Lily T. Zechner

Final Report UC Berkeley Program (Austrian Marshall Plan Foundation)

The research visit at UC Berkeley funded by the Austrian Marshall Plan Foundation this past semester allowed me to do several things. First, I was able to finish my dissertation thesis, which I will submit in the upcoming weeks after finalizing formalities. Second, I wrote a paper summarizing some of my results from the first part of the thesis, which was double-blind peer-reviewed and will be published in the EC Tax Review shortly (attached find the digital off-print in ECTA_31_0402). Third, this research visit allowed me to broaden my perspective by attending events hosted by UC Berkeley and exchanging ideas with academics in various legal and non-legal fields.

Meeting scholars from the Department of Economics and the Law School at UC Berkeley and learning about different approaches to tax was particularly enriching. I was invited to attend the weekly Public Finance seminar at the Robert D. Burch Center for Tax Policy and Public Finance and discuss tax research with professors and young academics. Through this experience, I was able to develop ideas for two more tax law papers: the first takes a US-EU comparative approach, the second is characterized by a legal theory perspective and includes economic analyses. Back in Austria, I am hoping to be able to continue working on these two papers over the summer. Moreover, I was able to make connections with faculty and students from various research fields during my visit, which will be inspiring and helpful throughout the rest of my career.

The Institute of European Studies was a wonderful host during my stay and organized monthly social gatherings for visiting scholars, which were very friendly. The Institute for Research on Labor and Employment provided me with a quiet and well-equipped work space, where I was able to meet PhD and master students from various backgrounds in economics. I was invited to talk about my legal research on April 13, 2022 as part of the Institute's weekly lunch seminar series. I was permitted to invite scholars with a legal background to my talk and was delighted to see how engaged my mixed audience of law and economics scholars was. The questions they asked helped me look at my research through various lenses.

Attachment: off-print peer-reviewed article "Understanding VAT in Three-Party, Platform-Based Business Models: Which Party is Supplying Which Service?"

EC TAX REVIEW 2022–4

Peer Reviewed Article

Understanding VAT in Three-Party, Platform-Based Business Models: Which Party Is Supplying Which Service?

Lily Zechner*

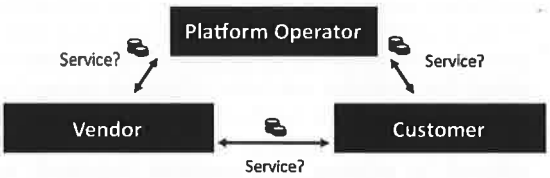
Three-party business models in which a platform operator intermediates between a supplier providing a service and a customer buying a service have become an important part of our daily lives. For purposes of European Value Added Tax (VAT), each transaction occurring as part of a three-party business model must be attributed to a 'taxable' person responsible for the VAT. Generally, suppliers may provide their services for VAT purposes as proprietary traders, undisclosed agents or disclosed agents, with varying VAT consequences. While there is little explicit case law specifying how to identify the two forms of agency, this article provides a framework for a distinction by building upon the case law of the European Court of Justice (ECJ), taking into consideration the economic and commercial reality of each case and placing particular emphasis on the view of the average consumer. To contribute to a more uniform approach in attributing supplies in three-party, platform-based business models, specifically, this article develops indicators for assessing the relevant facts and ascertaining the economic reality of a case. Lastly, this article provides a method for differentiating agents from providers of electronically supplied services under current EU VAT law.

Keywords: EU VAT law, Attribution of services, Platform economy, Three-party business models, Disclosed agency, Undisclosed agency, Electronically supplied services, ECJ's 'economic approach, View of the average consumer, Uniform interpretation of VAT law

1 Introduction

In recent years, globalization and digitalization of the economy have generated massive growth of the service sector. Online platforms like Airbnb and Uber which intermediate between suppliers providing services and customers buying those services play an increasingly significant role. Consumers can buy services offered and carried out (virtually) via Internet platforms. This frequently leads to cross-border transactions that are relevant for the purposes of European Value Added Tax (EU VAT). These transactions can take place between the platform operator and their users, but also between the users directly and can thus be referred to as 'three-party' transactions. Business models of this sort are often considered a part of a broader movement usually referred to as the 'sharing economy'.[1]

Figure 1 Three-Party Transactions



Since the EU's common system of VAT predates the Internet era, certain types of digital business models have presented a challenge to traditional VAT rules. In recent years, the EU legislature has taken action to adapt the VAT Directive to meet modern standards, e.g., by including rules for electronically supplied services and obliging certain platform operators to collect and report information on supplies made via their platforms or even to collect the tax amounts arising from those supplies.[2] Up until now, the obligation to collect taxes arising from supplies made via platforms does not extend to *physical* services offered via platforms. Thus, three-party, platform-based business models involving physical services still raise questions of determining who is providing which supply to whom and for which consideration and correctly classifying transactions.

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1 See e.g., the definitions in OECD, *The Sharing and Gig Economy: Taxation of Platform Sellers* 21 et seq. (2019).

2 In regard to Art. 9a of the VAT Implementing Regulation and Art. 14a of the VAT Directive see below.

In the sharing economy, the lines are blurred between active market participants and consumers. With regard to three-party, platform-based business models, the first question to be answered for VAT purposes is who is performing an economic activity within the meaning of Article 9(1) of the VAT Directive.[3] Depending on the individual case, both platform operators and vendors can qualify as 'taxable persons' who are supplying services for consideration within the territory of a Member State (Article 2(1)(c) of the VAT Directive).[4] For the purposes of this article, it is assumed that the platform operator as well as the vendor qualify as taxable persons within the meaning of Article 9(1) of the VAT Directive.

What will be discussed in more detail in this article is the question of how to attribute the services supplied within a three-party, platform-based business model for VAT purposes.[5] Generally, all of the circumstances of a given case are relevant in attributing supplies. Platform operators tend to consider themselves as 'intermediaries' facilitating services between vendors and customers on their platform. This approach is often reflected in their general terms and conditions, to which users of the platforms must consent before completing a transaction. In the author's opinion, the design of the respective business model as well as the role and appearance of the platform operator can, however, lead to a different legal assessment.[6]

Against this backdrop, this article addresses the following hypothesis. The provisions and legal categories attributing supplies for VAT purposes are sufficiently broad to cover many three-party, platform-based transactions involving services. It must, however be acknowledged that flexibility can leave substantial leeway for interpretation and can therefore impede legal certainty. More uniformity in applying the VAT rules could be achieved by adhering to a consistent framework by which to attribute services within three-party, platform-based business models.

The remainder proceeds as follows: part 2 presents different types of suppliers of services under EU VAT law. Part 3 provides a framework for distinguishing disclosed from undisclosed agency. First, it outlines the two general forms of agency in EU VAT law with regard to the supply of services. Next, it explains how to distinguish these modes of supplying services by taking a substance-over-form (or economic) approach and by considering the view of the 'average consumer' as applied by the European Court of Justice as well as in German and Austrian case law. Based on this case law, it then develops factors to take into consideration when attributing supplies of services in three-party, platform-based transactions. Part 4 provides a method for distinguishing agents from providers of electronically supplied services. Part 5 concludes.

2 Relevant provisions under EU VAT law

Under EU VAT law, for each transaction occurring as part of a three-party business model, only one legal person assumes the role of the supplier or 'taxable person' responsible for assessing the correct amount of VAT. In order for a taxable person to be considered the provider of a given service, that person must be performing the service *in their own name*. There are two ways in which suppliers may supply services in their own name: either by also acting for *their own account* or by acting for *account of a third person* (hereinafter: 'on behalf of a third person'). Where suppliers are acting on behalf of a third person, they are often referred to as 'intermediaries' or 'agents' commissioning or brokering services.

In this article, these three types of suppliers will be referred to as follows. Taxable persons acting in their own name and for their own account will be referred to as 'proprietary traders'. Taxable persons acting in their own name, but on behalf of a third person will be referred to as 'undisclosed agents' (Article 14(2)(c) and Article 28 of the VAT Directive).[7] Taxable persons acting on behalf *and* in the name of a third person (Article 46 of the VAT Directive), will be referred to as 'disclosed agents'.

The VAT consequences of qualifying suppliers as acting in their own name or in the name of a third person vary. In concrete terms, Article 28 of the VAT Directive provides that where taxable persons acting in their own name but on behalf of another person (undisclosed agents) take part in a supply of services, they shall be deemed to have received and supplied those services themselves.[8] This will be the case where a taxable person does not bear the economic risk of the service they are providing, but a third person is.

[3] Article 9(1) of the VAT Directive holds that '"Taxable person" shall mean any person who, independently, carries out in any place any economic activity', whatever the purpose or results of that activity'.

[4] *See* as a part of an analysis of the Sharing Economy in terms of EU VAT more generally G. Beretta, *European VAT and the Sharing Economy* (2019); G. Beretta, *VAT and the Sharing Economy*, 10 World Tax J. 381, at 381 et seq. (2018).

[5] Once this question has been answered, the substantive legal consequences, such as the place of supply, whether a VAT exemption applies and if not, which VAT rate applies, as well as the suppliers' compliance obligations must be established. These aspects of the VAT assessment are, however, outside the scope of this article.

[6] *See* e.g., L. T. Zechner, *How to Treat the Ride-Hailing Company Uber for VAT Purposes*, 30(6) Intl. VAT Monitor 261, at 263 (2019).

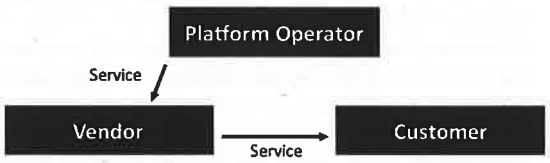
[7] This term is also used by e.g., B. Terra & J. Kajus, *A Guide to the European VAT Directives: Introduction to European VAT* 25n (2020).

[8] Article 14(2)(c) of the VAT Directive categorizes 'the transfer of goods pursuant to a contract under which commission is payable on purchase or sale' as a supply of goods. Given that the focus of this paper are services supplied within three-party, platform-based business models, this provision will not be discussed in further detail. However, B. Terra and J. Kajus submit that Art. 14(2)(c) of the VAT Directive should read as follows: 'where a taxable person acting in his own name but on behalf of another takes part in a supply of goods, he must be considered to have received and supplied those goods'; B. Terra & J. Kajus, *A Guide to the European VAT Directives* 899t (2020).

Figure 2: Undisclosed Agency

Where the rule for undisclosed agency does not apply, the B2C (business-to-consumer) place-of-supply rule for disclosed agency might: pursuant to Article 46 of the VAT Directive, 'the place of supply of services rendered to a non-taxable person by an intermediary acting in the name and on behalf of another person shall be the place where the underlying transaction is supplied in accordance with this Directive'. This B2C place-of-supply rule covers cases in which a taxable person initiates the conclusion of a contract between their principal and a third party without qualifying as the supplier of the underlying service.[9] The person actually supplying the facilitated service receives consideration for their service; the disclosed agent receives consideration for their brokerage service. The brokerage service may take a variety of forms, such as presenting the client with opportunities to conclude a contract, contacting third parties or negotiating the terms of the contract.[10]

Figure 3: Example of Disclosed Agency



Another provision that is particularly relevant in assessing three-party, platform-based business models is the B2C place-of supply-rule for electronically supplied services, Article 58(1)(c) of the VAT Directive. It holds that the place of supply of electronically supplied services to a non-taxable person shall be the place where that person is established, has their permanent address, or usually resides. Electronically supplied services are defined in Article 7(1) of the VAT Implementing Regulation as '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'. Article 7(2)(d) of the VAT Implementing Regulation holds that Article 7(1) covers, amongst other things, 'the transfer for consideration of the right to put goods or services up for sale on an Internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated from a computer'.

As the following example shows, the distinction between undisclosed agents, disclosed agents and suppliers of electronically supplied services is important in terms of VAT outcomes. A taxable person A based in Austria rents out accommodation in Italy to a non-taxable person B based in Germany via an accommodation rental platform. The platform operator charges both A and B a fee. If the platform operator were to be considered an undisclosed agent – acting in their own name in regard to the underlying accommodation service – they would be treated as providing the underlying service themselves and would be responsible for the entire VAT amount, including that of the accommodation service. If the platform operator qualifies as a disclosed agent – acting in the name of taxable person A in regard to the accommodation service – the platform operator is only responsible for the VAT amount arising from the intermediation service. In that case, if the platform operator's service to B qualifies as an electronically supplied service, it is taxable where B is resident, in Germany. If the platform operator is classified as a disclosed agent, their service would be taxable where the underlying service – the accommodation – is provided, in Italy. Only the latter would be consistent with the notion of taxing supplies where consumption takes place because the underlying service is consumed in Italy.

3 DISTINGUISHING DISCLOSED AGENCY FROM UNDISCLOSED AGENCY

3.1 Forms of Agency Under EU VAT Law

As stated in part 2, EU VAT law distinguishes between two types of agents: undisclosed agents, who are acting in their own name, but on behalf of a third person, and disclosed agents, who are acting on behalf and in the name of a third person. The European Court of Justices European Court of Justice's (ECJ's) case law provides little insight into the distinction between these two forms of agency.[11]

Generally, whether a service is performed for one's own account or on behalf of a third person depends on the relationship between the taxable persons involved in

[9] *See* e.g., Verwaltungsgerichtshof (Austrian Supreme Administrative Court, VwGH) 23 Nov. 2016, Ra 2014/15/0056; Bundesfinanzhof (German Federal Fiscal Court, BFH) 12 Jan. 1989, V R 43/84.

[10] ECJ 13 Dec. 2001, C-235/00, CSC Financial Services, para. 39; 21 Jun. 2007, C-453/05, Ludwig, para. 28.

[11] For a brief discussion of ECJ 14 Jul. 2011, C-464/10, Henfling; 23 Dec. 2015, C-250/14 and C-289/14, Air France-KLM and Hop!-Brit Air; 4 May 2017, C-274/15, Commission v. Luxembourg; 16 Sep. 2020, C-312/19, XT; 19 Dec. 2019, C-707/18, Amărăşti Land Investment; 21 Jan. 2021, C-501/19, UCMR – ADA; 12 Nov. 2020, C-734/19, ITH Comercial Timişoara; 3 Mar. 2005, C-472/03, Andersen *see* C. Amand, *Disclosed/Undisclosed Agent in EU VAT: When Is an Intermediary Acting in Its Own Name?*, 32(5) Intl. VAT Monitor 241, at 245 (2021); *see also* the request for a preliminary ruling of the ECJ in case C-695/20, Fenix International.

rendering the services,[12] for instance, the principal and the agent. For the purposes of this article, this relationship will be referred to as the 'internal relationship'. A taxable person will be considered as acting in their own name, if they are *outwardly* obliged to perform a given service.[13] The ECJ has considered a taxable person as acting in their own name where they were acting in their own name 'in relations with third parties' and had not mentioned their business partner's identity or business relationship to the final customer.[14] Whether a service is performed in one's own name or in the name of a third person will therefore depend in many cases on the relationship between the taxable person and their customer(s). For the purposes of this article, this relationship will be referred to as the 'external relationship'.

The internal relationship between two suppliers involved in one or more transactions reveals for whose account each transaction is being carried out and indicates which party bears the economic risk associated with each transaction. This assessment is generally straightforward. The nature of the internal relationship between a principal and an agent can be described as follows:

1) One of the two taxable persons involved – the agent – negotiates with third parties or brings the other taxable person – the principal – and a third party into a contractual relationship.
2) The agent is entitled to a commission as well as reimbursement of any costs incurred.
3) The principal bears the economic risk associated with the commissioned service.
4) The agent bears the economic risk associated with the commission.

The external relationship determines in whose name the supplier is acting. In order for a supplier to be considered a disclosed agent for EU VAT purposes, their acting in the name of a third person must be disclosed to the outside – in the external relationship. If a supplier's status as an agent is reflected in the (internal) relationship with their principal, but it is not transparent in the (external) relationship with their customer that they are acting in the name of a third person, they will be treated as acting in their *own* name for VAT purposes and therefore as an undisclosed agent. The distinction between undisclosed agents and proprietary traders is purely academic due to the legal fiction in Article 28 of the VAT Directive referred to above. According to this legal fiction, undisclosed agents are deemed to have received and supplied the (commissioned) services themselves, resulting in two consecutive supplies.[15]

According to the German Bundesfinanzhof (Federal Fiscal Court, BFH), the strict requirement of communicating clearly in whose name the supplier is acting can be explained by the principles of clarity and uniformity governing VAT law.[16] The German Bundesfinanzhof's case law provides important insights as to what determines whether the agency was clearly communicated to the outside. The so-called 'Ladenrechtsprechung', which can be translated to 'business premise jurisprudence', is a helpful metric in assessing the external relationship from a VAT perspective and is the subject of one of the next sections.

3.2 Disclosing Agency in the External Relationship

3.2.1 *Preliminary Remarks*

As explained in part 3, the external relationship determines whether a supplier is acting in their own name or in the name of a third person and, thus, in distinguishing undisclosed agency from disclosed agency. In evaluating the external relationship, three notions developed in VAT case law are particularly important in the author's view. First, EU VAT rules must be interpreted by applying a substance-over-form (or economic) approach. Second, in determining the scope of a given supply for VAT purposes, the perspective of the 'average consumer' must be considered. Third, supplies made on a supplier's business premise are to be attributed to that supplier, unless they clearly communicate to the outside that they are acting on behalf of a third person. The ECJ developed the first two notions which are also reflected in the German and Austrian case law. The German Bundesfinanzhof developed and substantiated the third notion which is also reflected in the case law of the Austrian Verwaltungsgerichtshof (Supreme Administrative Court, VwGH). These three notions will be the subject of this part of this article.

3.2.2 *Substance-Over-Form Under EU VAT Law*

In many cases, the external relationship between a supplier and a customer will be reflected in their contractual arrangements. However, as the ECJ has held in multiple decisions, the contractual terms only have determining influence on categorizing transactions for VAT purposes if those terms 'reflect the economic and commercial

[12] Verwaltungsgerichtshof (Austrian Supreme Administrative Court, VwGH) 29 Jul. 2010, 2008/15/0272; 20 Feb. 1968, 1153/67, Bundesfinanzhof (German Federal Fiscal Court, BFH) 25 Apr. 2018, XI R 16/16, para. 30.

[13] Verwaltungsgerichtshof (Austrian Supreme Administrative Court, VwGH) 30 Jun. 1960, 0188/59; 15 Jan. 1990, 87/15/0157; 17 Sep. 1990, 89/15/0070; 27 Apr. 1994, 94/13/0023; 31 Jan. 2001, 97/13/0066; 25 Jan. 2006, 2002/13/0199; 31 Mar. 2013, 2002/14/0111; Bundesfinanzhof (German Federal Fiscal Court, BFH) 16 Mar. 2000, V R 44/99; *see also* M. Weidmann, *The New EU VAT Rules on the Place of Supply of B2C E-Services: Practical Consequences – The German Example*, 24(2) EC Tax Rev. 105, at 113 (2015).

[14] ECJ 16 Sep. 2020, C-312/19, XT, paras 43 et seq.; *see also* Bundesfinanzhof (German Federal Fiscal Court, BFH) 31 Jan. 2002, V B 108/01.

[15] B. Terra & J. Kajus, *A Guide to the European VAT Directives* 25n (2020).

[16] Bundesfinanzhof (German Federal Fiscal Court, BFH) 9 Apr. 1970, V R 80/66 referring to 24 May 1960, V 152/58 U.

reality of the transactions'.[17] If the contractual terms do not fulfill this prerequisite, they may be disregarded for VAT purposes.[18] This applies in particular, where it becomes apparent that the contractual terms 'constitute a wholly artificial arrangement which does not reflect economic reality and was set up with the sole aim of obtaining a tax advantage'.[19]

While there is no explicit provision in the VAT Directive requiring an 'economic approach' to interpreting EU VAT rules, according to the ECJ, 'taking economic reality into account is a fundamental criterion for the application of the common VAT system'.[20] Legal assessments should be based on the substance of transactions, not their form. In the author's view, the economic approach can be described as a method of determining the commercial relationship between two parties by taking into account a wide range of factual elements. Ad van Doesum and Frank Nellen have categorized the circumstances under which the ECJ considers economic reality. One category covers abuse of rights cases, in which the ECJ uses economic reality as 'a standard of normality'. The second category covers cases, in which the ECJ takes an economic approach to 'purposefully' apply the VAT rules.[21]

In this second category, the economic approach serves to identify all of the facts of a case that are relevant in assessing the VAT.[22] The contract concluded between the parties to a transaction will in many cases reflect its economic reality and is 'a factor to be taken into consideration'.[23] In the author's view, the contractual arrangements between two parties should be treated as the first piece of evidence in determining the economic reality of a case. Overall, however, *all* of the circumstances of a case must be considered, including the actions and intentions of the parties as well as payment flows and previous business practices.[24] This approach allows for a balance between legal certainty for taxpayers and tax authorities on the one hand and flexibility and neutrality of the VAT system[25] on the other hand, ensuring that VAT applies to a broad range of traditional and new business models.

3.2.3 *The View of the 'Average Consumer'*

According to the case law of the ECJ, the perspective of the 'average consumer' is a decisive factor in determining the essential features of a supply where the *scope* of the supply is in question.[26] It ascertains whether a taxable person is supplying several distinct supplies or one composite supply and which type(s) of supply (also referred to as the 'tax object'[27]). In the author's opinion, it is impossible to separate the assessment of the scope and the type of a given supply. If the consumer's point of view is determinative in classifying the type of supply in cases where its scope is contentious, the consumer's point of view should also be relevant in cases where only its type is contentious. Based on this premise, the view of the average consumer also determines whether a supplier is acting in the name of a third person or in their own name and, thus, in distinguishing disclosed agency from undisclosed agency (or, depending on the internal relationship, proprietary trading).

In the author's view, the view of the average consumer plays an important role in assessing the external relationship. The notion that this legal concept has general relevance in interpreting EU VAT law (and is not confined to composite supplies) is supported by the fact that the ECJ considers this view against the backdrop of the principle of fiscal neutrality in VAT in determining

[17] ECJ 20 Jun. 2013, C-653/11, Newey, paras 42 et seq.

[18] ECJ 20 Jun. 2013, C-653/11, Newey, para. 52; 18 Jun. 2020, C-653/11, KrakVet Marek Batko, paras 66 et seq.; *see also* 7 Oct. 2010, C-53/09 and C-55/09, Loyalty Management UK and Baxi Group, para. 39; 6 Feb. 2003, C-185/01, Auto Lease Holland, paras 35 et seq.

[19] ECJ 20 Jun. 2013, C-653/11, Newey, para. 45.

[20] ECJ 20 Feb. 1997, C-260/95, DFDS, para. 23; *see also* 28 Jun. 2007, C-73/06, Planzer, para. 43; 7 Oct. 2010, C-53/09 and C-55/09, Loyalty Management and Baxi Group, para. 39; 20 Jun. 2013, C-653/11, Newey, para. 42; 5 Jul. 2018, C-544/15, Marcandi, para. 45; 22 Nov. 2018, C-295/17, MEO – Serviços de Comunicações e Multimédia, paras 43, 61; 10 Jan. 2019, C-410/17, A paras 47, 59; 2 May 2019, C-224/18, Budimex, para. 27; 18 Jun. 2020, C-653/11, KrakVet Marek Batko, para. 61; 7 May 2020, C-547/16, Dong Yang Electronics, para. 31.

[21] A. van Doesum & F. Nellen, *Economic Reality in EU VAT*, 29(5) EC Tax Rev. 213, at 216 et seq. (2020).

[22] A. van Doesum and F. Nellen refer to this as the 'VAT reality'; *Ibid.*, at 217.

[23] ECJ 20 Jun. 2013, C-653/11, Newey, para. 43; 18 Jun. 2020, C-653/11, KrakVet Marek Batko, para. 66; *see also* 17 Jan. 2013, C-224/11, BGŽ Leasing, para. 46 ff.

[24] For a selection of relevant circumstances *see* ECJ 18 Jun. 2020, C-653/11, KrakVet Marek Batko, paras 69 et seq.; *see also* Opinion of Advocate General Tizzano, 23 Jan. 2001, C-409/98, Mirror Group and Cantor Fitzgerald International, para. 27 ('In order to identify the key features of a contract, however, we must go beyond an abstract or purely formal analysis. It is necessary to find the contract's economic purpose, i.e., to say, the precise way in which performance satisfies the interests of the parties').

[25] The principle of neutrality requires both 'internal' and 'external' neutrality. In its first form, the right to deduct relieves the business of the burden of VAT throughout their economic activities; ECJ 29 Oct. 2009, C-174/08, NCC Construction Danmark, para. 27; 22 Dec. 2010, C-277/09, RBS Deutschland Holdings, para. 38; 8 May 2019, C-712/17, EN SA, para. 30. In its second form, the principle of neutrality, constituting a manifestation of the principle of equal treatment, prohibits treating similar and competing services differently; ECJ 17 Feb. 2005, C-453/02 and C-462/02, Linneweber and Akritidis, para. 24; 10 Nov. 2011, C-259/10 and C-260/10, Rank Group para. 32 with further references; cf. A. van Doesum, H. W. M. van Kesteren & G.-J. van Norden, *Fundamentals of EU VAT Law* 636 et seq. (2016).

[26] ECJ 25 Sep. 1999, C-349/96, Card Protection Plan, para. 29; 15 May 2001, C-34/99, Primback, paras 43; 27 Oct. 2005, C-41/04, Levob Verzekeringen and OV Bank para. 22; 2 Dec. 2010, C-276/09, Everything Everywhere, paras 26, 30; 21 Feb. 2013, C-18/12, Město Žamberk, paras 29, 30; 18 Jan. 2018, C-463/16, Stadion Amsterdam, para. 30; Bundesfinanzhof (German Federal Fiscal Court, BFH) 4 Mar. 2011, V B 51/10; 10 Jan. 2013, V R 31/10; *see also* Verwaltungsgerichtshof (Austrian Supreme Administrative Court, VwGH) 31 Jan. 2001, 97/13/0066.

[27] O. Henkow, *Defining the Tax Object in Composite Supplies in European VAT*, 2(3) World J. VAT/GST L. 182, at 199 (2013).

whether two supplies are *similar*.[28] Moreover, given that the VAT is a consumption tax and that it is the consumer who ultimately bears the burden of the tax, the perspective of the average consumer is an appropriate metric to discern the economic reality of a transaction. In the author's view, interpreting VAT law by including more broadly the perspective of the average consumer could contribute to a more uniform application of VAT law by streamlining the economic analysis.

Accepting the premise that the perspective of the average consumer is not only relevant in assessing composite supplies, but more generally in assessing all supplies for VAT purposes, requires specification of the bounds of this legal concept. Questions arise as to whether the view of the average consumer only applies to B2C (business-to-consumer) transactions and, if so, whether a different 'perspective' applies to B2B (business-to-business) transactions. In the author's opinion, it would be impractical to use different metrics for the assessment of VAT depending on the respective status of the customers as businesses or consumers. Furthermore, following the perspective of the business customer would contradict the consumption tax character of the VAT – even in the case of B2B transactions. This view is supported by the fact that in its rulings, the ECJ also refers to the perspective of the 'average customer' while seemingly attributing the same meaning to this perspective as to that of the 'average consumer'.[29]

Differentiating between the view of the average consumer and the view of the average business customer in three-party, platform-based business models could lead to unresolvable conflicts in the case of opposing views. Consider the following example. A platform operator brings a business and a consumer into contact and in this way facilitates a sale. From the perspective of the average consumer the platform operator is acting in their own name (and on behalf of the business). From the perspective of the average business customer the platform operator is acting in the name of the business (and on behalf of the business). From the point of view of the consumer, the platform operator would have to be treated as an undisclosed agent, but from the point of view of the business customer, the platform operator would have to be treated as a disclosed agent. Uniformly using the view of the average consumer in interpreting EU VAT rules would lead to more practical and teleologically sound results.

Second, the question arises as to what the perspective of the average consumer is with regard to its content and scope. In a fairly recent decision,[30] the ECJ made general comments on what constitutes the perspective of the average consumer by citing non-VAT-related case law.[31] In this case law, the ECJ uses as a metric an 'average consumer who is reasonably well informed and reasonably observant and circumspect'.[32] According to the ECJ, in determining the perspective of the average consumer, the regulatory framework in which the respective services are provided as well as non-legal circumstances, such as (limited) availability or cultural value of the supplied services, must be taken into account.[33]

The ECJ also stated that 'the national court is, in general, capable of appraising the point of view of the average consumer through its own knowledge'.[34] According to the ECJ, however, 'EU law does not preclude a national court which is experiencing particular difficulty in that appraisal from seeking, under the conditions laid down by its national law, an expert opinion as guidance for its judgment'.[35] Ultimately, the view of the average consumer is not based on the actual consumer in a given case, nor must it be based on statistics.[36] It is up to the judgment of tax authorities and courts to determine how the average consumer would perceive a given case using the means of their choice as permitted under national law. This level of discretion leaves room for subjective analysis based on personal impressions, which is why decisions can be unpredictable. On the flipside, this approach ensures flexibility and persistence of the VAT rules, ultimately contributing to stability of the common system of VAT.

The perspective of the average consumer likely corresponds to a similarly abstract formula previously applied by the Austrian Supreme Administrative Court, but also by the German Bundesfinanzhof, the 'Verkehrsauffassung'. This formula can be translated to

[28] *See* e.g., ECJ 10 Nov. 2011, C-259/10 and C-260/10, Rank Group, para. 44; *see also* 27 Feb. 2014, C-454/12 and C-455/12, Pro Med Logistik, paras 53 et seq.; 11 Sep. 2014, C-219/13, K para. 25; 9 Nov. 2017, C-499/16, AZ, para. 31; 5 Sep. 2019, Regards Photographies, C-145/18, para. 36; 3 Feb. 2022, C-525/20, B AG. In this context, the ECJ seems to interchangeably use the terms 'average consumer' and 'typical consumer'.

[29] ECJ 18 Jan. 2018, C-463/16, Stadion Amsterdam, para. 30.

[30] ECJ 9 Sep. 2021, C-406/20, Phantasialand.

[31] *See* e.g., ECJ 27 Feb. 2014, C-454/12 and C-455/12, Pro Med Logistik and Pongratz; 16 Jul. 1998, C-210/96, Gut Springenheide und Tusky; 28 Jan. 1999, C-303/97, Sektkellerei Kessler.

[32] ECJ 16 Jul. 1998, C-210/96, Gut Springenheide und Tusky, paras 31 et seq.; 28 Jan. 1999, C-303/97, Sektkellerei Kessler, para. 36; cf. for a similar definition recital 18 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, which states that the average consumer 'is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice'.

[33] ECJ 9 Sep. 2021, C-406/20, Phantasialand, paras 41 et seq. with reference to 27 Feb. 2014, C-454/12 and C-455/12, Pro Med Logistik and Pongratz, paras 55–59.

[34] ECJ 9 Sep. 2021, C-406/20, Phantasialand, para. 46.

[35] *Ibid.*, para. 47.

[36] *See* previously Bundesfinanzhof (German Federal Fiscal Court, BFH) 17 Apr. 2008, V R 39/05.

'(general) perception of the market'[37] and defined as the opinion of the majority of market participants not personally involved and capable of making a reasonable judgment. In the author's opinion, commercial practices can be instrumental to invigorating formulas like these. As Oskar Henkow convincingly argued, also marketing actions undertaken before the sale of a good or service should be considered in classifying supplies for VAT purposes.[38]

3.2.4 *VAT Case Law from Germany and Austria*

It has been established that in determining whether a supplier's (supposed) position as an agent is sufficiently transparent in the external relationship, the economic reality and the perspective of the 'average consumer' need to be considered. In terms of concrete points of reference that indicate that the agency was not disclosed before or while completing the transaction, the German Bundesfinanzhof's VAT case law provides important insights. According to its 'business premise jurisprudence' supplies made on a supplier's business premise are to be attributed to that supplier, unless they clearly communicate to the outside that they are acting in the name and on behalf of a third person.[39] The rationale behind this notion is the assumption that a customer wants to enter into a contractual relationship with the owner of the business premise and will frequently be unaware of the supplier's contractual agreements with third parties.[40]

Originally, this jurisprudence covered traditional, analog business premises, but eventually was also applied to 'digital' business premises. The German Bundesfinanzhof ruled that the operator of a website must clearly communicate to their customers that they are acting in the name and on behalf of a third person, or else the services provided via their 'digital business premise' will be attributed directly to them.[41] In this particular case, the services for sale on the website were electronically supplied services. Thus, not only the completion of the transaction, but also the transaction itself was carried out online.[42] As the author has argued in prior work,[43] this difference in the mode of delivery of the services should not lead to a different treatment for EU VAT purposes. Accordingly, in attributing any type of service offered on a digital business premise, such as a platform, the operator must communicate clearly that they are acting on behalf of a third person to avoid being treated as acting in their own name and as the actual supplier of the service (as undisclosed agent or proprietary trader).

The German Bundesfinanzhof's 'business premise jurisprudence' gives some indication of what may be relevant in assessing whether the agency was clearly communicated to the outside before or while completing the transaction. For instance, it is insufficient for the supplier to merely reference that they are acting on behalf of a third person in general terms and conditions[44] or on the invoice.[45] Likewise, it will not suffice to only mention the name of the person on whose behalf the supplier is acting.[46] According to the case law, neither the payment flow nor the substance of the service have determining influence on the attribution of services.[47] Where a customer buys a good or service after clicking on a link and having been forwarded to another website, however, this should be a clear indication that the operator of the first platform is not acting in their own name.[48]

In the author's view, the 'business premise jurisprudence' is a manifestation of the ECJ's economic approach in interpreting VAT law and perfectly aligns with the notion of taking into account the average consumer's perspective in attributing supplies. Moreover, this case law is reflected in Article 9a of the VAT Implementing Regulation[49] and Article 14a of the VAT Directive,[50]

[37] Bundesfinanzhof (German Federal Fiscal Court, BFH) 10 Sep. 1959, V 204/57 U, 3 Nov. 2011, V R 32/10, para. 24; 8 Aug. 2013, V R 8/12, para. 6; 21 Nov. 2013, V R 33/10, para. 23; 11 Jul. 2018, XI R 36/17, para. 47.

[38] Henkow, *supra* n. 27, at 200.

[39] Bundesfinanzhof (German Federal Fiscal Court, BFH) 9 Apr. 1970, V R 80/66; 14 May 1970, V R 77/66; 16 Mar. 2000, V R 44/99; 12 Mar. 1964, V 185/61; 23 Apr. 1964, V 190/61 U; Verwaltungsgerichtshof (Austrian Supreme Administrative Court, VwGH) 30 Jun. 1960, 0188/59.

[40] Bundesfinanzhof (German Federal Fiscal Court, BFH) 9 Apr. 1970, V R 80/66; 16 Mar. 2000, V R 44/99; 15 May 2012, XI R 16/10.

[41] *See* Bundesfinanzhof (German Federal Fiscal Court, BFH) 15 May 2012, XI R 16/10 Rz 25 et seq.

[42] Today, this could be covered by Art. 9a of the VAT Implementing Regulation.

[43] S. C. Hammerl & L.T. Zechner, *Plattformhaftung, SWK-Spezial*, 22 et seq. (2020); S. C. Hammerl & L. T. Zechner, in T. Ehrke-Rabel, S. C. Hammerl & L.T. Zechner, *Umsatzsteuer in einer digitalisierten Welt, ifst-Schrift 538*, 124 et seq. (2021).

[44] Bundesfinanzhof (German Federal Fiscal Court, BFH) 10 Aug. 2016, V R 4/16; so zur Reiseleistung auch Bundesfinanzhof (German Federal Fiscal Court, BFH) 22 Aug. 2019, V R 12/19.

[45] Verwaltungsgerichtshof (Austrian Supreme Administrative Court, VwGH) 30 Jun. 1960, 0188/59.

[46] Bundesfinanzhof (German Federal Fiscal Court, BFH) 16 Mar. 2000, V R 44/99.

[47] Bundesfinanzhof (German Federal Fiscal Court, BFH) 15 May 2012, XI R 16/10; 10 Aug. 2016, V R 4/16.

[48] D. Dietsch & T. Stelzer, *Die Digitalisierung der Ladenrechtsprechung des BFH*, 5 MwStR 182, at 185 et seq. (2021).

[49] Article 9a subparagraph 1 of the VAT Implementing Regulation holds that 'For the application of Art. 28 of Directive 2006/112/EC, where electronically supplied services are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications, a taxable person taking part in that supply shall be presumed to be acting in his own name but on behalf of the provider of those services unless that provider is explicitly indicated as the supplier by that taxable person and that is reflected in the contractual arrangements between the parties'.

[50] Article 14a of the VAT Directive holds that '1. Where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, distance sales of goods imported from third territories or third countries in consignments of an intrinsic value not exceeding EUR 150, that taxable person shall be deemed to have received and supplied those goods

which deem platform operators to be the providers of certain supplies effectuated via their platforms if certain criteria are met.[51] As the author has argued in prior work, these criteria are a proxy for when platform operators qualify as acting in their own name based on general VAT rules for attributing supplies.[52] When attributing supplies within three-party, platform-based business models, which do *not* fall under these special provisions, what is determinative in the author's view is the overall impression the average consumer gains before or while completing a transaction on a platform.[53]

3.2.5 *Attributing Supplies of Services in Three-Party, Platform-Based Business Models*

In evaluating three-party, platform-based transactions for EU VAT purposes, the first step is to identify the person assuming the role of the supplier for each individual transaction. The sellers and buyers on a platform usually register for the platform operator's service after consenting to their general terms and conditions. As argued above, this contractual relationship under (national) civil law can be one factor to be taken into account in assessing EU VAT consequences. The contractual relationship between the users of a platform and its operator *indicate* who is supplying which service for VAT purposes. In order for the VAT treatment to be based on the contractual terms, however, they must reflect the economic and commercial reality of the transaction.[54] The more dominant the role of the platform operator in facilitating services on their platform, the more likely they are to be considered the supplier of those services for VAT purposes – despite their (explicit) general terms and conditions.

In the author's opinion, what follows from the case law of the ECJ is that services provided via a platform are to be attributed to the platform operator, instead of the individual vendor, if the platform operator conveys a high level of authority as regards the sales made through their platform in the external relationship. In concrete terms this means that the platform operator is considered to be acting in their own name – and therefore a proprietary trader or an undisclosed agent – in regard to the sales they aim at facilitating, if, at the time of completing a transaction on the platform, the average consumer gains the impression that they are purchasing the service directly from the platform operator.

As mentioned above, the current legal situation leaves room for diverging decisions among authorities and courts across the Member States. To contribute to a more uniform approach in assessing the relevant facts and ascertain the economic reality of a case, the following indicators were developed. It is implied that the services facilitated on a platform are being supplied in the name of the platform operator where:

- The platform operator sets the price of the service facilitated between users;
- The platform operator determines other essential aspects of the service contract;
- The platform operator owns key assets necessary to provide the service to the customer;[55]
- The platform operator decides which vendor shall provide the service to the customer or the customer does not know the identity of the vendor before completing a transaction;
- The platform operator decisively influences the conditions under which the service is provided demanding uniformity and a certain quality;
- The platform operator is in charge of processing the payment;
- The user interface and/or confirmation e-mails depict the brand and identity of the platform operator more frequently or conspicuously than that of the vendor;
- The platform operator monitors the vendor while providing the service.

It is not asserted that this list of indicators is conclusive or must be cumulatively fulfilled in order for the platform operator to be considered a proprietary trader or undisclosed agent. Rather, in attributing services in three-party, platform-based business models, all of the circumstances of the case must be considered. The relevant circumstances may also vary depending on the type of service being supplied. For these reasons, the author is not advocating for indicators of this sort to be included in the VAT Directive. However, thinking about indicators, which will in many cases lead to the average

himself. 2. Where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, the supply of goods within the Community by a taxable person not established within the Community to a non-taxable person, the taxable person who facilitates the supply shall be deemed to have received and supplied those goods himself."

[51] Where a platform operator authorizes the charge to the customer or the delivery of the services, or sets the general terms and conditions of a supply, they are considered to be acting in their own name in regard to that supply effectuated via their platform and therefore as undisclosed agents; *see* Art. 5b subparagraph 2 and Art. 9a subparagraph 3 of the VAT Implementing Regulation.

[52] *See* in more detail S. C. Hammerl & L. T. Zechner, *Taxing Profit and Consumption in Market Jurisdictions: Equity and Administrability in the Digital Era*, Graz Law Working Paper No 06–2021, 26 et seq. (2021). Available at SSRN, https://ssrn.com/abstract=3854960 or, http://dx.doi.org/10.2139/ssrn.3854960.

[53] L. T. Zechner, *Internetplattformen und umsatzsteuerrechtliche Leistungszurechnung am Beispiel Airbnb*, 73(11) ÖStZ 300, at 301 (2020); T. Ehrke-Rabel & L. T. Zechner in T. Ehrke-Rabel, S. C. Hammerl & L. T. Zechner, *Umsatzsteuer in einer digitalisierten Welt*, *ifst-Schrift 538*, 65 (2021).

[54] ECJ 20 Jun. 2013, C-653/11, Newey, para. 45; 18 Jun. 2020, C-653/11, KrakVet Marek Batko, paras 66 et seq.; 6 Feb. 2003, C-185/01, Auto Lease Holland, paras 35 et seq. with further references.

[55] These first three indicators are in line with the criteria mentioned by the European Commission in its 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; European Commission, COM (2016) 356 final, 7.

consumer's impression that the platform operator is supplying the 'facilitated' service themselves, could contribute to a more uniform approach in attributing platform-based supplies for VAT purposes where special provisions such as Article 9a of the VAT Implementing Regulation and Article 14a of the VAT Directive do not apply.

The attribution of supplies of services affects the *types* of services provided. Where the platform operator can be considered to be acting in their own name as regards the underlying service, they will, in many cases, be acting on behalf of the vendor, meaning that they won't be supplying the underlying service as a proprietary trader but as an undisclosed agent (Article 28 of the VAT Directive). Where the platform operator is considered to be acting in their own name, but on behalf of a third person in regard to accommodation or transport services, it is worth mentioning that the special scheme for travel agents (Articles 306 to 310 of the VAT Directive) could apply.[56] Where the platform operator cannot be considered to be acting in their own name with regard to the facilitated service, they will, in many cases, provide the user(s) with an intermediation service – either as a disclosed agent (Article 46 of the VAT Directive) or as a supplier of an electronically supplied service (Article 58 of the VAT Directive, Article 7 of the VAT Implementing Regulation).

4 Distinguishing Agents from Providers of Electronically Supplied Services

4.1 Distinguishing Disclosed Agents from Providers of Electronically Supplied Services

Where the platform operator cannot be considered to be acting in their own name with regard to the facilitated service, it must be established whether they are providing intermediation services as a disclosed agent (Article 46 of the VAT Directive) or as a supplier of electronically supplied services (Article 58 of the VAT Directive, Article 7 of the VAT Implementing Regulation). Distinguishing disclosed agents and suppliers of electronically supplied services has been the subject of discussion among EU VAT experts for several years.[57] Originally as well as more recently, the VAT Committee has been interpreting the scope of electronically supplied services broadly.[58] It has unanimously agreed that 'online access to Internet platforms with automatic search and filter functions and no additional support by a staff member of the supplier' is covered by the term 'electronically supplied service'.[59] As a consequence of this interpretation, the B2C place-of-supply rule for disclosed agency does not apply to disclosed agency services where human intervention is minimal. In the author's view, giving precedence to the rule for electronically supplied services in these cases is appropriate for the following reasons.

Where a business supplies intermediation services electronically, the usual approach taken by the ECJ, according to which the dominant element of a supply determines which place-of-supply rule applies,[60] likely is not applicable. Article 7(1) of the VAT Implementing Regulation defines 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' as electronically supplied services.[61] In the author's view, the ratio legis of this rule is to eliminate definitional problems, for instance, between digital marketplace operators who provide infrastructure only, similarly to analog marketplace operators, and operators who are involved in the conclusion of a contract on behalf of a third person, by covering all automated digital services regardless of their substance.[62]

[56] According to the ECJ, the renting out of vacation homes by travel agents can lead to the application of the special scheme, even in cases, where the travel agent is not also providing transport services; *see* ECJ 12 Nov. 1992, C-163/91, van Ginkel, paras 22–24; 19 Dec. 2018, C-552/17, Alpenchalets Resorts, para. 35; *see also* H.-M. Grambeck, *Germany Extends Tour Operator Margin Scheme for Travel Services to B2B Sector*, 31(4) Intl. VAT Monitor 212, at 215 (2020). In the author's view, the legal assessments in these decisions are not necessarily transferable to other cases.

[57] VAT Committee, *Working Paper No 814*, taxud.c.1 (2014) 2806510; VAT Committee, *Working Paper No 843*, taxud.c.1 (2015) 694775; VAT Committee, *Working Paper No 906*, taxud.c.1 (2016) 3297911; *see also* M. Merkx, *VAT and E-Services: When Human Intervention Is Minimal*, 29(1) Intl. VAT Monitor 17, at 20 et seq. (2018).

[58] '(...) definition should aim at grasping to the widest possible extent services heavily dependent on information technology'; *see* VAT Committee, *Working Paper No 843*, taxud.c.1 (2015) 694775, 3; *see also* VAT Committee, *Working Paper No 919*, taxud.c.1 (2017) 1270284, 4 et seq.; VAT Committee, *Guidelines Resulting From Meetings of The VAT Committee – Up until 1 Dec. 2021*, 226 et seq, https://ec.europa.eu/taxation_customs/system/files/2021-12/guidelines-vat-committee-meetings_en.pdf (accessed 10 Feb. 2022).

[59] VAT Committee, *Guidelines Resulting From Meetings of The VAT Committee – Up Until 1 Dec. 2021*, 227, https://ec.europa.eu/taxation_customs/system/files/2021-12/guidelines-vat-committee-meetings_en.pdf (accessed 10 Feb. 2022).

[60] ECJ 21 Feb. 2013, C-18/12, Město Žamberk, paras 27, 29; 17 Jan. 2013, C-224/11, BGŻ Leasing, para. 32; 27 Sep. 2012, C-392/11, Field Fisher Waterhouse, para. 14 ff; 10 Mar. 2011, C-497/09, C-499/09, C-501/09 and C-502/09, Bog ua, para. 52.

[61] For an interpretation by the Commission's Directorate General for Taxation and Customs Union, *see* European Commission, *Explanatory Notes on the EU VAT Changes to the Place of Supply of Telecommunications, Broadcasting and Electronic Services That Enter Into Force in 2015*, 20 et seq. (2014).

[62] '(...) definition should aim at grasping to the widest possible extent services heavily dependent on information technology'; Value Added Tax Committee, *Working Paper No 843*, taxud.c.1 (2015) 694775, at 3; *see* Zechner, *supra* n. 53, at 310et seq.; T. Ehrke-Rabel, *Aspekte grenzüberschreitenden Wirtschaftens in der Umsatzsteuer*, in *Digitalisierung im Steuerrecht* 42, 371, at 374 (J. Hey ed. 2019). *See* for instance, the discussion on reduced VAT rates and e-books; F. Cannas, *Reduced Rates and the Digital Economy: The Treatment of (E-)Books Highlights Some Possible Inconsistencies of the EU VAT System*, 26(2) EC Tax Rev. 96, at 96 et seq. (2017); cf. P. Rendahl, *Imposing EU VAT on Unlawful Digital Supplies?*, 20(4) EC Tax Rev. 192, at 201 (2011).

Analog marketplace operators are generally not involved in the conclusion of contracts between the marketplace sellers at the stalls and their customers.[63] Typically, they do not qualify as intermediaries for VAT purposes because their services consist in granting third parties the opportunity to trade on their premises without further working toward the conclusion of a contract or exerting influence on the price. The infrastructure provided by a digital marketplace is comparable to the infrastructure provided by an analog marketplace. Where platform operators do in fact only provide a digital marketplace, Article 7(1) of the VAT Implementing Regulation applies.[64]

In many cases, however, a platform operator will do more than an analog marketplace operator, even if they are not acting in their own name with regard to the facilitated supply. The digital application operated by the platform enables the automatic conclusion of a contract. The operator therefore is 'involved' by concluding a contract with a third party's customer on their behalf and in this way enabling them to provide a service. In the analog world, such activity would qualify as an intermediation service for VAT purposes and lead to the application of agency rules.[65]

Article 7(2)(d) of the VAT Implementing Regulation explicitly refers to websites operating as online markets where potential buyers make their bids by means of an automated procedure and the parties involved are notified of a sale by an automatic, computer-generated e-mail as providers of electronically supplied services. Article 7 of the VAT Implementing Regulation therefore covers platform operators *involved* in the conclusion of the contract, including disclosed agency that is 'electronically supplied'.[66] Presumably, in enacting this provision, the EU legislature had in mind marketplaces such as Ebay facilitating supplies to the highest bidder. However, since Article 7 of the VAT Implementing Regulation is intended to cover such marketplaces, 'in particular', it is likely that marketplace operators facilitating supplies for fixed prices were also intended to fall under this provision. Moreover, 'bidding' can be interpreted broadly, as not only bidding a higher amount than the starting price, but as a customer's offer to complete a transaction to be accepted by the vendor (who has thus far expressed an invitatio ad offerendum). The intention of the legislature seems to be to qualify services supplied by marketplace operators who automatically link vendors and customers with minimal human intervention and who do not influence the performance of the service or the pricing as electronically supplied services. Thus, for purposes of determining the B2C place of supply, 'electronically supplied intermediation services' fall within the scope of the rule for electronically supplied services.[67]

In one of its working papers, the VAT Committee suggested that the classification as a disclosed agency service could be made conditional on whether the commission for the platform operator 'is influenced by' the price of the facilitated service.[68] According to this view, the B2C place-of-supply rule for disclosed agency within the meaning of Article 46 of the VAT Directive would not apply where the commission does not depend on the price of the facilitated service. Instead, in these cases, the B2C place-of-supply rule for electronically supplied services pursuant to Article 58(1)(c) of the VAT Directive would apply. According to the case law of the ECJ, pricing and invoicing alone are not relevant for categorizing transactions for VAT purposes.[69] Thus, under current law, whether or not the platform operator's consideration depends on the price of the facilitated service, should not be instrumental in distinguishing electronically supplied services from disclosed agency.

It has also been suggested that a service should be qualified as a disclosed agency service where the platform operator influences the contractual arrangements between the vendor and the customer 'such that they assess the customer's needs, a supplier's suitability, exert an influence over pricing or who makes the underlying supply'.[70] In the author's view, the extent of the platform operator's influence over the vendor's service is not a suitable indicator of whether 'minimal human intervention' has been exceeded. A platform operator may bring together vendors and customers without any human intervention, while exerting a high level of authority over their contractual relationship – for instance, by means of particularly detailed or strict general terms and conditions or technical restraints in the platform's user interface. The 'customer's needs' and the 'supplier's suitability' can be assessed in a fully automated way using filter options in the search function. Based on how the rule for electronically supplied services was conceived, this level of influence alone should not lead to its non-applicability or a replacement by the rule for disclosed agency.

The EU legislature enacted this special place-of-supply rule for electronically supplied services in order to better allocate tax revenues among the Member States.

[63] Ehrke-Rabel, *supra* n. 62, at 392.
[64] Ehrke-Rabel & Zechner, *supra* n. 53, at 72.
[65] *Ibid.*, at 72ff.
[66] *Ibid.*, at 73.
[67] Zechner, *supra* n. 53, at 305.
[68] VAT Committee, *Working Paper No 906*, taxud.c.1 (2016) 3297911, 7.
[69] *See e.g.*, ECJ 25 Sep. 1999, C-349/96, Card Protection Plan, para. 31; 27 Oct. 2005, C-41/04, Levob Verzekeringen and OV Bank, para. 25; 10 Mar. 2011, C-497/09, C-499/09, C-501/09 and C-502/09, Bog ua, para. 57; 26 May 2016, C-607/14, Bookit, para. 26.
[70] VAT Committee, *Working Paper No 906*, taxud.c.1 (2016) 3297911, 6; *see also* M. Álvarez Suso, *E-Platforms Providing Services in the Short-Term Rental Accommodation Market: The Challenges for Taxation of These Services Under the EU VAT*, 31(1) Intl. VAT Monitor 8, at 10 (2020).

Before the introduction of this rule, taxation in the jurisdiction in which the supplier is resident allowed suppliers to choose their place of establishment based on which Member States have the most favourable VAT rates.[71] By taxing supplies in the jurisdiction in which consumption takes place, distortions of competition can be reduced and results more consistent with the consumption tax character of VAT can be achieved.

The concept of an 'electronically supplied service' deviates from the common understanding that legislation must be construed in a way that its application does not depend on the form or technical implementation of a transaction but on its substance (so-called 'technology neutrality of law'[72]).[73] Inconsistencies occur in cases where a place-of-supply rule specifies that the analog equivalent of an electronically-supplied service shall be taxed in a different Member State than the electronically supplied service. As a result, disclosed agency that is 'electronically supplied' will not be taxed where the underlying transaction is supplied. However, given that supplies of this sort often evolve within a short amount of time, having to establish the particulars for each supply would be burdensome.[74] As the author has argued in prior work, indiscriminately combining all 'electronically supplied services' based on their form without considering their substance can therefore be justified by the need for clear and uniform rules regarding online services and the need to facilitate tax enforcement[75] as well as legal certainty.[76]

In the author's view, the rule for electronically supplied services applies if the above-mentioned ('technical') characteristics are fulfilled – even if the element of intermediation represents the essential ('substantive') characteristic of the service. According to its ratio legis, this rule takes precedence as long as minimal human intervention is not exceeded. The principle of neutrality as a manifestation of the principle of equality is no obstacle to this interpretation, because it is not an independent legal principle or a rule of primary law, but one of the objectives pursued by the VAT Directive and to be *considered* in interpreting the VAT Directive.[77] It is unlikely that the ECJ would consider the concept of electronically supplied services to infringe upon the principle of equal treatment as set out in Article 20 of the Charter of Fundamental Rights of the European Union[78,79]

As a result, where a transaction meets the criteria of both the place-of-supply rule for electronically supplied services and the one for disclosed agency, Article 58(1)(c) of the VAT Directive and Article 7(1) of the VAT Implementing Regulation take precedence over Article 46 of the VAT Directive.

4.2 Distinguishing Undisclosed Agents from Providers of Electronically Supplied Services

In the author's view, the B2C place-of-supply rule for electronically supplied services (Article 58 (1)(c) of the VAT Directive) takes precedence over the B2C place-of-supply rule for disclosed agency (Article 46 of the VAT Directive), but not over the rule for undisclosed agency (Article 28 of the VAT Directive). While the place-of-supply rules for disclosed agency and electronically supplied services are just that, namely place-of-supply rules, the provision for undisclosed agency fundamentally determines how undisclosed agency is to be treated for VAT purposes. It stipulates that the legal provisions that apply to the commissioned service also apply to the service provided by the undisclosed agent. The respective provisions thus have different regulatory contents. Furthermore, the service provided by an undisclosed agent is directly linked to the commissioned service and does not constitute a service on its own. Unlike the disclosed agency service or electronically supplied service, it is integrated into the commissioned service. In the author's opinion, the base rule for undisclosed agency (Article 28 of the VAT Directive) can therefore not be superseded by the place-of-supply rule for

[71] Where Member State C has a standard VAT rate of 15% and Member State D has a standard VAT rate of 20% and both can supply services in other Member States without having to be physically present there (i.e., electronically), the supplier established in Member State C has a competitive advantage over the supplier established in Member State D, as it will charge its final consumers a lower VAT rate (15%) than the supplier based in Member State D (20%) regardless of where the consumers are resident.

[72] For insights on technology neutrality, *see* M. Hildebrandt & L. Tielemans, *Data Protection by Design and Technology Neutral Law*, Comput. Law Secur. Rev. 509, at 510 et seq. (2013); M. Hildebrandt, *Smart Technologies and the End(s) of Law* 215 (2016).

[73] T. Ehrke-Rabel & L. T. Zechner, *VAT Treatment of Cryptocurrency Intermediation Services*, 48(5) Intertax 498, at 503 (2020); *see also* Zechner, *supra* n. 53, at 305 et seq.

[74] *See* the ECJ's arguments in ECJ 7 Mar. 2017, C-390/15, RPO, paras 65 et seq.

[75] Businesses providing electronically supplied services have had the option to register for VAT purposes in only one Member State and to declare and pay VAT in that Member State for the VAT due in other Member States for several years (so-called 'one stop shop'); cf. C. A. Heibain & S. Pierrée, *The One-Stop-Shop for VAT and Digital Services Tax*, in *Taxing the Digital Economy* 297, at 297 et seq. (P. Pistone & D. Weber eds 2019).

[76] Ehrke-Rabel & Zechner, *supra* n. 73; *see also* Zechner, *supra* n. 53, at 305 et seq.

[77] *See* ECJ 12 Oct. 2017, C-262/16, Shields & Sons Partnership, paras 40 et seq. as well as the following decisions on tax exemptions ECJ 14 Dec. 2006, C-401/05, VDP Dental Laboratory, paras 35–37; 29 Oct. 2009, C-174/08, NCC Construction, para. 42; 19 Jul. 2012, C-44/11, Deutsche Bank para. 45; 15 Nov. 2012, C-174/11, Zimmermann, para. 50 and those on e-books ECJ 5 Mar. 2015, C-502/13, Commission/Luxembourg, paras 61–63; 5 Mar. 2015, C-479/13, Commission/France, paras 41–43 with further references.

[78] Charter of Fundamental Rights of the European Union, OJ C326 (2012).

[79] ECJ 17 Mar. 2017, C-390/15 RPO, paras 62 et seq.; J. M. Macarro Osuna, *Non-Reduced Rates for E-Books: Has the ECJ Allowed a Violation of Fiscal Neutrality?*, 27(4) Intl. VAT Monitor 249, at 249 et seq. (2016); R. Pathiyil, *E-Books and VAT*, in *Taxation in a Global Digital Economy* 329, at 343 (I. Kerschner & M. Somare eds, 2017).

electronically supplied services (Article 58 of the VAT Directive).

Moreover, if the rules for electronically supplied services were given precedence over the rules for undisclosed agency, this would result in a contradiction to the statutory presumptions in Article 9a of the VAT Implementing Regulation and Article 14a of the VAT Directive. These provisions deem platform operators to be the providers of the supplies made via their platforms if certain criteria are met.[80] The mode of delivery of their services will in many cases fulfill the elements of an electronically supplied service (over the Internet, essentially automated, involving minimal human intervention, and impossible to ensure in the absence of information technology). Nevertheless, these platform operators are being treated as undisclosed agents. In addition, according to Article 7(3)(t) and (u) of the VAT Implementing Regulation cultural, artistic, sporting, scientific, educational, entertainment or similar events as well as accommodation, car-hire, restaurant services, passenger transport or similar services that were booked online are not to be classified as electronically supplied services. This indicates that the EU legislature did not intend to give electronically supplied services precedence over undisclosed agency.[81]

4.3 A Need to Redefine 'Electronically Supplied Services'?

In one of its documents on the platform economy, the European Commission's VAT Expert Group proposes to include a provision in the VAT Implementing Regulation stating that the place-of-supply rule for electronically supplied services takes precedence over the place-of-supply rule for 'intermediation (or other) services'.[82] Instead of delineating these two types of supplies based on whether the platform operator's fee depends on the price of the intermediated service or their 'influence', as discussed above, it would be helpful to clarify that the rule for electronically supplied services takes precedence over the rule for disclosed agency.

Where the VAT Expert Group mentions 'other' services, it is unclear which services, specifically, it is referring to. If it intends to statutorily determine that the rules for electronically supplied services supersede the rules for *undisclosed* agency, this would not constitute a mere clarification, but a change in the law. The service provided by an undisclosed agent is not an independent service, but forms a part of the commissioned service. It cannot, in the author's view, compete with the rules for electronically supplied services. Moreover, giving precedence to the rule for electronically supplied services over the rule for undisclosed agency, would be inappropriate for the following reasons: First, it would lead to non-neutral results among analog and digital business models. Second, it would impede effective taxation of platform-based business models because undisclosed agency arrangements increase both legal certainty and effectiveness of the EU VAT provisions by consolidating the VAT liability instead of distributing it among numerous vendors.

Overall, it seems desirable to explicitly state in the VAT Directive that the rule for electronically supplied services takes precedence over the rule for disclosed agency.

5 Conclusion

Services provided by and through Internet platforms make up a significant portion of the service sector, which has grown substantially over the past years. Three-party business models, in which the platform operator intermediates between a supplier and a customer, have become an important part of daily life.

For purposes of EU VAT, each transaction occurring as part of a three-party business model must be attributed to a 'taxable' person based on the facts of the individual case. Generally, there are several forms in which a supplier can provide their services for VAT purposes – as a proprietary trader, an undisclosed agent or a disclosed agent. Proprietary traders act in their own name and for their own account. Undisclosed agents act in their own name, but on behalf of a third person. Disclosed agents act in the name and on behalf of a third person. VAT consequences depend on which category the supplier's services pertain to. Given that there is little case law on how to distinguish the two forms of agency, in particular, this article attempts to systematize the assessment for VAT purposes. It provides a framework that builds upon the VAT case law of the ECJ by taking into consideration the economic and commercial reality of each case and placing particular emphasis on the view of the average consumer. This method aligns with the German Bundesfinanzhof's so-called business-premise jurisprudence, which is also reflected in the case law of the Austrian Verwaltungsgerichtshof. The proposed framework helps identify the supplier of each transaction in a three-party business model, regardless of whether it falls in the realm of traditional commerce or e-commerce.[83]

[80] *See* for an analysis S. C. Hammerl & L.T. Zechner, *Administering Profit and Consumption Taxation in Market Jurisdictions: Selected Similarities in the Digital Era*, 76(1) Bull. for Int'l Tax'n 2, at 7 et seq. (2022).

[81] *See also* VAT Committee, *Working Paper No 906*, taxud.c.1 (2016) 3297911, 3.

[82] VAT Expert Group, VEG N°095, *VAT Treatment of the Platform economy: contribution of the VEG*, taxud.c.1 (2020) 5816454, 13.

[83] However, this framework is only relevant where special regimes deeming platform operators to be the providers of certain supplies effectuated via their platforms, if certain criteria are met (e.g., Art. 9a of the VAT Implementing Regulation and Art. 14a of the VAT Directive), do not apply.

In the context of three-party, platform-based business models, the author concludes that services provided via a platform are to be attributed to the platform operator if, at the time of completing a transaction on the platform, the average consumer gains the impression that they are purchasing the service directly from the platform operator. This approach accounts for the fact that the economic reality is decisive in categorizing transactions for VAT purposes. The parties' contractual relationship is only one factor to consider. Moreover, given that VAT is a general tax on consumption, the perspective of the average consumer is particularly relevant in establishing the relevant facts and ascertaining the economic reality of a case. With regard to assessing the economic reality and the average consumer's impression in three-party, platform-based business models, certain activities of the platform operator can indicate that they are acting in their own name and not in the name of the vendor offering services via their platform. To contribute to a more uniform approach among authorities and courts across the Member States, this article develops a list of concrete indicators.

Lastly, this article provides a method for distinguishing agents from providers of electronically supplied services based on current EU VAT law. In an increasingly digitized economy, rules for electronically supplied services are gaining practical relevance. The B2C place-of-supply rule for electronically supplied services deviates from the common understanding that legislation must be construed in a way that its application does not depend on the form or technical implementation of a transaction but on its substance. In the author's view, the place-of-supply rule for electronically supplied services applies where disclosed agents supply their intermediation services 'electronically'. Since this rule does not provide for taxation where the intermediated service takes place, it does not, by all means, ensure taxation at the place of consumption. Neglecting the consumption tax character of the VAT in this way can be justified by the need to eliminate definitional problems and improve effectiveness of the common system of VAT as well as legal certainty.

Overall, this article illustrates that EU VAT legislation is flexible and can cover business models that the legislature could not have foreseen at the time of enacting many of the VAT provisions. Applying an economic approach in interpreting the law enables it to capture new business models without having to be amended each time a new technology or economic activity emerges. Specifically, traditional VAT rules for attributing supplies are well suited to cover various three-party, platform-based business models. While the legal assessment of such business models must be done on a case-by-case basis, the framework and legal interpretation offered in this article can contribute to a more uniform approach as well as legal certainty for taxpayers and tax authorities.