, depending on the number of the advertisements. <sup>86</sup>

However, that does not presuppose that every pageview will generate an impression. A user might employ a third-party software that prevents advertisements to be displayed when he is visiting a webpage or watches a video (adblocker). <sup>87</sup>Additionally, the “viewable” nature of the impression might be made conditional upon factors such as the duration of its display. <sup>88</sup>Therefore, a page view might not generate any impressions.

- **“Cost – per- click”(CPC):**

According to the CPC measurement, each time a user clicks on the advertisement, the publisher earns an amount of money.<sup>89</sup>

- **“Cost-per-engagement”(CPE):**

According to the CPE measurement, the advertiser will pay the publisher on the condition that the user will actively interact with the advertisement. That will be the case, for example, of “lightbox” type of advertisements. This type of will expand its size (from partially occupying a space on the computer screen to fully covering it) whenever the viewer hovers his mouse cursor on the ad for a specific time frame.<sup>90</sup>

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<sup>83</sup> As define by Adwords, see also Wei Zhou , Subhajyoti Bandyopadhyay , Hsing K. Cheng & Praveen Pathak (2008) A Mechanism for On-line Advertisement Placement to Deter Click Fraud, International Journal of Electronic Commerce, 13:2, 9-28, Literature review,par.1.

<sup>84</sup> This example is based on a similar one provided by Investopedia.

<sup>85</sup> Adwords, CPM on Viewable impressions.

<sup>86</sup> Difference between, Page Views and Impressions.

<sup>87</sup> As defined in Oxford Dictionaries.

<sup>88</sup> Adwords, CPM on Viewable impressions.

<sup>89</sup> Adsense, Cost-Per-Click .

<sup>90</sup> Adsense, Cost-per- Engagement.

### 3.2. Non-Monetized Model

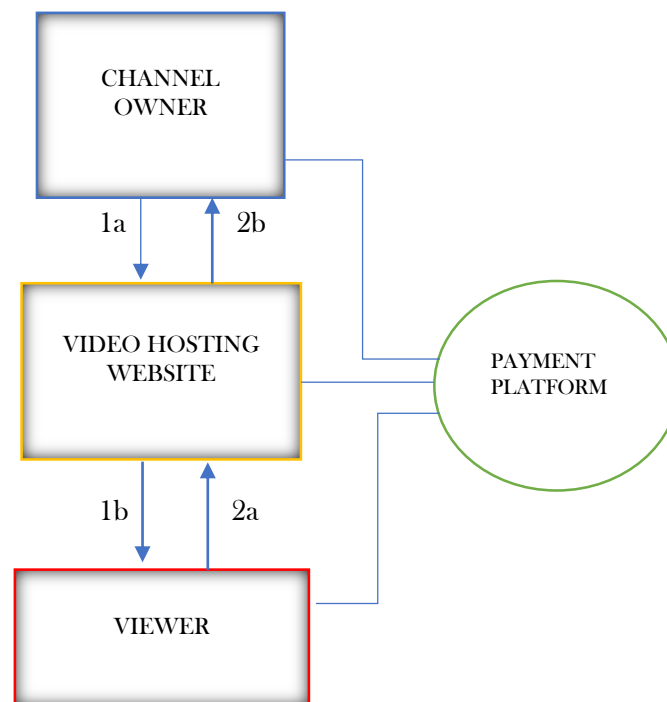
#### 3.2.1 “Non -reward”

In this model, the channel owner has not made the access to his content dependable on payments made by the viewer. The latter is eligible to casually enjoy the featured content “for free”, simply by accessing the relative platform. Additionally, the channel owner has not conducted any agreement with the digital platform to have advertising banners placed in his videos.

It follows that the channel owner does not receive any, monetary at least, benefits. The author remarks the non-monetary nature, due to the fact that during the assessment of the notions of taxable person and supply for consideration, an argumentation will take place regarding the potential derivation of in kind benefits by the channel owner.

## 4. MONETIZED MODELS

### 4.1 PAID CONTENT



*1A: The content owner uploads prerecorded audiovisual material to his channel or connects to the designated platform in order to commence live streaming of the audiovisual content. 2A: The viewer in return must proceed to make monetary payments to gain access to the content. 2B: The payments will be made through the digital platform to the channel owner. The former will usually charge a commission calculated on a ratio based on the price set by the latter (45/55 revenue split or a percentage of the denoted price). Transactions regarding payments can also be handled by a payment platform.*

*1B: The content is made available to the viewer through the digital platform*

### 4.1.1 Introductory Remarks

The function of this model is quite reminiscent of what the Commission perceives as sharing economy platforms, i.e. digital marketplaces that facilitate, inter alia, the provision of goods or services in exchange for remuneration.<sup>91</sup> Moreover, according to the author's research, in one case at least, VAT is in fact charged when the audiovisual content becomes available against payment.<sup>92</sup>

Nonetheless, the author considers that this does not suffice to draw safe conclusions regarding the legal status either of the content creator or of the activity in question for VAT purposes. Due to the peculiarities of the transaction at hand, the latter should be thoroughly assessed in the light of the EU VAT Directive and the CJEU concepts of supply for consideration and taxable person.

To that effect, the CJEU has held that an activity cannot qualify as economic, if it does not correspond to a transaction falling within the scope of application of the EUVD.<sup>93</sup> Thereby, it must firstly be ascertained if the provision of audiovisual material via digital media platforms constitutes a supply of goods or services effected for consideration.

### 4.1.2. The Objective Scope

#### 4.1.2.1. Supply of goods or services

To begin with, it must first be ascertained whether the provision of audiovisual material constitutes a supply of goods or services for VAT. To that effect, the CJEU holds the view that electronic books lack the objective characteristics of a tangible property, when they are provided online and their physical means of support do not form part of that supply<sup>94</sup>. Given the nature of the activity in question, it could by analogy be supported that the audiovisual content qualifies as intangible property.

Moreover, pursuant to Article 7 par. 2 of the VAT Implementing Regulation n. 282/2011/EC<sup>95</sup>, within the notion of ‘*electronically supplied*’ fall services which are “*delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology.*” According to the Commission, information technology denotes the field of engineering that is concerned

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<sup>91</sup> Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy, pag. 7/12 and par. 8/12.

<sup>92</sup> Vimeo Help Center, Video On demand Taxes.

<sup>93</sup> *Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele* [2016] C-520/14, Opinion Of Advocate General Kokott, delivered on 23 December 2015, ECLI:EU:C:2015:855 ref. to the decisions in *Saudaçor – Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA v Fazenda Pública* [2015] Court of Justice of the European Union (Court of Justice of the European Union) C-174/14, ECLI:EU:C:2015:733 par. 31 and the case law cited there

<sup>94</sup> *European Commission v French Republic* [(no. 48), par. 28-29, *European Commission v Grand Duchy of Luxembourg* [2015] Court of Justice of the European Union (Court of Justice of the European Union) C-502/13, ECLI:EU:C:2015:143, par. 36-38.

<sup>95</sup> Article 7(2) of 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.



with the “*development, maintenance and use of computers and telecommunications systems*” in order to “*retrieve, store, transmit and manipulate information or data*”.<sup>96</sup>

Furthermore, under (4) Point (4)(h) of Annex II of the Directive 2006/112/EC, the provision of audiovisual content through communication networks, which is neither provided nor edited by the media service provider, shall fall within the scope of electronically supplied services<sup>97</sup>. Thus, it can be inferred that the activity in question meets the definition of -electronic- supply of services for VAT purposes.

#### **4.1.2.2. The presence of consideration**

It stems from both the VAT Directive and the CJEU jurisprudence that, for an activity to be classified as a taxable supply for VAT purposes, a remuneration must, in principle, be stipulated.<sup>98</sup> Since the content becomes available only against payment of a predetermined fee, it can be safely assumed that the prerequisite of consideration is met.

Furthermore, it is a longstanding view of the CJEU that the level of the price or remuneration does not affect the classification of an activity as being carried out in return for consideration. Thus, it falls to the channel owner’s discretion to determine the appropriate price. Nonetheless, the author addresses that a remuneration of a nominal value can, under circumstances, be regarded as a concession to the consumer (viewer) and not as consideration. That being the case, the transaction might fall outside the scope of VAT.<sup>99</sup>

#### **4.1.2.3. The direct link between supply and consideration**

However, the sole presence of a price agreed and paid does not suffice for the classification of the transaction as a supply for consideration. In addition, it must be directly linked to that specific provision. Thus, the existence of a legal relationship between the paying viewer and the channel owner must be established. Not merely that, but also a reciprocal performance and counter- performance between the transactional parties must be manifest. Additionally, the value of the remuneration received must be the actual value.<sup>100</sup>

Under the paid content model, the chain of actions that will lead to the eventual supply can be described as follows: First, the viewer will be requested to register to the occasional platform that hosts the content owner’s channel. Subsequently, that will permit the viewer to proceed to subscribe to the relative channel against payment (“*paid channel*”). Otherwise, he will be able to subscribe without any consideration, though

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<sup>96</sup> Via the VAT Committee, Value Added Tax Committee (Article 398 Of Directive 2006/112/EC) Working Paper No 843, “VAT 2015: Scope of the notion of electronically supplied services”, pag. 5/15.

<sup>97</sup> (4) Point (4)(h) of Annex II Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006.

<sup>98</sup> Article 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006, *Hong-Kong Trade Development Council* (no. 10)

<sup>99</sup> *Hotel Scandic Gåsabäck* (no.29) paras 22-24, *Campsa Estaciones de Servicio* (no. 43), par. 16 paras 25-28, *Lajvér Meliorációs Nonprofit Kft, Lajvér Csapadékvízrendezési Nonprofit Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV)* (no.47) par. 43 -47, *Commission of the European Communities v French Republic* [(no.48), par. 21.

<sup>100</sup> *R J Tolsma and Inspecteur der Omzetbelasting Leeuwarden* (no.37) par. 14

he will be eligible to access the designated content only upon payment of the occasional fee (“*paid video*”).<sup>101</sup>

Within the context of services provided through digital platforms, it is noteworthy to mention that the Commission holds the view that, insofar the supply of goods or services takes -or will take place- solely in exchange for monetary payments, that alone suffices for meeting the titular prerequisite<sup>102</sup>. With regards to the manifestation of reciprocity, *Butler* argues that the latter might occur when the supplier of a service can limit the consumption of the relative service only to paying customers.<sup>103</sup>

The author sides with this line of reasoning. Specifically, the CJEU has held that a direct link between a service supplied and a remuneration received cannot be established, in cases where the provision of any payment is voluntary or uncertain, where the benefits of the supply accrue to both paying and nonpaying individuals, or they are of uncertain and unquantifiable nature. It follows that, under these circumstances, a legal and reciprocal relationship cannot sufficiently be ascertained.<sup>104</sup>

Thus, as soon as the viewer takes the necessary steps and pays the determined fee, a legal relationship, and a reciprocal performance between the former and the channel owner will be established. Consequently, that payment will constitute direct consideration for the provision of the audiovisual material.

#### **4.1.2.4. Paid channel: Individualized Content and the direct link**

The fact that a viewer may refrain from actually watching the hosted audiovisual material, or that the latter’s content may not be individualized to meet his/her personal preferences may be employed to support the view that under these circumstances, a direct link cannot be established.

Without prejudice to an opposite conclusion, the author considers, based by analogy on the decisions of the CJEU in *Kennemer Golf* and *Le Rayon D’or*, that these factors should not be deemed sufficient to call the existence of the direct link in question, since the viewer essentially acquires the right to access the channel<sup>105</sup> which hosts the audiovisual content for a predetermined period, rather than a specific video.<sup>106</sup>

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<sup>101</sup>See the graphical representation and the model’s framework in the preceding chapter. See also Youtube, Create Paid Channels, Introduction to Paid Content.

<sup>102</sup> Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy, pag. 5/12, the Commission did not question that supplies under a model reminiscent to the examined one were supplies for consideration.

<sup>103</sup> Deborah Butler, 'The Usefulness Of The 'Direct Link' Test In Determining Consideration For VAT Purposes' (2004) 13 EC TAX REVIEW pag. 93-94.

<sup>104</sup> *R J Tolsma and Inspecteur der Omzetbelasting Leeuwarden* (no.37) par. 17, ECLI:EU:C:1994:80, *Apple and Pear Development Council v Commissioners of Customs and Excise* (no.35) par.15, also paras 14 and 16, *Odvolačí finanční ředitelství v Pavlína Baštová* (no.40) par. 29, par. 35.

<sup>105</sup> For instance Youtube, Introduction to Paid Content.

<sup>106</sup> *Kennemer Golf & Country Club v Staatssecretaris van Financiën* [2012] Court of Justice of the European Union (Court of Justice of the European Union) C-174/00 ECLI:EU:C:2002:200, par. 38 -42. *Le Rayon d’Or* [2014] Court of Justice of the European Union (Court of Justice of the European Union), C-151/13, EU:C:2014:185 par. 36-37

#### 4.1.2.5. The implications of the level of the charged fee on the direct link

However, a different conclusion might be reached, in situations where the charged fee is determined on factors such as the personal or financial circumstance of the recipient, and ends up partially remunerating the relative supply. That being the case, the Court has dismissed the existence of a direct link between the service provided and the remuneration received.<sup>107</sup>

Within the context of the activity in question, application of the *Commission vs Finland* precedent<sup>108</sup> would lead to the exclusion from VAT of any provision of audiovisual content, as long as the channel owner is eligible, for instance, to run discount schemes based on the viewer's status<sup>109</sup>. Although, it should be remarked that AG Kokott has considered this approach to be incompatible with the settled case law of the CJEU regarding the subjective valuation of goods or services, and the VAT treatment of supplies below the cost price.<sup>110</sup> In addition, *Swinkels* has criticized this line of reasoning for being contradictory to the principle of neutrality<sup>111</sup> and the provisos of the EUVD establishing the basis of assessment of VAT.<sup>112</sup>

Nevertheless, the CJEU in *Lajver* did not specify under which circumstances the level of remuneration may affect the existence of a direct link. Given that the case revolved around the provision of agricultural engineering works by a company to its members, it has been supported that the Court did not preclude the existence of an artificial arrangement between the parties<sup>113</sup>. While the Court has stated in *Weald leasing*<sup>114</sup> that unusually low payments are indicators of an abusive practice, the author regards that

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<sup>107</sup> *Commission of the European Communities v Republic of Finland* (no. 45) par. 44 -51, *Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele* [2016] (no. 46) par. 32-34.

<sup>108</sup> Dr. Joep J.P. Swinkels, 'Economic Activities Under EU VAT Law' (2010) 21 International VAT Monitor, Chapter 4.5 Precedent, paras 2-3, page 126, see also, *Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele* (no.46) par. 32-34

<sup>109</sup> *Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele* [2016] C-520/14, Opinion Of Advocate General Kokott, delivered on 23 December 2015, ECLI:EU:C:2015:855 par. 45-46 and the case law cited therein.

<sup>110</sup> *Ibid.*

<sup>111</sup> The price for the services of both private and public servants was essentially calculated on the basis of the same criteria, and it was subsidized by the State, see Dr. Joep J.P. Swinkels, 'Economic Activities Under EU VAT Law' (no. 108), Chapter 4.4 Neutrality Principle, pag. 126

<sup>112</sup> Under no provision of the EUVD is the recipient of a good or service obliged to pay the total amount of that supply, for the latter to be subject to VAT, see Dr. Joep J.P. Swinkels, 'Economic Activities Under EU VAT Law' (2010) 21 International VAT Monitor, Chapter 4.1 Subsidized activities, paras 1-4 page 125. See also Article 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006.

<sup>113</sup> HU: ECJ, 2 June 2016, Case C-263/15, *Lajvér Meliorációs Nonprofit Kft. and Lajvér Csapadékvizrendezési Nonprofit Kft. v. Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága*, ECJ Case Law IBFD, pag. 4

<sup>114</sup> *The Commissioners for Her Majesty's Revenue and Customs v Weald Leasing Ltd* [2010] Court of Justice of the European Union (Court of Justice of the European Union) Case C-103/09 ECLI:EU:C:2010:804 par. 39

this approach would be applicable to the extent that the transaction in question might not reflect economic reality.<sup>115</sup>

It should be apparent that this line of case-law is rather ambiguous and controversial. If anything, it adds more to the existing uncertainty regarding the qualification of the activity in question as a supply for consideration for VAT purposes. Nonetheless, it is noteworthy to mention that in the context of the sharing economy, the Commission has assessed the implications of the judgement in *Commission v Finland* solely in the case where the consideration received is comprised of benefits in kind.<sup>116</sup>

#### **4.1.3. The Subjective Scope.**

With that in mind, the author finds good arguments to support that the provision of audiovisual content should constitute a supply of services for consideration. Pursuant to art. 2 of the EUVD<sup>117</sup>, it must then be ascertained whether the channel owner qualifies as a taxable person.

To that effect, it could be assumed that, insofar the provision of audiovisual content is carried out for consideration under art. 2 par. 1, that per se dictates that the activity is also economic. However, the CJEU has indicated that this finding is not sufficient to establish the aim of obtaining income on a regular basis.<sup>118</sup>

##### **4.1.3.1. The Dual nature of the exploited property**

Prior to the assessment of the continuous derivation of income, the nature of the employed property must be examined. To that effect, the settled-case law of the CJEU indicates that, inasmuch as the latter is suitable for economic exploitation, that alone conclusively dictates that the owner is using it for his economic activities. Conversely, it follows that if the property is eligible for both economic and private use, the conditions surrounding its use must be examined, as to ascertain if it is employed for the purposes of obtaining income on a continuing basis<sup>119</sup>.

Within the context of this research, the property at issue could take various forms. For example, it could be a videogame, the gameplay of which the content owner records, adds textual or oral commentaries, and subsequently uploads it to his channel for viewing. Additionally, if the content owner is a musician, it could be his music video clip. Hence, it can be argued that a videogame or a music video could be also serve the individual's private purposes.

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<sup>115</sup> In the sense that it is not artificially arranged, see Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 836, VAT treatment of crowdfunding, pag. 10/19.

<sup>116</sup> Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy, pag. 9/12 - 10/12.

<sup>117</sup> Article 2 par. 1 (a)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006

<sup>118</sup> *Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele* (no.46) par. 28.

<sup>119</sup> *Finanzamt Freistadt Rohrbach Urfahr v Unabhängiger Finanzsenat Außenstelle Linz* [2013] Court of Justice of the European Union (Court of Justice of the European Union) C-219/12, ECLI:EU:C:2013:413 par. 19-21.

Thus, considering the variety and peculiarities of the occasional digital content, it seems reasonable that a case by case assessment by the competent authorities must be conducted.

### **4.1.3.2 The purpose of obtaining income on a continuing basis**

#### **4.1.3.2.1. The Commission's approach**

With regards to the titular prerequisite, it must be stated that the Commission holds the view that the supplier's registration to a shared economy platform, via which the goods or services are subsequently provided, that by itself implies some sort of continuity. Due to the functional similarity between sharing economy and VSW supporting revenue models, the author considers that the Commission's reasoning can be extrapolated, by analogy, to the examined model.

However, the mere subscription to an online platform will not, in principle, result to a continuous economic activity by the channel owner; that will solely allow him to set up a channel and make his content available for public viewing<sup>120</sup>. In practice, most platforms set detailed terms and conditions regarding the potential derivation of revenue from the provision of audiovisual material. Consequently, only upon compliance with the latter, it could be argued that the channel owner carries out an economic activity with the objective of continuous generation of income<sup>121</sup>.

At this point, it is of importance to assess the potential implications of the aforementioned, in the light of the CJEU case-law on preparatory acts.<sup>122</sup> The main reason for this statement derives from the fact that video channels, or any application that facilitates the uploading or display of the hosted audiovisual content, are described by VSWs as services provided to the channel owner<sup>123</sup>.

It follows from said case-law that the acquisition of goods or services preparatory to the actualization of a taxable output supply can constitute an economic activity. Hence, it could be argued that the channel owner qualifies as a taxable person, to the extent that he/she has acquired the right to register to the platform and to create and maintain a channel. Whether the former manages to eventually carry out a taxable supply of audiovisual content should be immaterial for that classification.<sup>124</sup>

However, this conclusion cannot be upheld. According to *Terra* and *Kajus*, the “initial supplies” should be taxable.<sup>125</sup> The Court's repeated references to preparatory acts as

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<sup>120</sup> Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy, pag. 6/12 , also Youtube, Create a channel.

<sup>121</sup> The channel owner must comply with certain requirements such as agree and comply with Terms of Service, See for instance Youtube, Enable Paid Content, Twitchtv, Tips for Applying to the Partner Program, Potential Partners.

<sup>122</sup> *DA Rompelman and EA Rompelman-Van Deelen v Minister van Financiën* (no.61) *Intercommunale voor zeeewaterontziltling (INZO) v Belgian State* (no. 61).

<sup>123</sup> See for instance Youtube, Terms of Service, Chapter 1, par. 1.1.

<sup>124</sup> *Intercommunale voor zeeewaterontziltling (INZO) v Belgian State* (no. 61) par. 20-22, *Belgische Staat v Ghent Coal Terminal NV* (no.61) par. 19.

<sup>125</sup> Terra, B. and Kajus, J. (2017). *Introduction to European VAT (Recast)* (no. 24), Chapter 9.3, par. 4.

“investment expenditure”,<sup>126</sup> alongside its long-held standpoint that activities which are conducted for free do not qualify as “economic” for VAT, should permit that inference<sup>127</sup>. Therefore, since the services of the VSWs are provided against no consideration,<sup>128</sup> the channel owner does not acquire the legal status of “taxable person” for VAT.

On the contrary, one might not preclude an opposite inference with regards to the acquisition of assets such as a computer, a video game or a video editing software. Nevertheless, application of the aforesaid case law still presupposes that the channel owner declares his intentions to the competent authorities, and the eventual output transaction qualifies as “taxable” for the purposes of VAT<sup>129</sup>.

However, it is questionable whether conclusive evidence could be provided by the channel owner to support his intentions, yet alone actually making such declaration. The absence of legally binding sources regarding the VAT treatment of supplies effected via sharing economy platforms, arguably calls into question that possibility.

Furthermore, even if the that precondition was met, the adoption of the aforementioned approach<sup>130</sup> would potentially result to an eruption of the number of taxable persons within the Member States, especially considering the sheer number of individuals who interact with VSWs on an everyday basis. That being the case, the administrative burden could reach beyond manageable levels.

Therefore, it is essential to seek further criteria, in order to ascertain the examined activity’s eligibility to provide for regular income. To that effect, the CJEU has taken into account the contractual length<sup>131</sup> of the transaction, to establish that prerequisite. Namely, in *Lajver*, the Court deemed an eight-year contract to be sufficient. The same conclusion was reached in *Van Tiem*, for a contractual period of eighteen years.<sup>132</sup>

However, application of this line of reasoning in the context of our model might be problematic. Mainly, due to the fact that the length of the access to the audiovisual content may vary depending on the particular VSW, as well as the respected channel owner. For instance, some VSWs stipulate that under the paid channel scheme, viewers may purchase a monthly or yearly subscription<sup>133</sup>. What happens if the viewer opts for

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<sup>126</sup> *DA Rompelman and EA Rompelman-Van Deelen v Minister van Financiën (no.61) Intercommunale voor zeewaterontziltling (INZO) v Belgian State* (no. 61).

<sup>127</sup> *Staatssecretaris van Financiën v Hong-Kong Trade Development Council* (no. 31), par. 11-13.

<sup>128</sup> This presumption is based on the fact that VSWs do not stipulate any price for the use of their services, see for instance Youtube Terms of Service, Twitchtv Terms of Service.

<sup>129</sup> Terra, B. and Kajus, J. (2017). *Introduction to European VAT (Recast)* (no. 24), Chapter 9.3, par. 4, also *DA Rompelman and EA Rompelman-Van Deelen v Minister van Financiën* (no.61) par. 24, *Intercommunale voor zeewaterontziltling (INZO) v Belgian State* (no. 61), par. 23.

<sup>130</sup> To the extent that the operator is acting independently, and that this approach suffices to support that the conduct of the activity is regular, see Chapter 4.1.4. and 4.1.5. of this analysis.

<sup>131</sup> *Renate Enkler v Finanzamt Homburg* (no. 69) par. 28.

<sup>132</sup> *Lajvér Meliorációs Nonprofit Kft, Lajvér Csapadékvizrendezési Nonprofit Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV)* (no. 47) par. 35-37, *W M van Tiem v Staatssecretaris van Financiën* (no.15)par. 19

<sup>133</sup>For instance, Vimeo, Subscription Tools, Youtube, introduction to Paid Content.

the monthly scheme, but refrains from further renewing its subscription? Can one month be deemed to suffice?

In order to alleviate any difficulties regarding the presence of the titular precondition, resorting to comparing the circumstances under which the activity in question is carried out, to those it usually does<sup>134</sup>, appears to be of the essence.

#### **4.1.3.2.2. Application of the Enkler doctrine<sup>135</sup>**

In the author's view, application of the titular doctrine can be a rather challenging endeavor for the competent authorities. Given the vast amount of content creators worldwide, the variety and peculiarities of each type of audiovisual content and the number of online streaming platforms, it would require a "herculean" effort to adequately establish a benchmark of usual performance. Even so, the results might constantly be susceptible to scrutiny, due to the rapid evolving of the sharing economy.

However, the author cannot preclude the possibility of reaching a general consensus. Despite the uniqueness of each VSW, it could be supported that they essentially feature several common characteristics: partnership programs' obligation of compliance with the relevant terms and conditions, registration to the platform and creation of a channel. Therefore, it could be argued that these constitute the usual circumstances which surround the conduct of the examined activity.

Furthermore, the author considers that channel owners who derive income regularly, will presumably exhibit some common features, such as outsourcing video editing to professional editors, maintaining a considerably large number of subscribers or making considerable gains<sup>136</sup>.

This approach thought could potentially lead to the exclusion of channel owners who either derive sufficient benefits from their activities, but edit the audiovisual content themselves or have just commenced their activities<sup>137</sup> (to the extent that they have not acquired the legal status of "taxable person" for VAT, in respect of preparatory activities). Such a conclusion appears to be contradictive to the aim of the EUVD to achieve simplicity and neutrality concerning the imposition of the tax<sup>138</sup>, as well as the principle of legal certainty vis-à-vis with the tax authorities<sup>139</sup>.

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<sup>134</sup> *Renate Enkler v Finanzamt Homburg* (no. 69) par. 27

<sup>135</sup> Roland Ismer, 'Case C-520/14, ECLI:EU:C:2016:334 – Gemeente Borsele; C-263/15, ECLI:EU:C:2016:392 – Lajvér; C-11/15, ECLI:EU:C:2016:470 – Český Rozhlas On The Concept Of Consideration For The Supply Of Services And On The Concept Of Economic Activity By Public Bodies And Entities Receiving Public Funding' (2016) 5 World Journal of VAT/GST Law, 111-120, DOI: 10.1080/20488432.2016.1236532, Interim Conclusion. Pag. 115

<sup>136</sup> See for instance Business Insider, for the depiction of the characteristics of a successful Youtube entrepreneur, see by analogy *Renate Enkler v Finanzamt Homburg* (no. 69) par. 29.

<sup>137</sup> And presumably have not build a considerable number of subscribers.

<sup>138</sup> Preamble 5 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006.

<sup>139</sup> *SC Fatorie SRL v Direcția Generală a Finanțelor Publice Bihor* [2014] Court of Justice of the European Union (Court of Justice of the European Union). C-424/12, ECLI:EU:C:2014:50 par. 46

#### **4.1.4. The prerequisite of continuity in the performance of the activity**

In the author's view, ascertaining whether the conduct of the channel owner's activity in question should also be continuous appears to be pose quite a challenge for the competent authorities.

Specifically, the CJEU has consistently held that the presence of continuity is tantamount not only for the derivation of income, but also for the performance of the activity.<sup>140</sup> However, based on the wording of the proviso of article 9 par. 1 subpar. 2 of the EUVD<sup>141</sup>, it has been supported that the prerequisite of permanence essentially refers solely to the exploitation of property and in particular to the generation of income, and not on the conduct of the activity per se<sup>142</sup>.

Nonetheless, given that the that under art. 12 of the EUVD<sup>143</sup>, Member States may opt for the right to treat operators who occasionally perform economic activities as taxable persons, it can be inferred that the purely irregular conduct of activities, which possess a commercial nature, precludes them from acquiring the status of economic for VAT purposes. As AG Lenz argued in his opinion in *Van Tiem*, an otherwise interpretation would constitute the proviso of art. 12 of the EUVD redundant.<sup>144</sup>

Notwithstanding the aforementioned, if it is accepted that the channel owner is required to systematically carry out the activity in question, this would presuppose that a notional line can be drawn between regular and occasional performance.

##### **4.1.4.1. Establishing the notions of regular and occasional**

To begin with, the EUVD does not contain a general definition of the notion of "occasional".<sup>145</sup> How can then the precondition of continuity be interpreted in the context of the activity at hand? Is it the volume of content that the channel owner produces, or the frequency of the conduct that is decisive?<sup>146</sup>

Without prejudice to an opposite conclusion, the author considers that providing for a decisive answer might be avoided, to the extent that the reasoning of the CJEU in *Van Tiem* could be employed.

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<sup>140</sup> *Landesanstalt für Landwirtschaft v Franz Götz* [2007] Court of Justice of the European Union (Court of Justice of the European Union) C-408/06 ECLI:EU:C:2007:789 par. 18 and the case law cited therein.

<sup>141</sup> article 9 par. 1 subpar. 2 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006.

<sup>142</sup> *Galin Kostov v Direktor na Direktsia «Obzhalvane I upravlenie na izpalnenieto» - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* [2012] Court of Justice of the European Union (Court of Justice of the European Union) C-62/12 ECLI:EU:C:2013:391, Opinion Of Advocate General Wathelet delivered on 28 February 2013, ECLI:EU:C:2013:129, par. 37.

<sup>143</sup> Article 12 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006.

<sup>144</sup> *W M van Tiem v Staatssecretaris van Financiën* [1989] Court of Justice of the European Union (Court of Justice of the European Union). C-186/89 ECLI:EU:C:1990:429, Opinion Of Advocate General Lenz, ECR I-4363, Par. 12.

<sup>145</sup> Based on the wording of article 12 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006

<sup>146</sup> *Hutchison 3G UK Ltd and Others v Commissioners of Customs and Excise*, Opinion Of Advocate General Kokott (no.73)par. 67.



Namely, given the characteristics of the activity in question, it could be argued that the channel owner is, essentially, exploiting his/her audiovisual content by transferring the right to access it for a predetermined period. If that interpretation was held to be true, it could thereby be supported that the activity in question qualifies as economic, insofar as the aim to obtain income thereof on a systematic basis has been established.<sup>147</sup> Under these circumstances, the continuous – or not- production of audiovisual material or the duration of the conducted activity would be irrelevant; “one time” would suffice.

A similar view was adopted by AG Kokott in her opinion in *Hutchison 3G UK Ltd*. In her opinion, the AG dismissed the need for the applicants to have conducted a certain number of transactions regarding the transfer of the right to use radio frequencies. The “how often” was irrelevant for the qualification of the activity in question as economic. What was of the essence was the fact that the property at hand was eligible to provide for consistent revenue<sup>148</sup>.

It is noteworthy to address the effectiveness of this approach from a practical standpoint. Within its context, the feature of continuity in the activity’s conduct is integrated to that of “continuous basis”.<sup>149</sup> Thus, the competent authorities would arguably be spared from the administrative weight caused by an individual assessment of the prerequisite of continuity; any challenges emanating from the titular issue would be condoned.

To continue with, the author holds the view that further grounds to support this reasoning could be derived by drawing parallels to the Court’s decision in *Kennemer Golf*<sup>150</sup>. In that case, the applicant’s activities essentially consisted of making available, on a permanent basis, of sports facilities to their members, against an annual subscription fee.

Hence, it is submitted that inasmuch as the content remains permanently available against remuneration, the activity is carried out continuously. Contrariwise, given that the monetized status of a content does not obligatory remain as such for an indefinite period, it could thereby be supported that the occasional character is ascribed to the channel owner’s activity when the provided content becomes available against payment sporadically. In what way can then the element of permanence be manifest, other than the activity’s eligibility to generate long - term income?

In the absence of decisive guidance, it is arguably difficult to draw decisive conclusions from the CJEU’s jurisprudence. Mainly, due to the fact that the CJEU has dealt with

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<sup>147</sup> See the judgement in *W M van Tiem v Staatssecretaris van Financiën* [1989] Court of Justice of the European Union (Court of Justice of the European Union). C-186/89 ECLI:EU:C:1990:429.

<sup>148</sup> *Hutchison 3G UK Ltd and Others v Commissioners of Customs and Excise*, Opinion Of Advocate General Kokott (no. 73). However, the Court did not proceed to further elaborate, since the activity was deemed by virtue of its nature as non-economic, see par. 36-37 of the judgement.

<sup>149</sup> *W M van Tiem v Staatssecretaris van Financiën* [1989] Court of Justice of the European Union (Court of Justice of the European Union). C-186/89 ECLI:EU:C:1990:429, Opinion Of Advocate General Lenz, ECR I-4363 , Par. 12, sub.par. 2.

<sup>150</sup> *Kennemer Golf & Country Club v Staatssecretaris van Financiën* (no. 106), par. 40.

more “traditional” activities, and has done so on a case- by -case analysis<sup>151</sup>. Secondly, it has shifted more on assuring the commercial nature of the activity<sup>152</sup>, and less on indisputably defining the scope of the notion of “occasional”<sup>153</sup>. In the case of *Kostov*, for instance, the latter was interpreted as non-similar to the individual’s normal activity. However, application of such interpretation presupposes that a) the channel owner has been previously registered as a taxable person, in respect of his main activity, and b) the Member State has availed itself of the right stipulated in art. 12 of the EUVD.<sup>154</sup>

Without prejudice to the aforementioned, establishing a fine line between occasional or permanent provision of audiovisual content would be deemed to be unnecessary, if the findings of the CJEU in *Slaby*<sup>155</sup> were to be employed.

#### **4.1.4.2. Application of the Slaby doctrine**

With regards to their application, the Commission holds the view that by registering to a sharing economy platforms, the individual’s activities can be assimilated to those of a trader, a producer or a person supplying services corresponding to those mentioned in art. 9 par. 1 of the EUVD<sup>156</sup>.

Within the context of our case, that would mean that as far as the channel owner has taken all the necessary steps to register, set up a channel and monetize his content, to that extent he will be engaged in economic activities and will qualify as a taxable person, irrespective of the activity’s continuous nature.

It is noteworthy to mention that the Federal Fiscal Court of Germany (Bundesfinanzhof) has seemingly held a similar view to that of the Commission. In the case of supplies of goods that form part of the operator’s private assets via an online platform, the national Court decided that the suppliers were to be assimilated to producers or traders. Based on the decision in *Slaby*, the national Court considered that they took active steps to market their property, since they had to classify each product appropriately, place it in

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<sup>151</sup> See for instance the decisions in *Commission of the European Communities v Republic of Finland* [2009] (no. 45) par. 37, *Commission of the European Communities v Kingdom of the Netherlands* [1987] Court of Justice of the European Union (Court of Justice of the European Union) C- 235/85, ECLI:EU:C:1987 paras 6-10, *Landesanstalt für Landwirtschaft v Franz Götz* [2007] Court of Justice of the European Union (Court of Justice of the European Union) C-408/06, ECLI:EU:C:2007:789, par 17-18.

<sup>152</sup> In the sense that the operator is not acting within his private capacity, and that the activity can produce consistent income. See *Hutchison 3G UK Ltd and Others v Commissioners of Customs and Excise* Opinion Of Advocate General Kokott (no. 145) par. 66-67. *Galin Kostov v Direktor na Direktsia «Obzhalvane I upravlenie na izpalnenieto» - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* ,Opinion Of Advocate General Wathelet (no. 141) and the case law cited therein.

<sup>153</sup> *Galin Kostov v Direktor na Direktsia «Obzhalvane I upravlenie na izpalnenieto» - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* ,Opinion Of Advocate General Wathelet (no. 141) par. 44-45.

<sup>154</sup> *Galin Kostov v Direktor na Direktsia «Obzhalvane I upravlenie na izpalnenieto» - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* (no. 78), par. 28-32., and the case law cited therein.

<sup>155</sup> *Jaroslav Slaby v Minister Finansów and Emilian Kuć and Halina Jeziorska-Kuć v Dyrektor Izby Skarbowej w Warszawie* (no.77).

<sup>156</sup> Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy, pag. 6/12.

the website, and provide for photos and descriptions, actions which go beyond the scope of the private management of property.<sup>157</sup>

Nevertheless, this approach does not come without criticism. To *Glica's* eyes, the Commission's view appears to be rather excessive. In particular, he considers that the objective of a digital platform is to facilitate individuals to carry out their activities professionally, something that they would otherwise be incapable of. Therefore, assimilating them, by virtue of subscription, to professional traders or producers, who are eligible to properly market their goods or services without the mediation of a digital platform, defies the very nature of the sharing economy platforms and the established economic reality.<sup>158</sup>

In the author's view, application of the *Slaby* decision is, much like *Enkler*, dependent on what constitutes the benchmark of the trader or producer. On one hand, the latter could be comprised of individuals or businesses, that provide audiovisual content via their own website, and have the appropriate infrastructure to sufficiently market, by own means, their services on a significant scale. That being the case, *Glica's* criticism appears to be rather reasonable.

On the other hand, if the point of reference is set to that of a person, who provides audiovisual content through a VSW, and does so on a professional level, then the Commission's approach does not appear to be so implausible. In that case, the individual in question and the professional both benefit from the digital platform's infrastructure, which enables them to proficiently make their content available to the global audience. Hence, it might be argued that they essentially employ similar resources.

However, application of this reasoning seemingly presupposes that an identification of the professional exercise of this type of activity is possible. That could be the case, for example, of a supplier who has already been classified for these activities as a taxable person for VAT purposes. Consequently, this approach eventually brings up the previous issue, that is whether the channel owner qualifies as a taxable person in the first place.

On a concluding note, the CJEU's adoption of the *Slaby* and *Enkler* line of reasoning in subsequent cases has been generally criticized by *Van de Leur* as resulting to an escalation of the number of taxable persons beyond a reasonable and justified level. Insofar as individuals generated revenue on a regular basis from the exploitation of private assets, they might fall within the scope of application of the EUVD, irrespective

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<sup>157</sup> A.M. Bal, *The Vague Concept of "Taxable Person" in EU VAT Law*, (no. 26), Chapter 3.2 Ebay Seller, pag. 297. Ref to the case BFH, 26 June 2012, V R 2/11, see. Par. 36 et subs. of the judgement.

<sup>158</sup> I. Glica, *How the Sharing Economy Is Challenging the EU VAT System*, 28 Intl. VAT Monitor 2 (2017), Journals IBFD. Chapter 4.1.

of their intentions. Additionally, he has stated that this line of argumentation may pose significant problems for individuals who conduct supplies via online platforms<sup>159</sup>.

#### 4.1.5. Independently

Under the ordinary circumstances, the channel owner will not be contractually or legally bind to the VSW, in a manner that establishes an employer-employee relationship.<sup>160</sup> As a matter of fact, several digital platforms explicitly stipulate that the channel owner is presumed to be the owner, right holder and creator of the provided audiovisual material, and the sole responsible for everything regarding the content and its provision through the VSW<sup>161</sup>.

The fact that an online platform might explicitly prohibit the uploading or streaming of specific content should not be deemed sufficient to establish an employer – employee tie. In the author’s view, it is rather a precondition set by the online platform so as the channel owner will be eligible to use its broadcasting or other relating services<sup>162</sup>. In case of infringement of intellectual property rights or any violation of the code of conduct for instance, he will solely be held responsible for any damages caused. In other words, he will bear the financial risk of his supply<sup>163</sup>.

Therefore, it could be inferred that the channel owner is carrying out his activities independently. However, due to the vast number of VSW, the author cannot preclude the possibility of an employer – employee relationship being established between a channel owner and an online platform, emanating from the relevant terms and conditions.

It is also noteworthy to mention that according to the Commission, the economic reality must always be taken into account when determining the independent nature of the activity’s conduct. If the former contradicts the contractual relationship, in the sense that the actual relationship between provider and digital platform is reminiscent of that of an employer – employee, the Commission suggest that the activity must be treated as such<sup>164</sup>.

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<sup>159</sup> M. van de Leur, *Watch Out, You May Be a Taxable Person!*, 24 Intl. VAT Monitor 5 (2013), Journals IBFD, referring to the judgements in *Ainārs Rēdlihs v Valsts ieņēmumu dienests* (no.70), and in *Finanzamt Freistadt Rohrbach Urfahr v Unabhängiger Finanzsenat Außenstelle Linz* (no. 70).

<sup>160</sup> This presumption is based on how the Commission conceptualizes the basic traits of the sharing economy. 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, pag. 3.

<sup>161</sup> Article 10 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006, also Youtube, Terms of Service par. 7, Twitchtv Terms of Service par. 8., also *Gmina Wrocław v Minister Finansów* [(no.52) par.34, Terra, B. and Kajus, J. (2017). *Introduction to European VAT (Recast), Commentaries on European VAT Directives*. Chapter 9.4 Amsterdam: IBFD Publications

<sup>162</sup> For instance Youtube, Terms of Service, par.6-7, Twitchtv Terms of Service, Chapter Copyright, also *Gmina Wrocław v Minister Finansów* (no. 52) par.34, Terra, B. and Kajus, J. (2017). *Introduction to European VAT (Recast)*, (no. 24) Chapter 9.4.

<sup>163</sup> For instance Youtube, Terms of Use, par. 13, Twitchtv Terms of Use par. 17, Disputes par.3-4

<sup>164</sup> Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy, pag 6/12 -7/12.

To conclude with, it is apparent that a thorough examination of the particular circumstances must take place, for sufficiently ascertaining the element of independency regarding the examined activity's conduct.

#### **4.1.6. Acting as such**

It stems from the CJEU's jurisprudence that activities carried out within the operator's private sphere do not classify as economic activities.<sup>165</sup> The element of commerciality<sup>166</sup> in the conduct an activity is tantamount for the application of the EU VAT.

With regards to the ultimate prerequisite, the Commission holds the view that a person operating within the sharing economy spectrum acquires the legal status of taxable for VAT, since its supplies constitute, in principle, economic activities<sup>167</sup>. The author sites with this conclusion<sup>168</sup>. If anything, a channel owner producing videos without commercial intentions would presumably avoid, for instance, the commotion of having to comply with the strict terms and conditions regarding the content's monetization, or any considerable expenditure such professional video editing.<sup>169</sup>

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<sup>165</sup> *Jarosław Slaby v Minister Finansów and Emilian Kuć and Halina Jeziorska-Kuć v Dyrektor Izby Skarbowej w Warszawie* (no. 77) par. 37 and the case law cited therein

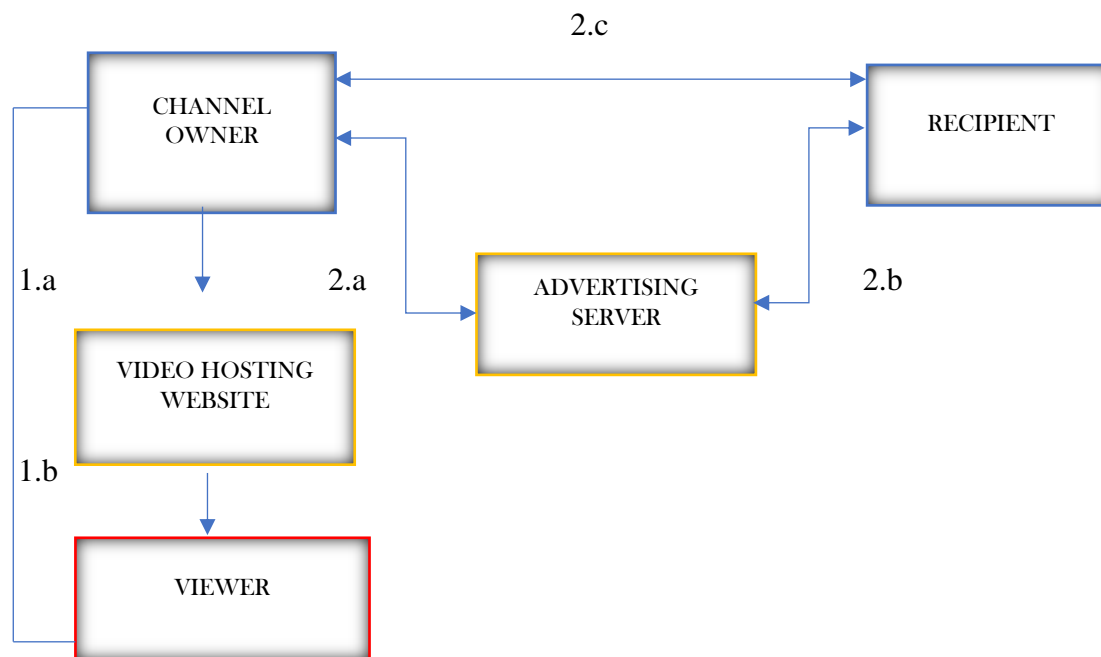
<sup>166</sup> *Hutchison 3G UK Ltd and Others v Commissioners of Customs and Excise*, Opinion Of Advocate General Kokott (no. 73) par. 66-67. *Galın Kostov v Direktor na Direktsia «Obzhalvane I upravlenie na izpalnenieto» - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* [2012] Court of Opinion Of Advocate General Wathelet (no. 141) par. 28 -29.

<sup>167</sup> Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy, pag 7/12.

<sup>168</sup> To the extent that the economic nature of the activity can be ascertained.

<sup>169</sup> See Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy, pag. 6/12, A.M. Bal, *The Vague Concept of "Taxable Person" in EU VAT Law*, 24 Intl. VAT Monitor 5 (2013), Journals IBFD, Chapter 3.2 Ebay Seller, pag. 297. This assumption seemingly presupposes the application of the *Slaby reasoning*.

## 4.2. ADVERTISEMENT -REWARD MODEL



1A-1B: The actions are identical to those of the paid content model.

2A-2B: The channel owner is required to register to the advertising platform. Thereby, the latter will be eligible to place advertisement banners to the former's videos, on behalf of its clients. 2C: The latter will pay ("bid") the channel owner a predetermined fee, the overall level of which is determined by the applicable measurement method (CPM, CPC, CPE).

### 4.2.1 Introductory Remarks

To begin with, this model must be differentiated from that of the paid content. While the latter deals with the provision of audiovisual material to final consumers (B2C transactions), the model at hand essentially deals with the provision of advertising space to -presumably- taxable persons for VAT purposes (B2B transactions). Nevertheless, both activities fall within the scope of the notion of electronic services for VAT<sup>170</sup>.

With regards to the challenges revolving around the VAT treatment of the activity in question, the author holds the view that certain findings from the paid content model analysis may be extrapolated to the current analysis.

### 4.2.2. The Objective Scope.

#### 4.2.2.1. Supply for consideration

It should be apparent from the model's framework that the channel owner provides his services in exchange for consideration, given that the transactional parties have

<sup>170</sup> Article 7(2) of 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, Annex I point (h) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006

stipulated a price<sup>171</sup>. However, due to the particularities of the employed measurement types, situations might occur where the service is provided for no consideration.

Namely, the provision and the amount of payments are dependent on the viewer interacting either passively (CPM) or actively (CPC, CPE) with the hosted advertisement unit. However, any engagement with the latter will be prevented when the viewer is using a software designed to prevent/remove any kind of web advertisements (“*ad block programs*”). Furthermore, even if such a software is not employed, the viewer is not, by all means, obligated to actively engage with the advertisement unit; the enjoyment of the audiovisual content is not dependent on any actions relating to the advertisements.<sup>172</sup>

Thus, in the absence of any interactions, the channel owner essentially ends up providing his services exclusively for free. That being the case, the supply falls outside the scope of VAT, since there is no basis of assessment. Consequently, the channel owner does not acquire the status of taxable person for VAT<sup>173</sup>.

#### **4.2.2.2. The existence of a direct link**

Without prejudice to the aforementioned, it could be assumed that the provision of advertising space is being carried out in return for direct consideration. By drawing parallels to the paid content model, it could be supported that insofar as the provider has registered to the designated advertising server, and receives consideration for his services, a legal and reciprocal relationship between the provider and the recipient is manifest.<sup>174</sup>

#### **4.2.2.3. The case of Limited Interactions**

The titular issue concerns the effects that the viewer’s interactions have on the calculation of the level of remuneration given in return for the supply of advertising space. Given their correlation, a situation might occur where the channel owner receives a consideration that could be characterized as of a relatively low, or even nominal, value.

To provide for an example, if the CMP is set, for instance, at a price of 10 Euros, and the video ends up generating only 100 impressions, the remuneration received will correspond to 0.1 Euros. Hence, it could be argued that the consideration is of such a negligible value, that it essentially constitutes a concession on behalf of the channel owner. Thereby, the transaction in question could potentially escape VAT.<sup>175</sup>

To continue with, a similar conclusion could be reached if the findings of the Court in *Commission v Finland, Borsele, or Lajver*. Particularly, one might not preclude a

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<sup>171</sup> Article 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006, *Hong-Kong Trade Development Council* (no. 10)

<sup>172</sup> This presumption is based on the fact that if it did, it would suppose that adblocker software or any absence of engagement would not permit the reproduction of the audiovisual content, see Chapter 4.1.3.2.

<sup>173</sup> *Staatssecretaris van Financiën v Hong-Kong Trade Development Council* [(no. 31) par 10.

<sup>174</sup> Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy, pag. 5/12 and the analysis under Chapter 4.1.2.2.

<sup>175</sup> *Commission of the European Communities v French Republic* (no.48), par. 21.

situation in which the channel owner ends up not covering the incurring cost for his supply, resulting from the low level of the received remuneration.

However, in comparison to the previous model, the author fails to see how the *Commission v Finland* and *Borsele* judgements could be applicable, since the level of consideration does not vary depending on the personal or financial circumstances of the recipient<sup>176</sup>. Nevertheless, the Court in *Lajver* did not provide for explicit indication regarding the factors that may potentially call into question (with the exception maybe of abusive practices) the existence of a direct link.<sup>177</sup> Consequently, this brings up the issue whether the viewer's interactions could be included in such factors.

In any case, the Court had dismissed the possibility of the direct link being called into question, when the amount of the stipulated remuneration was adjustable due to certain circumstances.<sup>178</sup> Moreover, it has held the same view regarding the arranged methods of payment.<sup>179</sup> It could, thereby, be argued that the measurement types essentially fall within the notion of "well established criteria", on the basis of which the amount of remuneration is determined.<sup>180</sup>

In addition, the Court has consistently disregarded the fact that the level or remuneration per se is sufficient enough to challenge the existence of a direct link.<sup>181</sup> Thus, and without prejudice to an opposite conclusion, the author considers that under the aforesaid circumstances, the supply of advertising space should be considered to being carried out in return for direct consideration.

### **4.2.3. The Subjective Scope**

#### **4.2.3.1. The purpose of obtaining income on a continuous basis**

With regards to the titular issue, the author considers that a similar approach to the preceding model could be adopted. In particular, the Commission's view on the way the presence continuity can be established within the context of economic activities via online platforms can be extrapolated to the examined model.

However, much like the in the paid channel model, the mere registration to the advertising server should not by itself be conclusive enough to establish that the channel owner aims to regularly derive income. Specifically, since the advertising server is interconnected to the VSW, it could be argued that the channel owner must also take

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<sup>176</sup> *Commission of the European Communities v Republic of Finland* [(no. 45) par. 44 -51, *Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele* (no.46), ECLI:EU:C:2016:334, par. 32-34.

<sup>177</sup> *Lajvér Meliorációs Nonprofit Kft, Lajvér Csapadékvizrendezési Nonprofit Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV)* (no.47) par.42-47.

<sup>178</sup> *Saudaçor* [2015] Court of Justice of the European Union (Court of Justice of the European Union), , C-174/14, EU:C:2015:733, par. 36.

<sup>179</sup> *Le Rayon d'Or* (no. 106) par. 32-34.

<sup>180</sup> *ibid*

<sup>181</sup> *Hotel Scandic Gåsabäck* [2005] (no. 29) paras 22-24, *Campsa Estaciones de Servicio* (no.43), par. 16 paras 25-28, *Lajvér Meliorációs Nonprofit Kft, Lajvér Csapadékvizrendezési Nonprofit Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV)* (no. 47) par. 43 -47, *Commission of the European Communities v French Republic* (no.48) par. 21.



the necessary steps to register to the affiliated VSW, set up a channel and comply with the occasional prerequisites to render the content eligible for monetization.<sup>182</sup>

Nonetheless, as crystallized under Chapter 4.1.3.2 of this analysis, merely relying on the Commission's approach might have, inter alia, undesirable effects from an administrative perspective. Hence it is necessary to seek further grounds for ascertaining the titular prerequisite.

To that effect, while resorting to the application of the *Enkler* doctrine seems just about unavoidable,<sup>183</sup> it should be apparent at this point that it poses difficulties identical to those referred in the preceding model's analysis. In a nutshell, it boils down to how and if it is possible to establish a concrete benchmark of common performance.<sup>184</sup>

#### **4.2.3.2. Permanent and occasional conduct of the activity**

In respect to the issues attached to the titular precondition, the author stands by the preceding analysis. If anything, it all comes down to how the continuous conduct of the activity in question can be interpreted: is it how much space the channel owner has provided for, the frequency of the conduct the capability of producing stable revenue that is of the essence?

Nevertheless, given that the CJEU has disregarded the volume or number of transactions or the course of the activity as inconclusive criteria to establish the economic nature of the activity per se (not only concerning the regular conduct)<sup>185</sup>, application of the *Van Tiem* approach permits for arguably plausible inferences. Therefore, if it is accepted that the channel owner essentially transfers the right to occupy space in his property – instead of individual advertising space in a video-, insofar as the purpose of obtaining income thereof on a stable basis is ascertained, to that extent the operator is engaged in continuous economic activities.<sup>186</sup>

Furthermore, in spite of the fact that the examined activities essentially constitute distinct transactions, one might wonder whether the interpretation in *Kostov*<sup>187</sup> can be applicable. The main reason behind this statement stems from the correlation between these transactions.

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<sup>182</sup> Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy, pag. 6/12,

[https://support.google.com/youtube/troubleshooter/7367438?visit\\_id=1-636307193615192264-1197254190&rd=1](https://support.google.com/youtube/troubleshooter/7367438?visit_id=1-636307193615192264-1197254190&rd=1), <https://www.google.com/adsense/localized-terms>

<sup>183</sup> Since the advertising space essentially occupies space in the audiovisual content, the issues regarding the examination of the length of the channel subscription follows the activity in question.

<sup>184</sup> See Chapter 4.1.3.2.2. of the preceding analysis.

<sup>185</sup> *Jaroslav Slaby v Minister Finansów and Emilian Kuć and Halina Jeziorska-Kuć v Dyrektor Izby Skarbowej w Warszawie* (no.77) par 36.-37 and the case law cited therein,

<sup>186</sup> A.M. Bal, *The Vague Concept of "Taxable Person" in EU VAT Law* (no. 26), pag. 295, *W M van Tiem v Staatssecretaris van Financiën* [1989] Court of Justice of the European Union (Court of Justice of the European Union). C-186/89 ECLI:EU:C:1990:429.

<sup>187</sup> *Galin Kostov v Direktor na Direktsia «Obzhalvane I upravljenje na izpalnenieto» - Varna pri Tsentralno upravljenje na Natsionalnata agentsia za prihodite* [2012] Court of Justice of the European Union (Court of Justice of the European Union) C-62/12 ECLI:EU:C:2013:391

Specifically, the channel owner, depending on the VSW, may be required to avail himself of the advertisement reward monetization as a prerequisite for setting up a paid content scheme. That being the case, the conduct of one functionally converges with the conduct of the other, since the advertisement banner occupies space within the audiovisual material. Given that interconnection, how can the “ancillary” nature of one of these activities can be established? What constitutes the main activity?<sup>188</sup>

In the author’s view, under these circumstances, the decision in *Kostov* can be employed to the extent that the channel owner already qualifies as a taxable person for VAT purposes, in respect of his main activity, which must be differentiated from those in question. In any case, much like under the preceding model, application of the Court’s decision in *Slaby* in the context of our case, would constitute the disputes revolving around the titular precondition superfluous.<sup>189</sup>

#### **4.2.4. Independently**

Pursuant to art. 10 of the EUVD<sup>190</sup>, it must be ascertained whether the channel owner is carrying out the activity in question in an independent manner. Given the circumstances within the latter takes place, the author considers that an employer – employee relationship cannot, in principle, be established, for the following reasons<sup>191</sup>.

First of all, it should be apparent at this point, that the channel owner is exploiting own property, and derives own income thereof<sup>192</sup>. While the ad server may provide for a variety of options regarding the publisher’s supply, this does not dictate the latter’s conduct. The channel owner will seemingly not be obliged to choose, for instance, a specific advertisement unit or advertiser. In other words, the former will possess the necessary freedom to arrange appropriately his activity<sup>193</sup>.

Second of all, given that the channel owner is presumably the sole responsible for the audiovisual content,<sup>194</sup> it could be assumed that in case of the latter being deemed ineligible for further monetization, e.g. due to a violation of intellectual property law or infringement of the code of conduct, it will be the channel owner that will bear the financial consequences, and not the ad server or the host VSW. Moreover, several ad

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<sup>188</sup> *Galina Kostov v Direktor na Direktsia «Obzhalvane I upravlenie na izpalnenieto» - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* [2012] Court of Justice of the European Union (Court of Justice of the European Union) C-62/12 ECLI:EU:C:2013:391 par. 28-32.

<sup>189</sup> See. Chapter 4.1.4.2. of this analysis.

<sup>190</sup> Article 10 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347 of 11 December 2006

<sup>191</sup> The preconditions for establishing the independent conduct of an activity *Gmina Wrocław v Minister Finansów* (no.52) par.34, *Staatssecretaris van Financiën v J. Heerma* (no.57), par. 18.Terra, B. and Kajus, J. (2017). *Introduction to European VAT (Recast)*, (no.24). Chapter 9.4 .

<sup>192</sup> For instance Youtube Terms of Service par. 7, Adsense Terms and Conditions par. 12, par.5, Media Net Terms of Use par. 10.

<sup>193</sup> Media Net, Are you ready to maximize your revenue, Publishers. Adwords, Choose where and when ads appear.

<sup>194</sup> For instance Youtube Terms of Service par. 13, Twitchtv Terms of Service par. 17, Disputes par.3-4

servers do explicitly stipulate that the channel owner is liable for damages caused for any infringement of the contractual terms of use or any violation of law.<sup>195</sup>

To conclude with, it is noteworthy to mention that according to the terms and conditions of the said servers, the parties involved in the transactional line (publisher-advertiser-ad server), as depicted in the graphical representation of the activity in question, are to be regarded as independent operators.<sup>196</sup>

#### **4.2.5. Acting as such**

In respect of the ultimate prerequisite, it could be inferred at this point that the channel owner would act as a taxable person, to the extent that he/she is carrying out, a continuous economic activity in an independent manner; the very nature of the examined activity should permit the assumption that it goes beyond the channel owner's private spectrum.<sup>197</sup>

#### **4.3. Interim part of Chapter 4: The CJEU's problematic approach.**

At this point, it could be inferred that it is not whether reward based activities could, or should, fall within the objective and the subjective scope of the EUVD, that constitutes the principle issue. Instead, it is the CJEU's interpretation of the concepts of "supply for consideration" and "taxable person" that essentially makes this assessment challenging.

On one hand, the ambiguous standpoint of the CJEU regarding the existence of the direct link when a supply is carried out at price below the incurred cost, appears to be quite problematic. Not solely in the context of the examined models, but rather on a general level.

On the other hand, in the context of the sharing economy, the Court's consistent resort to the application of doctrines involving "comparability" tests, in order to ascertain the VAT status of an activity, arguably reaches a dead end<sup>198</sup>. The *Enkler* case was adjudicated in 1994, and the CJEU had to deal with the VAT qualification of a caravan hire-out. While the judgement in *Slaby* was delivered in 2011, it revolved, inter alia, around the sale of land plots<sup>199</sup>. Given the nature of these activities, and the circumstances under which they were performed, they vastly differ, for instance, from the provision of audiovisual content via a VSW<sup>200</sup>. Therefore, the suitability of these

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<sup>195</sup> For instance AdSense Terms and Conditions par. 10.

<sup>196</sup> *ibid* par. 14, also Media net Terms of use par. 14.7.

<sup>197</sup> By analogy Value Added Tax Committee (Article 398 Of Directive 2006/112/Ec) Working Paper No 878, VAT treatment of sharing economy, pag 7/12, also *Galin Kostov v Direktor na Direktsia «Obzhalvane I upravljenie na izpalnenieto» - Varna pri Tsentralno upravljenie na Natsionalnata agentsia za prihodite* [2012] Court of Justice of the European Union (Court of Justice of the European Union) C-62/12 ECLI:EU:C:2013:391, Opinion Of Advocate General Wathelet delivered on 28 February 2013, ECLI:EU:C:2013:129, par. 28 -29 and the case law cited therein.

<sup>198</sup> *Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele* (no. 46), par.29-31, in *Ainārs Rēdlihs v Valsts ieņēmumu dienests* (no.70) *Finanzamt Freistadt Rohrbach Urfahr v Unabhängiger Finanzsenat Außenstelle Linz* (no. 70) par. 20-21.

<sup>199</sup> *Jarosław Slaby v Minister Finansów and Emilian Kuć and Halina Jeziorska-Kuć v Dyrektor Izby Skarbowej w Warszawie* (no.77) par. 13.

“tests” appears to be rather questionable, especially considering that the Commission has not provided for detailed guidance on how to apply them in the light of the new economy, and its opinion is not legally binding.<sup>201</sup>

The issue is further elevated, if account is given to the fact that, even in the context of non-digital activities, application of the aforementioned might still lead to contradictory results. That would be the case, for instance, of *Finanzamt Freistadt Rohrbach Urfahr*, where the CJEU dealt with the classification of the running of private photovoltaic installations against consideration as economic activities for VAT, when the energy produced by them was fed into the public power grid’s network.<sup>202</sup>

The preliminary question to the CJEU was referred by the Austrian Supreme Administrative Court. Based on the *Enkler* doctrine, the latter considered that said activity was not economic, since that the energy generated was not sufficient to cover the energy needs of the household. As such, its conduct differentiated from the usual exploitation of a photovoltaic installation for economic purposes.<sup>203</sup> However, the German Tax Supreme Court, to the judiciary of which the Austrian Supreme initially referred to, held the exact opposite view. Based on said doctrine, it was of the view that insofar as the activity was eligible to generate continuous income, to that extent it qualified as economic for VAT, irrespective of the relation between the energy produced or consumed.<sup>204</sup> In its judgement, the CJEU adopted a similar view.<sup>205</sup>

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<sup>200</sup> In the sense that they are not electronically provided via a VSW or an online platform in general

<sup>201</sup> I. Grlica, *How the Sharing Economy Is Challenging the EU VAT System*, (no. 157), Chapter 6. Conclusion, par. 1-2.

<sup>202</sup> *Finanzamt Freistadt Rohrbach Urfahr v Unabhängiger Finanzsenat Außenstelle Linz* (no. 66), par. 2.

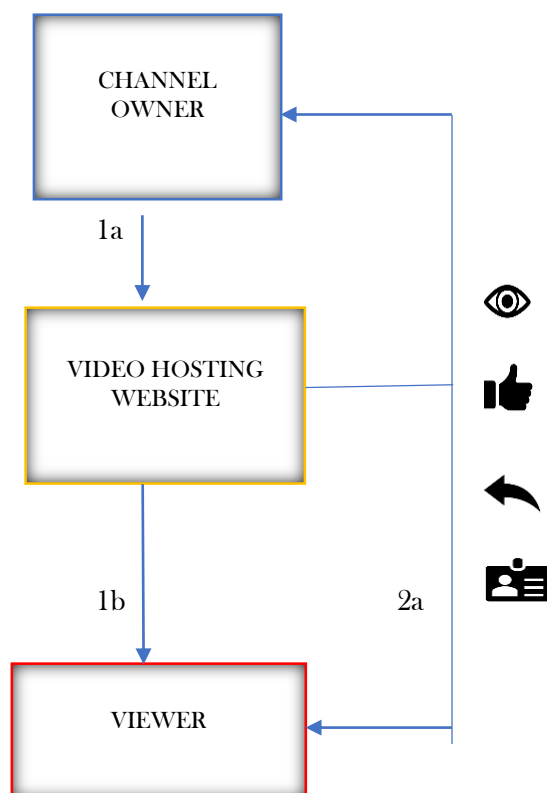
<sup>203</sup> Tina Ehrke-Rabel & Barbara Gunacker-Slawitsch (2012) Does the running of a photovoltaic installation without a power storage facility on or adjacent to a private dwelling constitute an ‘economic activity’ within the VAT Directive?, *World Journal of VAT/GST Law*, 1:2, 198-201, DOI: 10.5235/WJOVL.1.2.198 Chapter Comments, pag. 200-201.

<sup>204</sup> *Ibid*, pag. 199 par. 1, pag. 200. Par. 2.

<sup>205</sup> *Finanzamt Freistadt Rohrbach Urfahr v Unabhängiger Finanzsenat Außenstelle Linz* (no. 66), par. 28-31.

## 5. NON - MONETIZED MODEL

### 5.1 NON - REWARD MODEL



1A-1B: The actions are identical to those of the paid content model.

2A: The viewer might be required to register to the online platform, in order to perform actions such as “liking” or “commenting” a particular video, or subscribing to the channel which hosts the audiovisual content. Additionally, he will be eligible to “share” the content, by uploading it to other digital platforms. In any case, by watching the video, a “view” of the latter will be generated and recorded by the digital platform.

#### 5.1.1 Introductory remarks: Is there a Taxable Supply?

At first glance, one might question why this transaction could be subject to VAT, since the provision of the audiovisual content is, *prima facie*, carried out for free. However, not solely monetary contributions qualify as consideration for VAT purposes.

##### 5.1.1.2 Remuneration in kind

Pursuant to art. 2 par. 1 (a), (c) and art. 73 of the EUVD, the CJEU has held that the consideration for a supply of goods or services may be comprised of a supply of goods or services, insofar as a direct link between them can be established, and the value of these supplies is capable of being “expressed in money”.<sup>206</sup> That would be the case, for instance, of barter contracts, where the remuneration is by nature in kind. In bartering,

<sup>206</sup> *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA* (no.29) par. 9-13

instead of monetary consideration, the supplier will receive a supply of goods or services in return for his initial supply.<sup>207</sup>

Consequently, this raises the question whether the viewer and the channel owner may be engaged in a barter transaction. To adequately provide for an answer, it must first be established whether the viewer is providing a service to the channel owner, when he watches a video, performs actions such as liking or sharing, or provides his personal data, by virtue of his registration to a VSW or a hosted channel.

To that effect, the author considers that it would be constructive to address how these behaviors are conceptualized in fields other than tax law, such as marketing.

### **5.1.2. Understanding Non-Monetary Customer Value Contributions**

Based on a recent research conducted by *Anderl, März and Schumann* regarding the way customers of free services may contribute value without actually making monetary payments, *NMCVCs* constitute “*resource contributions by customers that do not include a monetary transaction, in services that are completely free to end customers*”. (italics added)<sup>208</sup>

This kind of contributions may take various forms. Included amongst the most notable ones are “Word of Mouth”, co- production, attention, and data.<sup>209</sup>

#### **5.1.2.1. Word of Mouth (WOM)**

WOM has been depicted in literature as an “*unpaid interpersonal communication between people*”. This type of communication occurs when a consumer actively talks about, refers to and encourages -or not- other consumers to purchase a certain product or service.<sup>210</sup> Therefore, WOM functions in a way reminiscent of that of advertising or promotion.<sup>211</sup> Furthermore, when these actions are performed via online platforms or applications, such as social media networks, they fall within the notion of electronic word of mouth (e-WOM).<sup>212</sup>

Within the context of our case, e- WOM recommendations will presumably occur when the viewer “shares” the audiovisual content to a social media page, persuading other members of his network to view the shared content or other content featured in the

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<sup>207</sup> *Serebryannay vek EOOD v Direktor na Direksia ‘Obzhalvane i upravlenie na izpalnenieto’ — Varna pri Tsentralno upravlenie na Natsionalna agentsia za prihodite* (no. 39) par. 37-39 and the case law cited therein.

<sup>208</sup> Eva Anderl, Armin März & Jan H. Schumann (2016) Nonmonetary customer value contributions in free e-services, *Journal of Strategic Marketing*, 24:3-4, 175-189, DOI: 10.1080/0965254X.2015.1095219, pag. 175-176.

<sup>209</sup> *Ibid*, pag. 176 par.2

<sup>210</sup> Matthew L. Meuter , Deborah Brown McCabe & James M. Curran (2013) Electronic Word-of-Mouth Versus Interpersonal Word-of-Mouth: Are All Forms of Word-of-Mouth Equally Influential?, *Services Marketing Quarterly*, 34:3, 240-256, DOI:10.1080/15332969.2013.798201 pag. 240.

<sup>211</sup> Roger B. Mason (2008) Word of mouth as a promotional tool for turbulent markets, *Journal of Marketing Communications*, 14:3, 207-224, DOI: 10.1080/13527260701754258 pag. 207. Introduction.

<sup>212</sup> Matthew L. Meuter , Deborah Brown McCabe & James M. Curran (2013) Electronic Word-of-Mouth Versus Interpersonal Word-of-Mouth: Are All Forms of Word-of-Mouth Equally Influential?, *Services Marketing Quarterly*, 34:3, 240-256, DOI:10.1080/15332969.2013.798201 pag. 241.

owner's channel. It could, thereby, be argued that the viewer essentially provides a promotional or advertising service - of some sorts - to the channel owner.

Nevertheless, it has been supported that direct monetization of WOM contributions by free e-services providers rarely occurs. The benefit for the latter is comprised of cost savings relating to the attraction of customers<sup>213</sup>. While crystalizing the amount of these savings for VAT purposes falls outside the scope of this thesis, the author holds the view that e-WOM contributions in the context of our case may, arguably, be expressed in monetary terms.

#### **5.1.2.2. Co-production**

*Co- production* of a good or service occurs when a consumer participates in the production of a good or service by commuting, for instance, his individual ingenuity or his designs. When it comes to free e-services, co-production will take place when the consumer provides for additional material himself (photos, text,) or enhances the original content (i.e. translation). Moreover, providing for beneficial feedback to the provider may also qualify as *co-production* of the supplied service<sup>214</sup>.

With regards to the free provision of audiovisual material via VSWs, co-production may occur for instance, when a viewer -or several viewers- comments on how the channel owner could improve the streaming or video quality of the provided material. Additionally, when he/she expresses his/her view on what he/she liked or disliked about the content, and provide for ideas on how to make it more appealing to viewers (although in several cases, viewer commentaries might be completely irrelevant to the quality of the content). Providing for material such as audio files might also occur.

Therefore, it could be supported that the latter provides a service reminiscent to that of product quality check. Since the value of these contributions consists, in principle, of cost savings relating to production or support (indirect monetization), the author stands by the preceding view.<sup>215</sup>

#### **5.1.2.3. Attention**

It is not unfamiliar to businesses that customers might actually pay with attention. The notion of attention, as conceptualized, includes two types: exposure and behavioral responses. These types differentiate based on whether the consumer actively reacts to a specific service, or not.<sup>216</sup>

On one hand, exposure can be described as the aggregated sum of potential individual views or actual views<sup>217</sup>. In the context of our case, the viewer expresses passively his

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<sup>213</sup> Eva Anderl, Armin März & Jan H. Schumann (2016) Nonmonetary customer value contributions in free e-services, *Journal of Strategic Marketing*, 24:3-4, 175-189, DOI: 10.1080/0965254X.2015.1095219, pag. 179.

<sup>214</sup> Ibid, pag. 180, *Co-production*.

<sup>215</sup> Ibid, see the ultimate paragraph of the WOM contributions analysis of this Chapter.

<sup>216</sup> Eva Anderl, Armin März & Jan H. Schumann (2016) Nonmonetary customer value contributions in free e-services, *Journal of Strategic Marketing*, 24:3-4, 175-189, DOI: 10.1080/0965254X.2015.1095219, pag. 182

<sup>217</sup> Ibid, Youtube, Frozen View Count, How Views are counted.

attention when he views a video, and the latter is recorded and aggregated to the views of other consumers.<sup>218</sup>

On the other hand, when the viewer engages in actions such as clicking on links, this interaction presumably will fall within the notion of behavioral responses. That could be the case, for instance, when the viewer subscribes to the channel that host the audiovisual content, or clicks links that are available either in the video or in its description.<sup>219</sup>

#### **5.1.2.3.1. Can attention constitute a provision of services for VAT?**

Unlike the previous types on NVMCM, where convincing parallels to relating services could be drawn, it seems unlikely that similar conclusions could be extrapolated in the case of attention.

##### **i. Views**

The main reasoning behind this statement is the fact that, when a user watches a video, he essentially acts as a recipient and final consumer of the service. In other words, he “consumes” the audiovisual product, in the same way that an individual “consumes” a painting that is put on display when looking at it<sup>220</sup>. It is that final consumption -or rather the final consumption’s expenditure- that the EU VAT aims to tax<sup>221</sup>.

In the author’s view, the fact that his action is electronically captured and recorded as a “view”<sup>222</sup>, the aggregate of which can be subsequently used by the channel owner to attract advertisers or sponsors – and thus derive financial benefits-, should not lead to the assumption that the viewer is providing a service in return for the former’s supply, at least for VAT purposes.<sup>223</sup> An opposite approach would lead to the nonsensical conclusion that consumption can simultaneously constitute a supply of services.

Therefore, it can be inferred that under the above circumstances, the provision of audiovisual content is being carried out for free. As such, it falls outside the scope of application of the EU VAT.<sup>224</sup>

##### **ii. Interactions**

When it comes to active interactions, similar conclusions could be drawn. Specifically, the author fails to view how the former could be construed as a provision of services. If anything, clicking on a link or subscribing to a channel may constitute actions that facilitate an eventual supply of audiovisual content<sup>225</sup>.

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<sup>218</sup> *ibid*

<sup>219</sup> For instance Youtube, Subscribers report.

<sup>220</sup> Terra, B. and Kajus, J. (2017). *Introduction to European VAT (Recast)*, ((no.24) Chapter 7.2.2, Amsterdam: IBFD Publications

<sup>221</sup> *Ibid*, also chapter 7.2.1.

<sup>222</sup> For instance, Youtube, Watch Report.

<sup>223</sup> Eva Anderl, Armin März & Jan H. Schumann (2016) Nonmonetary customer value contributions in free e-services, *Journal of Strategic Marketing*, 24:3-4, 175-189, DOI: 10.1080/0965254X.2015.1095219, pag. 182. Par. 3

<sup>224</sup> *Staatssecretaris van Financiën v Hong-Kong Trade Development Council* [1982] Court of Justice of the European Union (Court of Justice of the European Union) C-89/81, ECLI:EU:C:1982:121 par 10

<sup>225</sup> For instance Youtube, Manage Notifications.



The fact that the number of subscribers might constitute a measure to attract sponsors and advertisers – much like “views” -, should not suppose that the relative actions constitute supply of services. Otherwise, what kind of service could the viewer be providing? Could it be the right to use the individualized subscriber’s data?

Nonetheless, subscribing to a channel does not result to a transfer of personal data or the right to use thereof,<sup>226</sup> by the viewer to the channel owner; it is rather a notification application, handled by the VSW, that informs, inter alia, the subscriber when new content has been uploaded<sup>227</sup>.

#### **5.1.2.4. Data**

The notion of data includes a various collection of digital information. It could span from behavioral data, such as browsing patterns or interactions (i.e. clicks), to profile data.<sup>228</sup> According to the Oxford Dictionary, a profile (“on a social media website or application”) is defined as “a user’s summary of their personal details or current situation”.<sup>229</sup> In addition, the OECD defines personal data as “any information relating to an identified or identifiable individual (data subject)”<sup>230</sup>. Thus, it appears that the terms “profile data” and “personal data” constitute, to some extent, notionally interchangeable terms.

With regards to whether the transfer of personal data can constitute a supply of services, *Pfeiffer* has argued in favor of that conclusion. Particularly, he considers that as far as the supply of an electronic service is conditional upon the recipient providing his personal data – by virtue of his registration-, the latter is transferring intangible property, or the right to use thereof, to the supplier. Thereby, both are deemed to be engaged in a barter transaction.<sup>231</sup>

Nonetheless, when it comes to the provision of audiovisual content via VSWs, the channel owner will not, in principle, have access to the viewer’s personal data. In fact, several DMPs have included specific provisos in their user terms and conditions, which explicitly prohibit the channel owner to collect or gain access to any personal or profile data of other users. Some platforms though may permit this upon the user’s consensus.<sup>232</sup>

#### **5.1.3. Can a direct link be established?**

Based on the aforementioned, the author finds good arguments to support that non - monetary contributions may correspond to a provision of services, and thereby

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<sup>226</sup> For instance, Youtube, Terms of Service, Data analytics and transfer, par. 5. I and

<sup>227</sup> Ibid (no 20)

<sup>228</sup> Eva Anderl, Armin März & Jan H. Schumann (2016) Nonmonetary customer value contributions in free e-services, *Journal of Strategic Marketing*, 24:3-4, 175-189, pag. 183-184

<sup>229</sup> Oxford Dictionaries, Definition of Profile, point 2.1

<sup>230</sup> OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data Part One. General Definitions, point 1 (c).

<sup>231</sup> S. Pfeiffer, *VAT on “Free” Electronic Services?*, 27 *Intl. VAT Monitor* 3 (2016), *Journals IBFD*.Chapter 2.1, 2.2. pag. 158-161.

<sup>232</sup> For instance Youtube, Terms of Service, par. 5. I, Twitchtv, Prohibited Conduct point. 5,

constitute in kind remuneration for the supply of the audiovisual material. Nonetheless, pursuant to the CJEU's case law, the latter will fall within the scope of application of the EU VAT only if that provision of services can be directly linked to it.<sup>233</sup>

Under the paid content model, the registration to the VSW, and the subsequent subscription to the content owner's channel, were deemed to suffice for the establishment of a legal and reciprocal relationship between the latter and the viewer. Despite the fact that the registration to the platform constitutes a necessary step for the viewer, so as to be eligible to subscribe, provide for a comment, a like or share the designated content, that does not suffice to establish said relationship between the channel owner and a contributing viewer.

The main reason behind this statement emanates from the fact that, unlike the paid content model, where the content was accessible ("performance") solely in exchange for monetary payments ("counter performance"), that obligation to "pay" is absent under the examined model.<sup>234</sup> Specifically, the viewers are not obliged to subscribe or to proceed to make any kind of the aforementioned contributions in order to access the hosted content.

Furthermore, even if they do contribute, either via sharing a video to a social media profile or provide for any sort of data, that would still not be capable to establish a legal or reciprocal relationship. Given that it falls to the viewers sole discretion to make any contributions, the benefits that the channel owner derives thereof are, arguably, of uncertain nature.<sup>235</sup>

Thus, in the absence of a legal and reciprocal relationship between the channel owner and the viewer, the latter's presumed supplies of services do not qualify as direct consideration for the provision of audiovisual content. As such, that activity falls outside the scope of application of the EU VAT.<sup>236</sup>

## 6. CONCLUSION

In principle, the provision of goods or services against consideration constitute taxable supplies for VAT purposes. Hence, monetized activities effected via VSWs should fall within the objective scope of the tax. Taking the necessary steps that permit the monetization of the hosted audiovisual content should arguably suffice to establish a direct link between supply and consideration.

Nonetheless, it is apparent from the preceding analysis, that what constitutes a rather challenging endeavor is establishing the channel owners engage in continuous

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<sup>233</sup> *Serebryannay vek EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' — Varna pri Tsentralno upravlenie na Natsionalna agentsia za prihodite* (no. 39) par. 37-39 and the case law cited therein.

<sup>234</sup> Deborah Butler, 'The Usefulness Of The 'Direct Link' Test In Determining Consideration For VAT Purposes' (no.39) See also *Serebryannay vek EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' — Varna pri Tsentralno upravlenie na Natsionalna agentsia za prihodite* (no. 39).

<sup>235</sup> *Odvolaci finanční ředitelství v Pavlína Baštová* (no. 40) *R J Tolsma and Inspecteur der Omzetbelasting Leeuwarden* (no. 37) par. 17-19.

<sup>236</sup> *R J Tolsma and Inspecteur der Omzetbelasting Leeuwarden* (no. 37) par15-20.

economic activities. Ascertaining the element of continuity of the transactions in question is tantamount. Not solely because the Commission considers that the sharing economy is based on the occasional provision of goods or services, but also due to the fact that the application of the EUVD is conditional upon the existence of said prerequisite. On one hand, activities that are not eligible to produce income on a regular basis are excluded from its scope. On the other hand, irregularly performed activities are, in principle, not subject to VAT.

However, deriving definite answers from the CJEU's jurisprudence is seemingly a vain attempt: the case-law is rather unclear on what differentiates an occasional from a permanent conduct of an activity, other than the latter's capability of generating continuous income.

Therefore, one might not disregard the usefulness of the *Slaby* doctrine. The global scope of the VSWs, and their nature as potential digital marketplaces, should permit the inference that the provision of services via these platforms goes beyond the scope of private management of property. Hence, insofar as the continuous economic purpose of the activity is established, the channel owner could be assimilated to a professional operator, irrespective of the intentions or the frequency in the activity's conduct. In order to ascertain the latter precondition, the CJEU has consistently resorted to the employment of the *Enkler* doctrine.

However, it is exactly that formalistic approach<sup>237</sup> of the CJEU that constitutes the main drawback for deriving decisive answers regarding the VAT status of the channel owner. Given that the aforementioned doctrines are seemingly conditional upon the existence of professional operator as a point of reference, their applicability appears to be rather questionable. If anything, they were developed by the CJEU when dealing with non-digitalized activities. Therefore, in the absence of relative case-law, their unsuitable nature becomes evident.

While the Commission has provided for guidelines, in an effort to capsize the VAT treatment of the sharing economy, it missed the opportunity to provide for detailed guidance on how to assess this new phenomenon in the light of said doctrines. Even if it did, it would still be non-legally binding in nature. In addition, one might question whether that would even allow for the derivation of indisputable conclusions: even in the context of traditional activities, application of these doctrines has produced somewhat questionable or contradictory results.

In a nutshell, it becomes evident from the current analysis that the concept of "taxable person" for VAT has not been adequately crystallized by the CJEU'. In other words, it is as wide as it is vague. On the contrary, one might argue that the concept of "supply for consideration" is fairly clear. However, the rather ambiguous standpoint of the CJEU, following the decision in *Commission v Finland*, does not permit for that inference.

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<sup>237</sup> M. van de Leur, *Watch Out, You May Be a Taxable Person* (no. 158), pag. 279, ultimate par.

However, the digital economy is standing at the gates of the EU VAT, and the uncertainty stemming from the CJEU's interpretation of the scope of the EUVD might have undesirable repercussions for operators worldwide: under the presumption that they do not constitute taxable persons, the tax authorities might make claims to collect the undeclared and unremitted VAT, which will presumably lead to long litigation procedures between these parties.<sup>238</sup>

Thus, the need for a new regulation, that crystalizes the application of the EUVD provisos in the overall context of the sharing economy, appears to be more tantamount than ever. Instead of waiting for the CJEU to clarify or “digitalize” the VAT concepts, it is time to “digitalize” the VAT Directive.

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<sup>238</sup> To that effect, see A.M. Bal, *The Vague Concept of “Taxable Person” in EU VAT Law*, 24 Intl. VAT Monitor 5 (2013), Journals IBFD, Conclusion, page. 298

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