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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 836

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN: Commission

REFERENCES: Articles 2(1)(b) and (c), 65, 73 and 135(1)(b) and (f)

SUBJECT: VAT treatment of crowdfunding

1. INTRODUCTION

The Commission services wish to discuss with the VAT Committee certain issues related to the VAT treatment of crowdfunding.

Although crowdfunding is in an early stage of development, and its benefits and risks need to be further assessed, it may be seen for start-ups and small business as an alternative to banking finance and venture capital¹.

At European level, the development of crowdfunding is being closely monitored by the European Commission²: notably, in June 2014 the expert group "*European Crowdfunding Stakeholders Forum*" was set up; in March 2014 a Communication³ was published; and in November 2013 a public consultation⁴ was launched. These initiatives all aim at studying how crowdfunding fits into the wider financial ecosystem and the existing regulatory framework, particularly taking into account issues related to transparency and investor's protection. However, the VAT implications of crowdfunding seem to have been overlooked so far.

With a view, if possible, to reach a common and consistent position on the VAT treatment of crowdfunding across the European Union, the Commission services collected views from Member States. From the responses received, it does not seem that, until now, this issue has caused major problems at national level. A few Member States have issued guidelines on this topic.

2. SUBJECT MATTER

Crowdfunding⁵ generally refers to the process of raising funds for a specific project via an open call on the Internet, by way of specifically designed platforms which allow the peer-to-peer interaction between entrepreneurs⁶ and contributors⁷, *i.e.*, those that create a

¹ For more information about its market share, see European Banking Authority (EBA), "*Consumer Trends report 2014*", 2014, p. 32.

<http://www.eba.europa.eu/documents/10180/534414/EBA+Consumer+Trends+Report+2014.pdf>

² Overview of measures taken: http://ec.europa.eu/internal_market/finances/crowdfunding/index_en.htm

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "*Unleashing the potential of Crowdfunding in the European Union*", COM(2014)172, 2014.

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2014:172:FIN>

⁴ European Commission (DG MARKT), Public consultation document "*Crowdfunding in the EU – Exploring the added value of potential EU action*", 2013.

http://ec.europa.eu/internal_market/consultations/2013/crowdfunding/docs/consultation-document_en.pdf.

The responses to the referred consultation are also available in European Commission (DG MARKT), "*Summary. Responses to the public consultation on crowdfunding in the EU*", 2013.

http://ec.europa.eu/internal_market/consultations/2013/crowdfunding/docs/summary-of-responses_en.pdf

⁵ For a complementary view on the concept of crowdfunding, see also Securities and Market Stakeholder Group (ESMA), "*Position paper: crowdfunding*", ESMA/2014/SMSG/010, 2014.

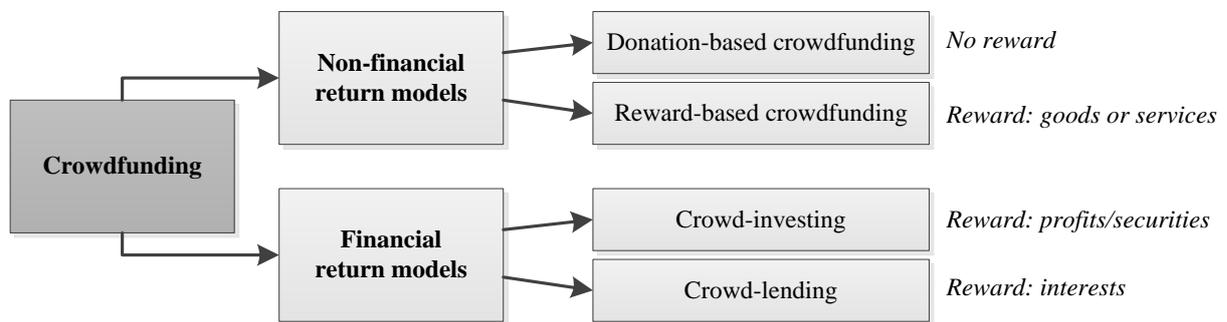
<http://www.esma.europa.eu/content/SMSG-position-paper-Crowdfunding>

⁶ This paper uses the expression "entrepreneur" to mean the recipient of the funds, which may be also referred to as "campaign owner", "investee" or "borrower", depending on the crowdfunding models.

⁷ The term "contributor" shall refer to the party providing with funds, also named "donator" or "investor".

project and those that provide with financial support to that project, respectively. Crowdfunding platforms generally perceive a fixed amount of the contribution made. Usually, a limited period of time is set up for the funding, and small contributions from a large number of parties are typically expected.

The expression "crowdfunding" merely refers to the channel used for the financing, but can take different forms. Depending on the return, if any, that can be obtained by the contributor in exchange for the investment, it seems that two main crowdfunding models can be identified: (i) non-financial return models, where the return may range from either nothing (donation) to goods or services (reward-based model); and (ii) financial return models, where a financial return is expected, either a participation in the form of revenues or securities (crowd-investing), or interest on loans (crowd-lending).



It is necessary to briefly describe the main features of each model, before assessing its VAT implications.

- *Donation-based crowdfunding*: Contributors altruistically donate without being given anything in return.
- *Reward-based crowdfunding*⁸: Contributors are rewarded with a non-financial compensation – goods or services – in exchange for their participation in the funding campaign. Rewards can take multiple forms, *e.g.*, the copy of a product that the campaign aims at developing, or even incentives of a more intangible nature, such as the opportunity to participate in a film as an extra. The expected reward can be taken into account by the contributor when deciding to pledge, as the campaign owner will offer different rewards depending on the amount of money to be perceived – typically, the value of the reward increases as it does the amount of the contribution. In some cases, the rewards may be of symbolic value, compared to the contribution that is given in exchange.

⁸ As to reward-based crowdfunding, the approach taken differs slightly from the one exposed in the Commission's Communication, *op.cit.*, p. 3; and in its Consultation document, *op.cit.*, p. 3. It is considered more appropriate to group the sub-categories "reward-based" and "pre-sales" together, given that the line between the two is blurred. This is analysed further under section 3.1 of this document.

- *Crowd-investing*⁹: In exchange for their investment, contributors expect a financial remuneration, which may take the form of (i) participation¹⁰ in future earnings of the project that is being financed; and/or (ii) investment into securities such as shares or bonds issued by the entrepreneur who launched the funding campaign.

- *Crowd-lending*: In this model, contributors act as lenders and entrepreneurs take the position of borrowers. Contributors expect the entrepreneur to repay the money lent, often with a fixed interest rate. Some debt crowdfunding is interest free or carries low interest rates, particularly when lending to social enterprises, while others will set interest rates at commercial level.

From the description of the abovementioned models, some remarks concerning the VAT treatment of crowdfunding need to be made.

First of all, as to donation-based crowdfunding, VAT issues are unlikely to arise due to the characteristics of the model itself. No reward is envisaged for the contributor to the crowdfunding campaign and so there will be no taxable supply of goods or services. A freely given donation for which no benefit is given in return falls outside the scope of VAT¹¹.

Secondly, with regard to reward-based crowdfunding, where the contributor to the crowdfunding receives goods or services from the entrepreneur in exchange for the support given, several VAT issues need analysis. Notably, whether there is a supply of goods or services for VAT purposes by the entrepreneur in charge of the project to the contributor. If so, it needs to be clarified whether the contribution made should be seen as a payment on account of the goods or services to be received, as well as the corresponding taxable amount. It is also necessary to consider the extent up to which a potential supply may be affected if the value of the goods or services supplied is symbolic.

Thirdly, the interaction between financial return models of crowdfunding – which comprise crowd-investing and crowd-lending – and the exemptions pursuant to Article 135(1) of the VAT Directive¹² concerning financial services shall be explored.

And finally, the VAT treatment of services related to intermediation provided by crowdfunding platforms to the entrepreneurs needs to be examined.

⁹ This could also be referred to as "equity-based" crowdfunding but using the terminology "crowd-investing" seems more accurate taking into account that the financial reward consists of participation in future earnings or investment in securities. In the latter case, the contributor may be given an equity instrument (share) but also a debt instrument (bond).

¹⁰ These models of crowdfunding are called also profit-sharing or royalty-sharing, because the reward might also be in the form of future royalties. Royalty-sharing is typically used by creators that offer intellectual property rights of the project for which funds are sought.

¹¹ If the donation is made in kind, the goods or services donated could be subject to VAT pursuant to Articles 16 and 26 of the VAT Directive, provided that the conditions there are met.

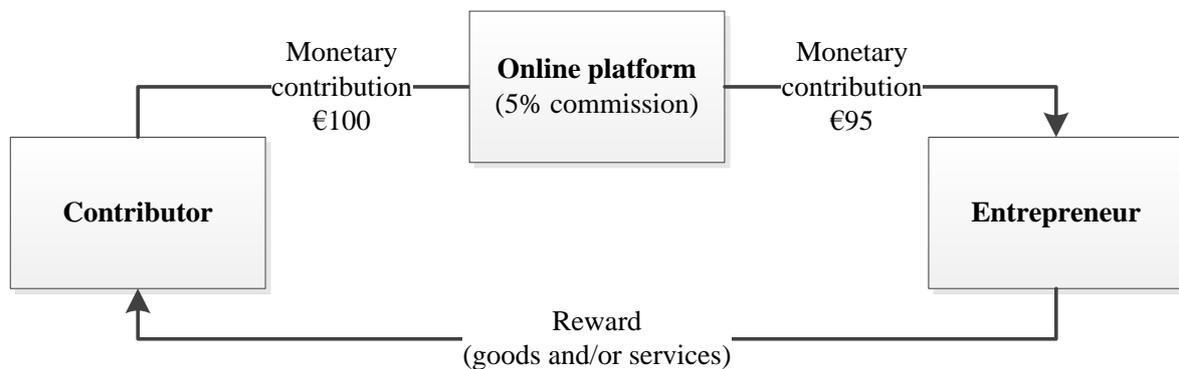
¹² Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

3. THE COMMISSION SERVICES' OPINION

3.1. VAT treatment of reward-based crowdfunding

The object of this section is to analyse (i) whether supplies of goods or services made in return for reward-based crowdfunding constitute supplies for VAT purposes; (ii) whether contributions to a project shall be seen as payments on account before the goods or services are supplied; (iii) what shall be the taxable amount of the supply; and (iv) whether scenarios where the reward is of symbolic value should be treated differently.

The following diagram aims at summarising the functioning of reward-based crowdfunding.



3.1.1. Does the reward constitute a supply of goods or services for VAT purposes?

According to Article 2(1)(a) and (c) of the VAT Directive, the supply of goods or services for consideration within the territory of a Member State by a taxable person acting as such shall be subject to VAT.

Concerning the consideration, according to settled case-law¹³ of the Court of Justice of the European Union (CJEU), there must be a direct link between the supply of goods or services made and the consideration received, if the supply is to be taxable for VAT purposes. Otherwise, if a person's activity consisted exclusively in providing services for no direct consideration, there would be no basis of assessment and the free services would not be subject to VAT¹⁴.

A direct link is established if there is a legal relationship between the person receiving consideration for a service and the person paying it, according to existing case-law¹⁵. As the CJEU stated in *Tolsma*, a supply of services is effected for consideration within the meaning of Article 2(1)(c) of the VAT Directive, and hence is taxable, “only if there is a

¹³ Among others, CJEU, judgment of 8 March 1988 in case C-154/80 *Coöperatieve Aardappelen*, paragraph 12; and CJEU, judgment of 23 November 1988 in case C-230/87 *Naturally Yours*, paragraph 11.

¹⁴ CJEU, judgment of 1 April 1982 in case C-89/81 *Hong-Kong Trade Development Council*, paragraph 10.

¹⁵ *Inter alia*, CJEU, judgment of 23 March 2006 in case C-210/04 *FCE Bank*, paragraph 34.

*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*¹⁶. Such a legal relationship and reciprocal performance seems to exist between the contributor and the entrepreneur, since the goods or services will only be supplied in exchange for the contribution to the project that is being funded.

Finally, according to Article 2(1)(a) and (c) of the VAT Directive, transactions fall within the scope of VAT only where performed by a taxable person acting as such. Pursuant to Article 9(1) of the VAT Directive, a taxable person shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Given that reward-crowdfunding is a financing instrument mostly used by start-ups and small businesses or individuals getting going a project, the question whether such starting entrepreneurs qualify as taxable persons even when no taxable output is yet realised, seems a timely one. This is a matter of major significance, notably concerning the right of deduction of the entrepreneurs.

The CJEU has dealt with this situation in the case *Rompelman*¹⁷, inter alia, wherein a broad interpretation was given to the terms "taxable person" and "economic activity", concluding that the company in question had the status of taxable person even though it had not at that time commenced making taxable supplies¹⁸; and that economic activity can include preparatory acts prior to the making of the taxable supplies¹⁹. This conclusion was made even more clear with the case *Lennartz*, wherein it was stated that "*preparatory activities, such as the acquisition of operating assets, must be treated as constituting economic activities within the meaning of that article. (...) A person who acquires goods for the purposes of an economic activity (...) does so as a taxable person, even if the goods are not used immediately for such economic activities*"²⁰.

Even where the output of the project that is being financed by means of crowdfunding is never materialised, the preparatory acts would retain the character of being economic activity²¹. So, the concept of economic activity within the meaning of Article 9(1) of the VAT Directive should be assessed without regard to its purpose or results.

The fact that the goods or services may be supplied on an occasional basis²² would not seem to preclude entrepreneurs from being regarded as taxable persons, according to Article 12 of the VAT Directive. This is the line of thought defended by some

¹⁶ CJEU, judgment of 3 March 1994 in case C-16/93 *Tolsma*, paragraphs 13 and 14.

¹⁷ CJEU, judgment of 14 February 1985 in case C-268/83 *Rompelman*.

¹⁸ *Rompelman*, paragraph 23.

¹⁹ *Ibid*, paragraph 22.

²⁰ CJEU, judgment of 11 July 1991 in case C-97/90 *Lennartz*, paragraphs 13 and 14.

²¹ CJEU, judgment of 29 February 1996 in case C-110/94 *INZO*, paragraphs 20 and 21.

²² For instance, where a filmmaker is seeking funds via crowdfunding in order to make a movie and offers DVD copies of this movie to the contributors in exchange for their support. The supply of DVDs would not be the usual economic activity of the filmmaker itself, but of the producing and distributing companies.

commentators²³, and also by the Advocate General (AG) in the *Wellcome Trust* case, making it clear that *"In assessing an activity, it is neither the scope nor the duration which is conclusive, but solely the question whether that activity is an economic activity"*²⁴. This point has been confirmed by the CJEU in *Kostov*²⁵ and *Slaby*²⁶. From this, it can be drawn that goods or services supplied in return for reward-based crowdfunding constitute a supply of goods or services for VAT purposes, subject to the conditions described above being met. The Commission services believe that such supplies should be treated in the same way as any other supplies for VAT purposes.

All of the Member States who expressed a view considered that where a contributor receives goods or services in exchange for funds, the transaction should be seen as a taxable supply whose VAT treatment should follow the liability of the goods or services provided.

3.1.2. Shall the contribution be seen as a payment on account?

Given the functioning of reward-based crowdfunding, where the funds offered by the contributor to a project are usually given well before supply of the reward takes place, it seems that the contribution could constitute a payment made on account before the goods or services are supplied. This affects the chargeability of VAT since, according to Article 65 of the VAT Directive, *"where a payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received"*.

In order for the tax to become chargeable where an amount is paid on account without the supply of goods or services having been made, all the relevant information concerning the chargeable event, namely the future delivery or future performance, must already be known. Particularly, it is required that the goods or services must be precisely identified when the payment on account is made²⁷.

Most of the contributions received from Member States considered such contributions to be payments on account before the goods or services are supplied.

3.1.3. Taxable amount of the supply of goods or services

Pursuant to Article 73 of the VAT Directive, the taxable amount for the supply of goods or services is the consideration actually received for them by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.

²³ Kajus, J. and Terra, B., *Commentary – A Guide to the Sixth VAT Directive (Historical Archive) – Chapter 3.7*, 2014, IBFD Tax Research Platform: *"How many transactions should be performed in order to be treated as a taxable person, in other words, can objective criteria be found? From Article 4(3) [present Article 12] it may be derived that when a single transaction is performed a person may be treated as a taxable person. (...) Although the cases in which a single transaction results in taxability are mentioned separately in the Sixth Directive one should not assume, a contrario, that the Sixth Directive in general requires a continuing basis in order to treat a person as taxable"*.

²⁴ CJEU, opinion of AG Lenz in case C-155/94 *Wellcome Trust*, point 32.

²⁵ CJEU, judgment of 13 June 2013 in case C-62/12 *Kostov*, paragraph 28.

²⁶ CJEU, judgment of 15 September 2011 in case C-180/10 *Slaby*, paragraph 49.

²⁷ CJEU, judgment of 21 February 2006 in case C-419/02 *BUPA*, paragraph 48.

Concerning the fact that the contributor does not directly send the funds to the entrepreneur but through an intermediary (see section 3.3) it is settled case law of the CJEU²⁸ that the eventual payment service provided by the intermediary needs to be regarded as an independent transaction, thereby not altering the supply of goods or services by the entrepreneur to the contributor and its taxable amount.

Therefore, the taxable amount would be the total amount paid by the contributor, without any reduction arising from the consideration paid by the entrepreneur to the intermediary. Following the example in section 3.1, the taxable amount in that case would be EUR 100.

3.1.4. Particular scenario: reward of symbolic value

The underlying philosophy of reward-crowdfunding is that the entrepreneur offers a reward in order to stimulate participation of contributors in his venture. But it may also be the case that the contributor is not in the first instance motivated by the reward itself, but rather by an emotional connection with the project. Hence some may see the reward as a thank you gift rather than as counterpart to a transaction, especially if it is of a symbolic value.

It is important to note that, despite the common meaning of the word "gift", a symbolic reward could not be seen as a gift²⁹ for VAT purposes. Indeed, while a gift consists of a supply of goods or services made for no consideration, in the case of reward-based crowdfunding the consideration is in principle the income received from the contributor. And, as the settled case-law³⁰ of the CJEU confirms, the existence of a consideration is the key point in order to identify whether a supply of goods or services is a gift.

In some scenarios, the contribution paid to the entrepreneur may be far more significant than the benefit received by the contributor. Or, in other words, there might be no substantial benefit for the contributor in return for the funds. An extreme case, for instance, would be where a charity raising funds by means of crowdfunding gives stickers to the contributors of a project in appreciation of their support.

Therefore, it is worth assessing whether the conclusions laid out in section 3.1.1 would apply in scenarios where the reward offered by the entrepreneur to the contributor is of symbolic value, *i.e.*, the open market value³¹, if any³², of the goods or services given as a reward is clearly lower than the contribution they are being exchanged for.

²⁸ CJEU, judgment of 25 May 1993 in case C-18/92 *Bally*, paragraph 16.

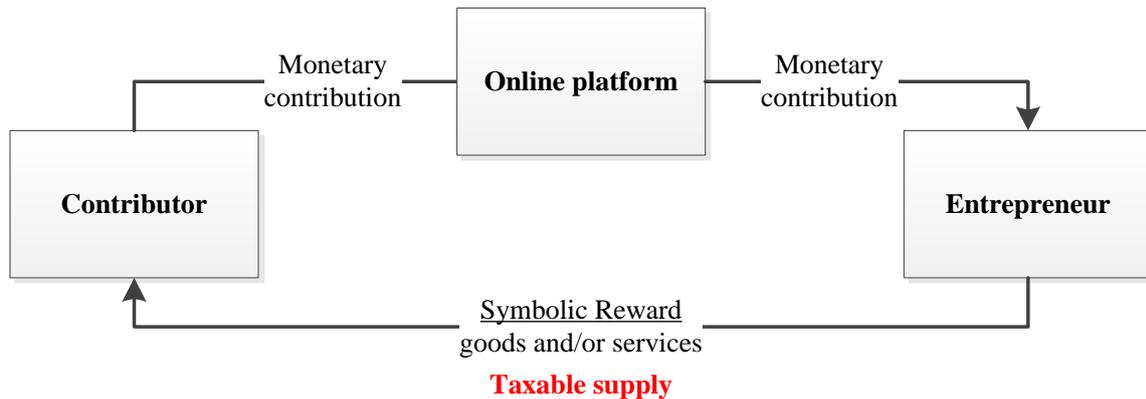
²⁹ The second paragraph of Article 16 of the VAT Directive refers to the concept "gifts of small value" and prevents the application of goods for business used as samples or as gifts of small value from becoming a supply of goods for consideration. So, supplies of goods given for free may be seen as "gifts of small values" in some cases. However, this is not relevant as the existence of a consideration is not put into question.

³⁰ Amid others, in the case *Hong-Kong Trade Development Council* (paragraph 10) it was stated that services provided free of charge – for no direct consideration – are not subject to VAT.

³¹ As to the concept "open market value", we refer to Article 72 of the VAT Directive which defines it as the full amount that, in order to obtain the goods or services in question at that time, a customer at the same marketing stage at which the supply of goods or services takes place, would have to pay, under conditions of fair competition, to a supplier at arm's length within the territory of the Member State in which the supply is subject to tax.

The question that merits being examined in more detail is whether symbolic reward constitutes the counterpart for a taxable supply of goods or services for VAT purposes. In this respect, two potential approaches shall be considered: (i) to see the supply of the reward as a taxable supply; or (ii) to assimilate it to a donation. Finally, the interaction between these approaches shall also be seen.

i. Interpretation 1: taxable supply of goods or services



Neither the VAT Directive, nor the case-law of the CJEU, seem to make the existence of a supply of goods or services for VAT purposes conditional upon the value ascribed to the goods or services in question. Therefore, if the conditions exposed under section 3.1.1 are met, a transaction shall be subject to VAT pursuant to Article 2 of the VAT Directive.

In cases where the reward is of symbolic value, there is of course a mismatch between the value of the goods or services supplied by the entrepreneur and the consideration received from the contributor; *i.e.*, the consideration paid by the contributor may be higher than what would have been paid for similar goods or services, had they been supplied outside the crowdfunding framework.

Nonetheless, it is not generally required for VAT purposes that a consideration has to reflect the open market value of the goods or services supplied in order for a transaction to be qualified as taxable. In fact, as to the concept of "consideration", it is settled case-law³³ of the CJEU that the taxable amount for the supply of goods or services is represented by the consideration actually received for them. That consideration is thus the subjective

³² It might even be that the purchase of certain goods or services, such as the participation in a film as an extra, would not have been available in the open market. Also, for example, cases where the entrepreneur offers as a reward a prototype of an innovative product that has never been sold before. For the open market value in such situations, see Article 72 of the VAT Directive (second paragraph).

³³ Among others, *Coöperatieve Aardappelen*, paragraph 13; *Naturally Yours*, paragraph 16; and CJEU, judgment of 29 July 2010 in case C-40/09 *Astra Zeneca*, paragraph 28.

value, that is to say, the value actually received, and not a value estimated according to objective criteria³⁴.

The CJEU has often dealt with cases where the consideration is lower than the open market value of the goods or services supplied, which is precisely opposite to the scenario that we analyse under this section. Still, it is important to have in mind some reflections that could also enlighten the reasoning at hand and allow for consistency.

In *Gåsabäck*³⁵, where the VAT treatment of food supplied by a hotel to its personnel for a consideration below cost price was examined, the Swedish Government argued that there was no difference between the payment of a symbolic price and the supply free of charge. Analogously, it might be argued that there is no difference between a supply of goods or services of symbolic value and donation made in the form of reward-based crowdfunding.

However, the approach defended by the Swedish Government was refuted, because *"the fact that an economic activity is carried out at a price higher or lower than the cost price is irrelevant for the purposes of describing it as being carried out for consideration. (...) Furthermore, as the Commission points out, there is nothing in the Sixth Directive or in the case-law which requires the taxable amount to be fixed on the basis of the market valuation of the transaction subject to tax, irrespective of the amount paid. (...) The taxable amount is always determined in accordance with the consideration received, a rule which is also based on the principle of neutrality and on the configuration of this tax as an indirect tax levied on economic capacity indicated by consumption"*³⁶.

The CJEU in *Campsa Estaciones de Servicio* confirmed that *"the possibility of classifying a transaction as 'a transaction for consideration' requires only that there be a direct link between the supply of goods or the provision of services and the consideration actually received by the taxable person. Thus, the fact that the price paid for an economic transaction is higher or lower than the cost price, and, therefore, higher or lower than the open market value, is irrelevant as regards that classification"*³⁷.

In *Weald Leasing Limited* the CJEU has regarded *"rentals that were set at levels which were unusually low or did not reflect any economic reality"*³⁸ as being potentially contrary to the VAT Directive. However, this case refers to a situation of abusive practice with an artificial low consideration that runs against economic reality, whereas in *Gåsabäck* and *Campsa Estaciones de Servicio* the low consideration was fully justified in economic terms and did not have any abusive purpose.

It might be useful referring at this point to the relevant provisions in New Zealand where, under national law³⁹, the definition of consideration excludes explicitly any payment made

³⁴ Article 80(1)(a), (b) and (c) of the VAT Directive comprises an exhaustive list of the circumstances in which a Member States may levy VAT on a transaction on the basis of its open market value rather than of the consideration actually paid. However, those provisions do not authorise a Member State to take such an approach where the supplier or customer, as the case may be, has a full right of deduction.

³⁵ CJEU, judgment of 20 January 2005 in case C-412/03 *Gåsabäck*.

³⁶ *Ibid*, paragraphs 35 and 36.

³⁷ CJEU, judgment of 9 June 2011 in case C-285/10 *Campsa Estaciones de Servicio*, paragraph 25.

³⁸ CJEU, judgment of 22 December 2010 in case C-103/09 *Weald Leasing Limited*, paragraph 39.

³⁹ Section 2 of the Goods and Services Tax (GST) Act 1985 of New Zealand.

by any person as an unconditional gift⁴⁰ to any non-profit body. An unconditional gift is defined as a payment voluntarily made to a non-profit body for the carrying on or carrying out of the purposes of that non-profit body and in respect of which no identifiable direct valuable benefit arises or may arise in the form of a supply of goods and services to the person making that payment. From this follows a contrario that conditional gifts to non-profit bodies are treated as a consideration as well as gifts to persons and bodies, other than non-profit bodies, provided they must account for VAT. According to the doctrine⁴¹, *"It could be argued that the payment to an organ grinder (or a tip to a waiter or taxi-driver) is a gift and therefore falls beyond the scope of the VAT. Under the New Zealand GST this argument would not hold. Any payment whether additionally made or as a gift is treated as consideration, provided there is a consequential benefit (...) We advocate a similar approach under the EU VAT"*.

Based on the above, it could be concluded that the existence of a taxable supply of goods or services is not dependent upon the market valuation of the transaction. This approach seems consistent with the view of the CJEU, whereby "consideration" is defined as a subjective value.

It follows from Article 73 of the VAT Directive that the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or third party. Such taxable amount should be the consideration received by the entrepreneur by way of reward-based crowdfunding, even if the consideration paid by the purchaser is higher than the open market value of the supply.

The fact that the taxable amount of a transaction should not be established according to the open market value as a general rule does not contravene the principle of equal treatment. As stated by the CJEU, *"in so far as transactions, such as those in the present case, in which a price patently lower than the open market price has been agreed are none the less transactions for consideration in which an actual consideration able to serve as the taxable amount has been received, the principle of equal treatment is not, in itself, such as to necessitate applying to them the rules for determining the taxable amount which were laid down for transactions effected free of charge for the estimation, in the absence of any actual consideration, of such a taxable amount according to objective criteria, as those two types of transaction are not comparable"*⁴².

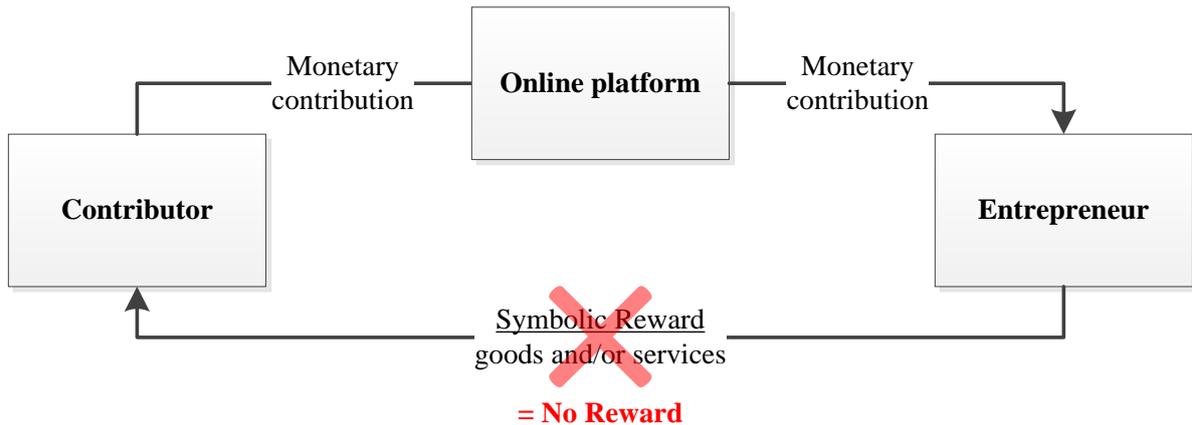
ii. *Interpretation 2: supply of goods or services, regarded as a donation*

An alternative view could be to regard the reward of symbolic value as a "non-reward", thus treating the transaction as a donation by the contributor to the entrepreneur. The transaction would then qualify for VAT purposes as "donated-based crowdfunding" and be treated as if no reward was offered to the contributor.

⁴⁰ The concept of gift used in the national law would be the equivalent of what has been described as a "donation" in this document.

⁴¹ Kajus, J. and Terra, B., *Commentary – A Guide to the Sixth VAT Directive (Historical Archive) – Chapter 1.3*, 2014, IBFD Tax Research Platform.

⁴² *Campsa Estaciones de Servicio*, paragraph 30.



The application of this interpretation, whereby the supply of goods or services of symbolic value is assimilated to a donation, should be assessed on a case-by-case basis, taking into account the characteristics of each scenario⁴³.

Such an approach could be sensible in cases where the benefit received by the contributor in return for the funds given is negligible, *i.e.*, the value of the goods or services received by the contributor is so little that they could be seen as not bringing any substantial benefit at all. Nonetheless, to find a legal basis supporting the application of this approach on a general basis is not straightforward, be it in the VAT Directive or in the case-law of the CJEU.

Having in mind *Gåsabäck* and *Campsá Estaciones de servicio*, it might be also argued that regardless of the value of the goods or services, there is no direct link between the supply of goods or services and the consideration actually received by the taxable person. That would still depend on the characteristics of the scenario, assessed according to the criteria laid out in section 3.1.1.

For example, in *Commission vs Finland*⁴⁴, where the recipient of the services was obliged to pay an amount according to his financial resources, the existence of a direct link was challenged on the grounds that the amount was not calculated according to the volume of the services received it was "contaminated" by the client's income and assets being taken into account.

In *Tolsma*, the existence of a direct link was connected by the CJEU to the existence of a legal relationship between the person receiving consideration for a service and the person paying it, in the sense that there needs to be a reciprocal performance, a service provided in exchange of a remuneration and vice versa; *i.e.*, there would be no service for consideration without the remuneration, and the other way round. However, although in the case of reward-based crowdfunding the supply of goods or services depends on the existence of a contribution, where the goods or services are not at all related to the amount

⁴³ In order to facilitate the case-by-case analysis and for the sake of legal certainty, it is possibly so that a line would need to be drawn between donations and supplies for consideration, *i.e.*, a concrete ceiling value for the goods or services supplied up to which the transaction could be regarded as a donation.

⁴⁴ CJEU, judgment of 29 October 2009 in case C-246/08 *Commission vs. Finland*, paragraphs 49 and 51.

of the contribution it could be held that there is no direct link. On the other hand, it seems that the CJEU has dismissed the existence of a direct link, in cases⁴⁵ where the goods or services supplied could not be foreseen by its recipient, which would imply a lack of reciprocal performance. Concerning crowdfunding, such would be the case if the contributor could not anticipate, before funding takes place, which would be the symbolic reward to be received.

Also in favour of interpretation 2 some might indeed argue that there is no actual consumption from the point of view of the contributor, as the aim of the transaction is not to obtain the symbolic reward offered by the entrepreneur but rather to altruistically donate. According to this view, bearing in mind that VAT constitutes taxation of private expenditure, this transaction could then be treated as out of scope of the VAT.

In this regard, reference must be made to *Landboden-Agrardienste*⁴⁶, which involved an undertaking given by a farmer not to harvest a part of his crop in exchange for a specific compensation by the government. The CJEU ruled that by compensating farmers who undertook to cease the harvest, the government did not acquire goods or services for its own use. Therefore, a transaction as such did not seem to lead to appreciable consumption by the government payment the compensation.

iii. Interaction between interpretations 1 and 2

The above interpretations should not necessarily be seen as alternatives but rather potentially complementary solutions whose application needs to be assessed on a case-by-case basis, although we do stress the need to be very cautious as to the application of interpretation 2.

Regarding the supply of goods or services as a donation (interpretation 2) seems a reasonable outcome only in cases where the benefit received by the contributor in exchange for the funds is close to nothing.

It seems that a supply of goods or services could possibly be regarded as a donation even in cases where the benefit received, if not strictly negligible, is totally unrelated to the amount of the contribution, following the approach by the CJEU in *Commission vs Finland*, as there would not be direct link. That could be the case, for example, where the reward is identical irrespective of the amount contributed. Notice that in those cases, taxation would still be possible on the basis of Article 16 of the VAT Directive, under certain conditions.

However, as the legal basis for interpretation 2 is tentative, it is difficult to sustain a broad application to cover all cases involving rewards of symbolic value, given that a transaction is subject to VAT if there is a supply of goods or services for "consideration" pursuant to Article 2 of the VAT Directive, and that "consideration" is defined by the CJEU as a subjective value not estimated according to objective criteria or the open market value.

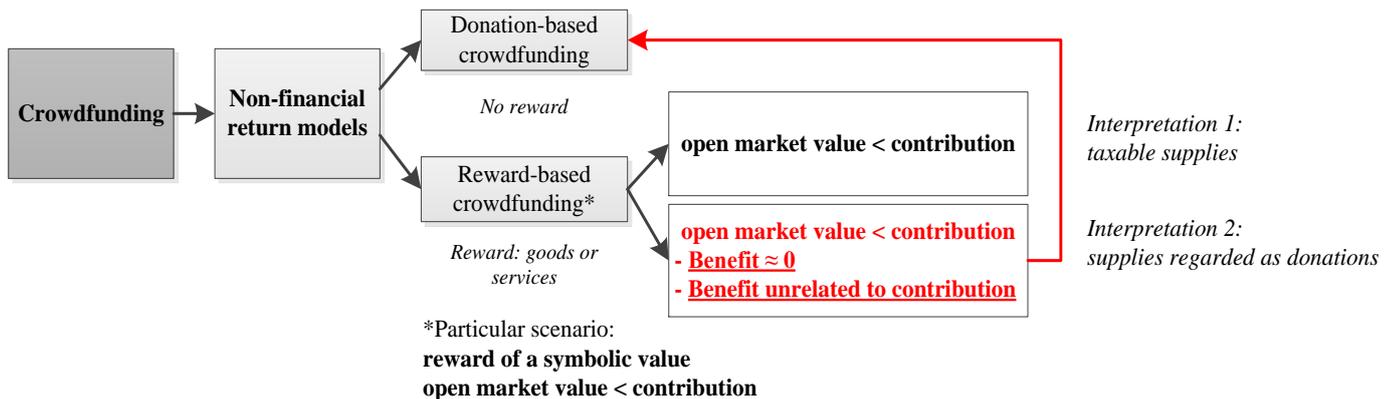
The subjective nature of a "consideration" is in line with the purpose of the VAT, which is to tax actual consumption. This approach is being applied in similar scenarios, where the consideration differs from the value of the goods or services supplied. For instance, where

⁴⁵ See CJEU, judgment of 8 March 1988 in case 102/86 *Apple & Pear Development Council*, paragraph 15

⁴⁶ CJEU, judgment of 18 December 1997 in case C-384/95 *Landboden-Agrardienste*.

a consumer is granted an 80% discount on goods or services purchased, or where a customer is willing to pay more than the face value for a concert ticket⁴⁷, the taxable amount for VAT purposes is the actual price finally paid by the consumer, regardless of the value of the goods or services.

The objective of the following diagram is to set out a possible approach for cases of reward-based crowdfunding where the reward is of symbolic value.



As to the position expressed by Member States concerning this particular scenario, all the contributions received express a preference for regarding a supply of goods or services of symbolic value as a transfer not subject to VAT (interpretation 2).

Some of them specified that interpretation 2 should be applied only to cases with a "manifest disproportion" between the value of the supply and the reward. One Member State suggested to take into account the aim of the contributor. It was also suggested to regard transfers of goods or services that have an intrinsic value (e.g. clothing, tickets, DVDs) as taxable transactions (interpretation 1), while goods or services without intrinsic value (e.g. an acknowledgement, such as a mention in a programme) as a donation (interpretation 2).

3.2. VAT treatment of financial return models of crowdfunding

In addition to the issue of there being a taxable supply of goods or services, the interaction between financial return models of crowdfunding – which comprise crowd-investing and crowd-lending – and the exemptions laid down in Article 135(1) of the VAT Directive concerning financial services shall be assessed.

⁴⁷ A customer may also end up paying more than the open market value, for example, in auctions, that online platforms like eBay have popularized.

3.2.1. *Crowd-investing*

i. *Participation in future earnings*

Contributors of crowd-investing may be offered financial remuneration in the form of participation in future earnings of the project that is being financed. Future profits could be dividends, which would result from being given participation in the form of shares⁴⁸; or royalties, which would stem from the ownership of intellectual property rights.

The supply of intellectual property rights – which may give rise to royalties in the future – by the entrepreneur to the contributor may be a taxable transaction falling within the scope of VAT pursuant to Article 25(a) of the VAT Directive, whereby a *"supply of services may consist in (...) the assignment of intangible property, whether or not the subject of a document establishing title"*. Moreover, Article 59(a) of the VAT Directive refers to *"transfers and assignments of copyrights, patents, licences, trade marks and similar rights"* as supplies of services.

This approach seems confirmed by the CJEU, for whom *"the assignment of a share in the co-ownership of an invention, notwithstanding the fact that that invention was not registered as a patent, may, in principle, be an economic activity subject to VAT"*⁴⁹.

ii. *Investments into securities*

In exchange for their investment, contributors of crowd-investing may also receive financial remuneration in the form of securities issued by the entrepreneur who launched the funding campaign.

From the financial perspective⁵⁰, securities can be classified in (i) equity securities, such as shares; and (ii) non-equity securities (or debt securities), such as bonds. While holders of the equity security become owners of the corporation responsible of its issue, a debt security creates a debtor-creditor relationship between the corporation and the holder of the debt security.

In determining whether the supply of securities by the entrepreneur is exempt, it is relevant to consider Article 135(1)(f) of the VAT Directive, whereby *"transactions, including negotiation but not management or safekeeping, in shares, interests in companies or associations, debentures and other securities, but excluding documents establishing title to goods, and the rights or securities referred to in Article 15(2)"* are exempted.

Concerning shares issued by companies to increase their capital, the VAT Committee unanimously agreed that *"such operations should either remain outside the scope of VAT"*

⁴⁸ Investments in shares are analysed under the subsequent section.

⁴⁹ CJEU, judgment of 27 October 2011 in case C-504/10 *Tanoarch*, paragraph 46.

⁵⁰ As to the meaning of equity and debt securities, we refer to European Commission (DG TAXUD), Background paper of 6 March 2008 on financial and insurance services TAXUD/2414/08, 2008, p. 31. http://ec.europa.eu/taxation_customs/resources/documents/common/publications/services_papers/other_papers/background_paper_2414_08_en.pdf

or should be exempt as financial transactions"⁵¹. This aspect has also been confirmed by the CJEU⁵².

As to the precise meaning of this provision and whether it includes not only equity securities but also debt securities, the CJEU confirmed in *Granton Advertising* that "*that exemption thus refers specifically to securities conferring a property right over legal persons and securities representing a debt...*"⁵³; the expression "securities representing a debt", should cover debentures but also bonds, for instance. This conclusion is endorsed by the background paper issued by DG TAXUD⁵⁴, where it was stated that "supply of securities" should cover, apart from equity securities, "*instruments recording the promise of repayment of a debt, including debentures, bonds and corporate bonds, promissory notes, Euro debt securities and other tradable commercial papers*".

From the perspective of the contributor who is likely to become the holder of shares or bonds, in this case as the result of crowd-investing, the CJEU has concluded that "*the mere acquisition of ownership in and the holding of bonds, activities which are not subservient to any other business activity, and the receipt of income therefrom are not to be regarded as economic activities conferring on the person concerned the status of a taxable person*"⁵⁵; and that there is no reason to treat bondholding differently from shareholding⁵⁶.

All of the Member States who expressed a view considered that the issue of a share is not a supply for VAT purposes, and that its consequent sale shall be exempt under Article 135(1)(f) of the VAT Directive.

3.2.2. Crowd-lending

As to crowd-lending, the contributor grants credit to the entrepreneur and, in return, receives from the latter the payment of interests on the loan. Such granting of credit by the contributor shall be a transaction subject to VAT only if the contributor is acting as a taxable person, according to Article 2(1)(c) of the VAT Directive. Pursuant to Article 9(1) of the VAT Directive, a taxable person shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

The second subparagraph of Article 9(1) of the VAT Directive makes clear that "the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity". Such provision seems relevant concerning crowd-lending, since some contributors may lend money with the objective of receiving interest on a "continuing" basis.

So, if the granting of credit by the contributor to the entrepreneur does not constitute an economic activity carried out independently, the transaction would be out of the scope of VAT.

⁵¹ Guidelines resulting from the 23rd meeting of 1-2 February 1988 (XXI/632/88)
http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/vat_committee/guidelines-vat-committee-meetings_en.pdf

⁵² Among others, CJEU, judgment of 26 May 2005 in case C-465/03 *Kretztechnik*, paragraph 36.

⁵³ CJEU, judgment of 12 June 2014 in case C-461/12 *Granton Advertising*, paragraph 27.

⁵⁴ European Commission (DG TAXUD), *Op.cit.*, p. 31.

⁵⁵ CJEU, judgment of 6 February 1997 in case C-80/95 *Harnas & Helm*, paragraph 20.

⁵⁶ *Ibid*, paragraph 19.

Concerning the cases where the direct granting of credit is subject to VAT, it shall be exempt pursuant to Article 135(1)(d) of the VAT Directive, which exempts *"the granting and the negotiation of credit and the management of credit by the person granting it"*.

The fact that the loan is granted by a contributor that may not belong to the banking system does not stand in the way of exemption. Although the exemptions provided for in Article 135(1) of the VAT Directive are to be interpreted strictly⁵⁷, the wording of the abovementioned provision in no way suggests that the scope of exemption is limited to loans and credits granted by banking and financial institutions⁵⁸.

Most of the Member States who expressed a view considered that the granting of credit by the contributor in the form of a loan which generates interests in return could be a taxable transaction, if the contributor is acting as a taxable person, which would be exempt pursuant to Article 135(1)(d) of the VAT Directive.

3.3. VAT treatment of services related to intermediation provided by online crowdfunding platforms

Online crowdfunding platforms provide an opportunity for contributors and entrepreneurs to interact, and in exchange the platform perceives a fee usually borne by the entrepreneur. This service would typically constitute intermediation to the extent that the crowdfunding platform does not act in its own name.

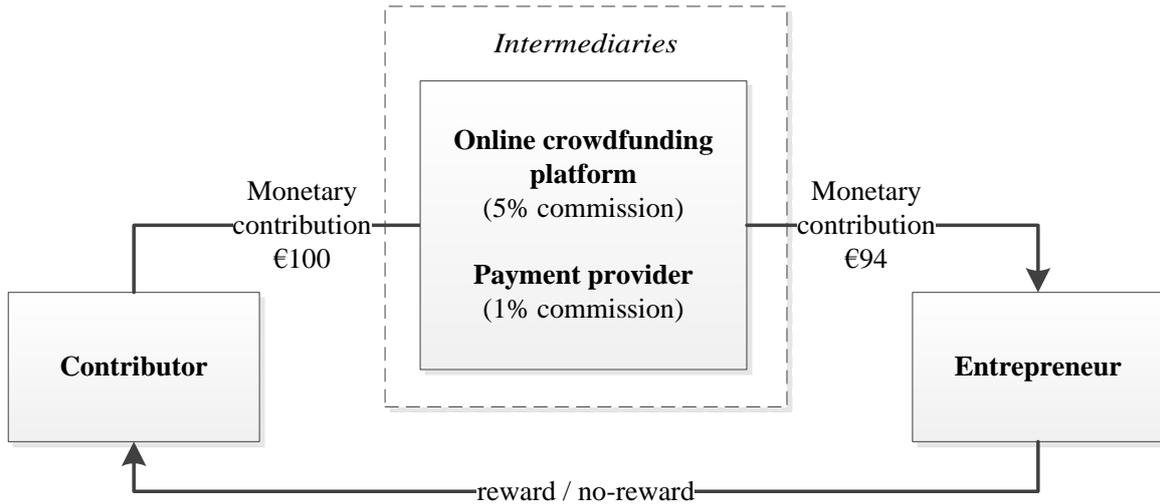
The types of intermediation services that may be supplied to the entrepreneur differ. It is notably so that services provided by online crowdfunding platforms should be distinguished from the services provided by other involved parties, such as payment services provided by financial institutions or other online payment platforms⁵⁹, which allow funds to be transferred from the contributor to the entrepreneur. The latter may require the payment of the corresponding transaction fees, borne by the entrepreneur. Evidence seems to indicate that the actual transfer of money does not necessarily depend on the crowdfunding platform itself. For example, one online platform of crowd-investing, clarifies to its potential entrepreneurs that *"The actual transaction of wiring money does not happen on Crowdfunder. The closing of dollars will happen offline with the investor. Crowdfunder is a marketing and engagement tool for your deal"*⁶⁰.

⁵⁷ CJEU, judgment of 15 June 1989 in case C-348/87 *Stichting Uitvoering Financiële*, paragraph 13.

⁵⁸ CJEU, judgment of 27 October 1993 in case C-281/91 *Muys & De Winter*, paragraph 13.

⁵⁹ See, for instance <https://www.paypal.com/>.

⁶⁰ <https://www.crowdfunder.com/blog/faqs/faq-entrepreneur/#q11>;
As to the breakdown of fees, see also <https://go.indiegogo.com/pricing-fees>;
or <http://www.crowdfunder.co.uk/terms-conditions/> (section B.2.3 and B.3.4).



The Commission services are of the opinion that services related to intermediation are economic activities falling within the scope of VAT. Where these intermediary services consist in financial services, such as payments or transfers, exemptions pursuant to Article 135(1) of the VAT Directive may apply. In all other cases, VAT would be payable.

In assessing the VAT treatment of the scenario described, the intermediation services should be distinguished from any potential supply of goods or services between the contributor and the entrepreneur. For example, the fact that the intermediary service provided by the online platform could be carried out within the framework of crowd-investing or crowd-lending (financial-return models) should not lead one to think that the intermediary service is exempt pursuant to Article 135(1) of the VAT Directive. In this respect, the intermediary services would generally consist in the provision of an opportunity for contributors and entrepreneurs to interact, which as such is independent from the funding operation that may take place between them.

All contributions from Member States consider that intermediary services are taxable economic activities that may be exempt pursuant to Article 135(1) of the VAT Directive, but only if connected to financial services.

3.4. Final considerations

First of all, as to the donation-based crowdfunding, VAT issues are unlikely to arise given the characteristics of the model, where the contributor expects no reward and none is given.

Concerning the reward-based crowdfunding, where the contributor of the funding receives goods or services from the entrepreneur in exchange for support given, it constitutes a taxable transaction for VAT purposes, provided that there is a direct link between the supply of goods or services and its corresponding consideration, and that the entrepreneur is a taxable person acting as such.

If the goods or services are identified precisely, the contribution may be regarded as a payment made on account before the goods or services are supplied – provided the aforementioned direct link exists – and VAT shall become chargeable upon receipt of the payment pursuant to Article 65 of the VAT Directive.

The VAT treatment of transactions where goods or services supplied by the entrepreneur to the contributor are of symbolic value should be assessed on a case-by-case basis. Given that a transaction is subject to VAT if there is a supply of goods or services for "consideration" pursuant to Article 2 of the VAT Directive, and that "consideration" is defined by the CJEU as a subjective value regardless of any open market value, such supplies should in principle fall within the scope of VAT. However, the supply of goods or services could possibly be assimilated to a donation in cases where the benefit received by the contributor is negligible, or totally unrelated to the amount of the contribution.

As to crowd-investing, where the financial reward takes the form of participation in future profits by means of intellectual property rights, its supply by the entrepreneur to the contributor may constitute a taxable supply. On the other hand, if the financial reward is participation in securities, such as shares or bonds, its supply may be exempt under Article 135(1)(f) of the VAT Directive.

Regarding crowd-lending, the granting of credit by a contributor acting as a taxable person to the entrepreneur shall be a taxable transaction exempt pursuant to Article 135(1)(d) of the VAT Directive.

Finally, the services related to intermediation provided by crowdfunding platforms to entrepreneurs are economic activities falling within the scope of VAT and likely to be taxed unless what is provided consist in financial services exempted under Article 135(1) of the VAT Directive.

4. DELEGATIONS' OPINION

The delegations are requested to give their opinion on the following:

- (1) the VAT treatment of reward-based crowdfunding, including those cases where the reward may be of symbolic value.
- (2) the VAT treatment of financial return models of crowdfunding, be it in the form of crowd-investing or crowd-lending.
- (3) the VAT treatment of services provided by crowdfunding platforms.

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