

Joachim Englisch*

1 INTRODUCTION

In recent years, many have mused on whether substantive EU VAT rules are sufficiently versatile to adapt to technological innovations that disrupt traditional business models. Some national courts applying those rules are apparently not: For instance, the German Federal Tax Court recently decided that the rental of virtual land cannot, in itself, attract VAT, because such transactions do not happen in the ‘real’ economy and therefore allegedly cannot imply a supply of any consumable benefit.¹ The wisdom (and the correctness) of such a decision may be questioned – considering the efforts currently made to develop a ‘metaverse’, such reasoning might well become the new *Watson* anecdote of future generations of VAT practitioners.²

But admittedly, in some respects the current EU VAT system clearly was or still is in need of modernization, not only regarding the tax collection procedures, but indeed also with respect to substantive law issues. Examples are the recent reform on the place of supply rules for a virtual provision of certain services,³ the late and piecemeal inclusion of electronically supplied services in the list of supplies eligible for reduced rates,⁴ or the need to clarify and, possibly, amend the treatment of crowdfunding in the light of its increasing tokenization.⁵

Notwithstanding the above, it should be acknowledged that in many cases, the harmonized VAT rules

are future-proof enough to ‘go virtual’ and produce consistent and reasonable results. Arguably, one such area are blockchain-based innovations in the field of financial instruments, i.e., so-called security tokens or investment tokens. This editorial discusses how they fit into established concepts of EU VAT and how to adequately address some peculiarities in line with established VAT doctrine.

2 THE CONCEPT OF SECURITY TOKEN AND KEY VAT ISSUES

Security tokens are a sub-category of so-called crypto assets or virtual assets.⁶ They still occupy a mere niche in financial markets, but they have considerable growth potential as a cost-saving and flexible alternative to classical finance instruments for raising capital. Like all crypto-assets, they are digital representations of some (perceived) inherent value or of asset ownership, they are secured by cryptography, and they are issued, stored and transferred using distributed ledger technology (DLT, typically a blockchain).⁷ The distinct feature of security tokens is that they represent a tradeable financial instrument that has been issued to raise capital (or a derivative thereof) and that they are held or traded by investors.⁸ Issuers are typically companies, but could also be governments in the case of debt instruments.

As in the case of traditional securities, different forms of security tokens can be distinguished, depending on their economic function and legal design.

* University of Muenster, Email: joachim.englich@uni-muenster.de.

¹ See Bundesfinanzhof, 18 Nov. 2021, Case V R 38/19, ECLI:DE:BFH:2021:U.181121.VR38.19.0, paras 29–30.

² In the early 1940s, IBM president T.J. Watson reputedly assumed that the world market would need no more than five computers.

³ See the amendments of Arts 53 and 54 of the VAT Directive 2006/112/EC through Art. 1 No. 1 and 2 of Council Directive (EU) 2022/542 of 5 Apr. 2022.

⁴ See Art. 7 VAT Implementing Regulation (EU) No 282/2011 of 15 Mar. 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, OJ L 77, 23 Mar. 2011.

⁵ See e.g., the assessment of the Commission services in their working paper for the VAT Committee, WP No. 1037, 24 Feb. 2022, at 3–4, regarding the doubtful applicability of the voucher VAT regime.

⁶ Both terms are often used interchangeably; see for instance, the Commission proposal on information accompanying transfers of funds and certain crypto-assets (recast), COM(2021) 422 final, at 4. In the following, this editorial will only refer to crypto-assets.

⁷ There exists no uniformly applied definition of crypto-assets, but both legal and scholarly definitions typically mention the above three key features. For an overview, see also OECD, *Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard, Public Consultation Document*, 22 Mar. 2022, at 15; C. Zilioli, *Crypto-Assets: Legal Characterisation and Challenges Under private Law*, 45 Eur. L. Rev. 251, 253–254 (2020).

⁸ See also Commission, WP No. 1037, *supra* n. 5, at 3.

Equity tokens are virtual shares that are used to create and convey digital ownership rights or interests in a company.⁹ Debt tokens constitute virtual debt instruments.¹⁰ Between those two types of tokens sit mezzanine tokens that have both debt and equity features. Equity tokens in a strict sense furthermore need to be distinguished from tokenized stock. In case of the latter, the token does not, in itself, embody ownership rights but instead constitutes a digital record of entitlement to an underlying classical stock; quintessentially, a virtual version of the traditional depository receipts. Finally, a company can also issue hybrid tokens¹¹ that combine security token elements with additional rights or benefits that resemble virtual currencies or utility tokens, the other two main classes of crypto-assets.¹² The issuance of the tokens in exchange for the transfer of capital (usually by way of virtual currencies), the trade in tokens, and the periodical payment of the return on capital can – but need not – be fully automated based on smart contracts.

The aforementioned core transactions involving security tokens are furthermore embedded in a broader ecosystem of service providers. These include, among others, third party IT service providers who will either program the issuance of the tokens – the so-called security token offering (STO) – on an existing distributed ledger infrastructure, or create a new private DLT network for this purpose. Issuance platform operators go a step further and provide fully integrated services for the STO, ranging from investor management to compliance with Know Your Customer (KYC) and anti-money-laundering obligations. Exchanges facilitate the trading of security tokens in secondary markets. Specialized law firms provide legal advice; custodians will securely store the access keys to tokens on behalf of investors.

Against this backdrop, three core issues arise from a VAT perspective: Firstly, the VAT implications of the STO from the perspective of both, the issuing company and the investor. Secondly, the VAT treatment of any subsequent trade in the respective class of security token. And finally, the collection or not of VAT on the services in the broader token ecosystem. Considering that all the aforementioned transactions occur in, or are related to, capital markets and corporate finance, two key questions need to be answered in all three contexts: To what extent are the

relevant transactions taxable at all, and if they are, do the exemptions of Article 135 VAT-Directive apply?

So far, there is directly relevant European Court of Justice (CJEU) case law only for the most prominent class of crypto-assets, i.e., virtual currencies.¹³ But this case law cannot be easily applied to other forms of crypto-assets. In particular, cryptocurrencies differ from tokens in that they typically – or at least in the eyes of the Court¹⁴ – have the same properties as fiat money, which has a special status for VAT purposes, because it cannot normally be the object of a taxable supply.¹⁵ Nevertheless, as we shall see in the following, the European rules and case law are sufficiently clear to provide reliable guidance also for the VAT treatment of security tokens.

3 ISSUANCE AND HOLDING OF SECURITY TOKENS

From the issuer's perspective, the STO is an alternative means of finance. As regards equity tokens, they are the functional equivalent to a share issue or to the generation of new partnership equity. It is consistent case law of the CJEU that the admission of new shareholders or partners into a company is not, in itself, an economic activity, and it is therefore out of scope of the harmonized VAT and does not constitute a taxable transaction.¹⁶ This is even more obvious when a debt instrument is issued, which does not attract any VAT, because the issuer does not grant ownership or membership rights in return.¹⁷ The Court did not make any reservations or distinctions with respect to the structure of the equity or finance instrument when it arrived at those conclusions. Indeed, neither the wording of Articles 2 and 9 VAT Directive nor the underlying VAT principles suggest that the manner in which the investor's rights are securitized should make any difference in this regard. The issuance of a security token does therefore not come within the scope of VAT.¹⁸

Under the settled 'look through' approach of the Court, an entity issuing such tokens could nevertheless

⁹ For examples, see <https://stomarket.com> (accessed 22 Aug. 2022).

¹⁰ Examples are the OFH bond token issued by Societe Generale SFH in 2019 with a volume of EUR 100 million and the bond token issued by Vonovia SE in 2021 with a volume of 20 million.

¹¹ An example of a token that at least comes close to this – rare – form of hybrid token is the MakerDAO Governance Token MKR; see R. Kozhan & G. Visvanath-Natraj, *Fundamentals of the Maker DAO Governance Token*, Warwick Publication service (10 Aug. 2022), <https://wrap.warwick.ac.uk/165179/>.

¹² See also OECD, *Taxing Virtual Currencies: An Overview of Tax Treatments and Emerging Tax Policy Issues* 11 (12 Oct. 2020); Commission, WP No. 1037, *supra* n. 5, at 3. Utility tokens entitle their holder to access a company's products or services.

¹³ CJEU, 22 Oct. 2015, Case C-264, *Hedqvist*, ECLI:EU:C:2015:718.

¹⁴ For a more reserved view, see T. Ehrke-Rabel & L. Zechner, *VAT Treatment of Cryptocurrency Intermediation Services*, 48 *Intertax* 498, 510 (2020).

¹⁵ See e.g., CJEU, 9 Oct. 2001, Case C-409/98, *Mirror Group*, ECLI:EU:C:2001:524, para. 26.

¹⁶ See e.g., CJEU, 26 May 2005, Case C-465/03, *Kretztechnik*, ECLI:EU:C:2005:320; 26 Jun. 2003, Case C-442/01, *KapHag*, ECLI:EU:C:2003:381.

¹⁷ This has correctly been held to be a necessary implication of the CJEU case law on equity instruments by the German Federal Tax Court, see Bundesfinanzhof, 6 May 2010, Case V R 29/09, ECLI:DE:BFH:2020:U.161220.XIR26.20.0.

¹⁸ Likewise the Maltese tax administration, see their Guidelines for the VAT Treatment of transactions or arrangements involving DLT assets, issued on 1 Nov. 2018, at 9; M. Ferrari, *Are VAT Rules Really Inadequate for Distributed Ledger Technology's Transactions?*, in *Blockchain, Law and Governance* 111, 126 (B. Cappiello & G. Carullo eds 2021); and probably also K. Pauwels & A. Snyers, *ICOs in Belgium: Down the Rabbit Hole into Legal No Man's Land? Part 2*, 29 *Int'l Co. & Com. L. Rev.* 537, 553 (2018).

be entitled to an input VAT deduction regarding any eventual input supplies that it received on occasion of the out of scope-STO, e.g., legal advice or the services of issuance platform operators. The deduction must be granted to the extent that the corresponding costs constitute overheads that have a direct and immediate link with the whole economic activity of the issuer where the latter is a taxable person.¹⁹ This will quintessentially depend on the use made of the new funds.²⁰ This is also the position of the French tax authorities.²¹

Complexities arise only in the exotic case of a hybrid security token that has also features of a utility token, because in addition to a dividend or interest payment it also entitles its holder to access future products or services offered by the issuing company. The issuance of such an instrument must be treated as two separate transactions for VAT purposes. The Court's established doctrine on composite supplies, whereby regard must be had to all relevant circumstances in order to determine whether an operation gives rise to several distinct supplies or to one single supply where it comprises a bundle of elements and acts,²² is inapplicable. It presupposes that the individual elements of the operation do in themselves constitute a supply of a good or service, i.e., economic activities that each fall within the scope of VAT also if treated as distinct transactions.²³ It cannot bring an out-of-scope transaction that does not, in itself, constitute a supply of a consumable benefit (or cost component thereof) within the ambit of VAT, because this would be contrary to the very rationale of VAT as a tax on consumption expenditure. Since the equity token element does not imply any taxable supply, the utility token component must be assessed on its own as to its VAT implications. If taxable and not exempt, this may then require to split up the payment made by the acquirer into a non-taxable capital contribution and a taxed consideration for the access to products and services. While practically difficult, this challenge is also nothing new to the VAT system.²⁴ By contrast, if a token merely combines investment and cryptocurrency

elements, the entire issuance operation qualifies as an out of scope-transaction, because none of its individual elements constitutes a taxable supply.

From an investor perspective, the acquisition of an equity token is an out of scope-operation, too, since cash contributions by an investor in exchange for a share in the company's equity do not constitute an economic activity pursuant to settled case law of the Court.²⁵ Again, it would be inconsistent to apply this jurisprudence only to classical forms of equity financing.²⁶ A taxable transaction could therefore only be assumed if one were to – wrongly – regard the 'virtual capital' that is typically provided in the context of an STO (i.e., cryptocurrencies) as taxable supply of a virtual asset instead of a purely monetary capital contribution.²⁷

In a similar vein, the investment in a debt (or mezzanine) token does not normally qualify as an economic activity, either,²⁸ in analogy to the Court's case law on classical loan financing activities.²⁹ This is only different where it constitutes the 'direct, continuous, and necessary extension of the person's taxable activity', or where it even belongs to the taxable person's core business activities.³⁰ But in this case, the VAT exemption for the granting of credit laid down in Article 135 (1) (b) VAT-Directive should apply also to debt tokens.³¹ As the CJEU has explained, the relevant concept of 'granting of credit' consists in making available an amount of capital, duly remunerated by the payment of interest.³² This is also the essence of a transaction consisting in the purchase of a newly issued bond token or other kind of tokenized debt instrument. Moreover, the CJEU has also clarified that at least regarding the financial services concepts of Article 135 VAT-Directive, the neutrality principle also guarantees technological neutrality of the exemptions.³³

¹⁹ See by analogy, CJEU, 26 May 2005, Case C-465/03, *Kretztechnik*, ECLI:EU:C:2005:320, para. 36.

²⁰ See e.g., CJEU, 12 Oct. 2020, Case C-42/19, *Sonaecom*, ECLI:EU:C:2020:913, paras 50 et seq.

²¹ See the ruling BOI-RES-000054-20190807, 7 Aug. 2019.

²² See e.g., CJEU, 2 May 1996, Case C-231/94, *Faaborg-Gelting Linien*, ECLI:EU:C:1996:184, paras 12–14; 27 Oct. 2005, Case C-41/04, *Levob Verzekeringen*, ECLI:EU:C:2005:649, para. 19; 18 Jan. 2018, Case C-463/16, *Stadion Amsterdam*, ECLI:EU:C:2018:22, para. 21.

²³ See e.g., CJEU, 21 Feb. 2013, Case C-18/12, *Město Zamberk*, ECLI:EU:C:2013:95, para. 28: 'There is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply [...] There is also a single supply where one or more elements are to be regarded as constituting the principal supply, while other elements are to be regarded, by contrast, as one or more ancillary supplies' (emphasis added).

²⁴ Compare CJEU, 25 Feb. 1999, Case C-349/96, *CPP*, ECLI:EU:C:1999:93, para. 31.

²⁵ See e.g., CJEU, 20 Jun. 1991, Case C-60/90, *Polysar Investments Netherlands*, ECLI:EU:C:1991:268, para. 13; 26 Jun. 2003, Case C-442/01, *KapHag*, ECLI:EU:C:2003:381, para. 39. See also CJEU, 26 May 2005, Case C-465/03, *Kretztechnik*, ECLI:EU:C:2005:320, para. 26: mere capital investment.

²⁶ Likewise S. Richter, *Germany*, in *Taxation of Crypto Assets* 293, 310 (N. Schmidt et al. eds 2021); D. R. Dietsch, *Umsatzsteuerliche Einordnung von Initial Coin Offerings*, 6 *MwStR* 546, 550 (2018).

²⁷ It can be inferred from Art. 19 VAT Directive that capital contributions in kind fall within the scope of VAT.

²⁸ Likewise Richter, *supra* n. 26, at 310.

²⁹ CJEU, 6 Feb. 1997, Case C-80/95, *Harnas & Helm*, ECLI:EU:C:1997:56, para. 18.

³⁰ See CJEU, 29 Apr. 2004, Case C-77/01, *EDM*, ECLI:EU:C:2004:243, paras 66–70; regarding intra-firm debt financing in particular, see also CJEU, 14 Nov. 2000, Case C-142/99, *Floridienne and Berginvest*, ECLI:EU:C:2000:623, paras 28–30.

³¹ Likewise C. Joisten, *Umsatzsteuerliche Behandlung von Token-Transaktionen*, 101 *Finanzrundschau* 421, 424 (2019).

³² CJEU, 17 Oct. 2019, Case C-692/17, *Paulo Nascimento Consulting*, ECLI:EU:C:2019:867.

³³ Compare CJEU, 5 Jun. 1997, Case C-2/95, *SDC*, ECLI:EU:C:1997:278, para. 37; 17 Jun. 2021, Case C-58/20, 'K', ECLI:EU:C:2021:491, para. 55.

4 TRADE IN SECURITY TOKENS

It is settled case law that the holding of shares and other negotiable securities does not constitute a taxable economic activity if it does not go beyond the management of one's own portfolio investments. Private investors and taxable persons with comparable business investments do not carry out an economic activity within the meaning of Article 9 VAT-Directive, regardless of the trading volume and professionalism of their capital investments.³⁴ This can be no different when investments in equity or debt instruments are managed and recorded on a digital ledger rather than on trading platforms and in deposits of traditional financial institutions. The characterization as (quasi-)private investor activity is not altered by the technology that the investor relies on to carry it out. Even if one were to argue that at present, crypto investment proficiency indicates a higher degree of expertise and professionalism in investment management, this would be irrelevant in the light of the Court's consistent case law.

It is equally settled case law, however, that transactions relating to shares are subject to VAT when they are carried out in order to secure a – taxable – involvement in the management of the companies in which the holding has been acquired, or as part of a commercial share-dealing activity, or if they constitute the direct, permanent and necessary extension of another taxable activity.³⁵ *Mutatis mutandis*, the latter two forms of taxable transactions can moreover arise in relation to bonds and other debt instruments, too. The crucial question is then whether the exemption for 'transactions in shares, interests in companies or associations, debentures and other securities' provided for in Article 135(1)(f) of the VAT Directive also applies to such taxable trade in security tokens. The answer should be in the affirmative, for the following reasons.

First, the CJEU has repeatedly emphasized that the basic prerequisite for the application of this exemption is that the transaction at issue relates to the sphere of financial transactions.³⁶ All security tokens discussed here can undoubtedly be characterized accordingly. Second, as already mentioned, the VAT exemptions for financial services respect the principle of technological neutrality. Third, the EU legislator has recently acknowledged that 'DLT financial instruments', i.e., security tokens, can constitute 'transferable securities' for the purpose of financial markets regulation.³⁷ In this context, the relevant DLT financial instruments are categorized as, i.e., 'shares' and 'bonds and other forms of

securitized debts'.³⁸ This recognition should also inform the interpretation of Article 135 (1) (f) of the VAT Directive. There is a precedent for this kind of alignment with concepts of financial market regulation in the *Fiscale Eenheid X* judgment of the CJEU, where the Court found inspiration in the UCITS Directive (on undertakings for the collective investment in transferable securities) for the purpose of defining concepts of the financial services exemptions.³⁹ More generally speaking, the financial market regulation acknowledges an emerging economic and commercial reality as to the functional equivalence of traditional and DLT-based securities, and it should therefore have a bearing also on the interpretation of the relevant VAT concepts.⁴⁰ Finally, the CJEU has made clear in its *Hedqvist* ruling that a purposive construction of the terms used to specify the exemptions referred to in Article 135(1) of the VAT Directive is required when deciding whether they also cover certain crypto-assets.⁴¹ According to the CJEU, the rationale of Article 135 (1) (f) of the VAT Directive is, inter alia, to alleviate the difficulties connected with determining the taxable amount and the amount of VAT deductible.⁴² One might add that this exemption also reflects the fact that the transfer of securities does not give rise to final consumption, nor will the traded securities, in themselves, constitute cost components of subsequent supplies to final consumers; such transactions should therefore not attract any (output) VAT. Under either proposition, it would be inconsistent to construe Art. Article 135 (1) (f) of the VAT Directive narrowly so as to exclude security tokens, because the latter do not differ from traditional securities with respect to the possible justifications underlying the exemption.

From the above it can be inferred that taxable transactions in equity and debt tokens are exempt as transactions in (blockchain-based) 'shares' and 'debentures', respectively. There is no need to revert to the more general concept of 'other securities'.⁴³ This becomes relevant only for the category of tokenized stock, which as a derivative is not directly covered by the notion of 'shares'.

³⁴ See e.g., CJEU, 20 Jun. 1996, Case C-155/94, *Wellcome Trust*, ECLI:EU:C:1996:243, para. 36; 21 Apr. 2004, Case C-8/03, *BBL*, ECLI:EU:C:2004:650, para. 39; 3 Jul. 2019, Case C-316/18, *University of Cambridge*, ECLI:EU:C:2019:559, para. 30; 17 Mar. 2021, Case C-459/19, *Wellcome Trust*, ECLI:EU:C:2021:209, para. 48.

³⁵ See e.g., CJEU, 8 Nov. 2018, Case C-502/17, *C&D Foods*, ECLI:EU:C:2018:888, para. 33.

³⁶ See e.g., CJEU, 12 Jun. 2014, Case C-461/12, *Granton Advertising*, ECLI:EU:C:2014:1745, para. 29.

³⁷ See Art. 2 points (11) and (12) of Regulation (EU) 2022/858 on a pilot regime for market infrastructures based on distributed ledger technology, OJ L 151, 2 Jun. 2022, read together with Art. 4(1), point (15) and s. C of Annex I of Directive 2014/65/EU ('MiFiD II').

³⁸ See Art. 3 (1) (a) and (b) of Regulation (EU) 2022/858.

³⁹ See CJEU, 9 Dec. 2015, Case C-595/13, *Fiscale Eenheid X*, ECLI:EU:C:2015:801, regarding the UCIT definition and the concept of 'special investment funds' used in Art. 135 (1) (g) of the VAT Directive.

⁴⁰ Regarding the relevance of economic and commercial realities for the application of the common system of VAT, see e.g., CJEU, 17 Dec. 2020, Case C-801/19, *Franck*, ECLI:EU:C:2020:1049, para. 44, with further references.

⁴¹ See CJEU, 22 Oct. 2015, Case C-264, *Hedqvist*, ECLI:EU:C:2015:718, paras 35–36.

⁴² See *ibid.*, para. 36.

⁴³ For a different opinion – exemption as transactions in other securities – see Ferrari, *supra* n. 18, at 126.

5 SERVICES IN THE TOKEN ECOSYSTEM

As to the services that are rendered by third parties in order to facilitate the issuance, holding and transfer of security tokens, they normally qualify as taxable transactions unless they are provided for free. Against the backdrop of the above considerations, it can furthermore be confirmed that such services relate to ‘securities’ within the meaning of Article 135 (1) (f) of the VAT Directive. What needs to be determined for each type of supply is therefore only whether the respective involvement in security token operations qualifies as exempt ‘transactions, including negotiation in’ those DLT securities. The following analysis is merely illustrative and it is therefore limited to two categories of services which are deeply embedded in the technological context of security tokens: crypto-asset exchanges and wallet providers.

The – so far: few – existing exchange platforms that support the trade in security tokens do not offer the central counterparty (CCP) services of traditional stock exchanges. Instead, two main categories of exchanges can be distinguished: Centralized exchanges (CEX)⁴⁴ keep digital order books with lists of buy and sell orders in order to match up buyers and sellers and they also clear matching trades and initiate their settlement on the blockchain. By contrast, decentralized exchanges (DEX) for security tokens⁴⁵ do not normally use order book mechanisms to balance supply and demand, and they do not manage the clearance and settlement process. Instead, they now typically rely on automated market maker (AMM) protocols in order to atomize transactions and match them with so-called liquidity pools; fulfilment is then guaranteed through smart contracts. In either case, matchmaking is the core service offered by the exchange platform. This should be regarded as an exempt ‘negotiation in securities’ under Article 135 (1) (f) of the VAT Directive.⁴⁶ In line with the classification of negotiation as a special category of ‘transactions in securities’, the CJEU interprets this concept broadly as any act of intermediation between two parties that seeks to alter the legal relations of a security. According to the Court’s case law, negotiation ‘may consist, amongst other things, in [...] making contact with another party [...] to do all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the terms of the contract’.⁴⁷ This is precisely what a security token exchange does, regardless of its

specific matchmaking mechanics and even where it does not ‘negotiate’ the terms of the trade in the strictest sense of the word.⁴⁸ Any eventual additional services that are provided, e.g., clearing and informational services in case of a CEX, also benefit from the exemption to the extent that they are merely ancillary supplies to the primary matchmaking service pursuant to the Court’s composite supply doctrine.⁴⁹

In order to verify their ownership in a particular security token, investors must be in possession of a ‘private key’ that together with a matching ‘public key’ gives them digital access to the respective crypto-asset. For ease of use and security reasons, those keys are usually stored digitally using software or hardware solutions, so-called wallets. Such solutions are also provided by third party service providers who offer to store the keys in a custodial wallet which they control and to which the investor has access via the internet.⁵⁰ Unless offered for free, such services constitute taxable transactions. In principle, they also do not qualify for the exemption of Article 135 (1) (f) of the VAT Directive. Even though the private key is essential for any transfer in ownership of the security token, its storage is not, in itself, ‘liable to create, alter or extinguish rights in respect of securities’ and therefore does not constitute a transaction ‘in’ securities within the meaning of the exemption.⁵¹ Custodial wallets are merely technical services similar to the management and safekeeping of shares that are expressly excluded from the scope of Article 135 (1) (f) of the VAT Directive.⁵² Their place of supply is where the investor is established or resident pursuant to either Articles 43, 44 or Article 58⁵³ of the VAT-Directive. This should not be difficult to determine in practice, because custodial wallets normally imply identity verification (KYC). However, CEX platforms usually require the use of a custodial wallet that is tied to them in order to increase liquidity and facilitate clearance. If the platform operator itself offers this wallet service and no separate fee is charged for it, it should be regarded as an ancillary element of the aforementioned matchmaking service that constitutes the primary supply of the exchange platform and should therefore not give rise to a VAT liability.⁵⁴

⁴⁴ An example for this kind of platform is the INX Digital Security Trading Platform, see <https://www.inx.co/digital-securities>.

⁴⁵ Examples for DEX are IX Swap (<https://ixswap.io/>) (accessed 22 Aug. 2022) and tZero (<https://www.tzero.com/>) (accessed 22 Aug. 2022).

⁴⁶ Regarding the matchmaking services of traditional stock exchanges, see the judgment by the Austrian Verwaltungsgerichtshof, 21 Sep. 2016, Case 2013/13/0096, ECLI:AT:VWGH:2016:2013130096.X02.

⁴⁷ See e.g., CJEU 13 Dec. 2001, Case C-235/00, CSC Financial Services Ltd., ECLI:EU:C:2001:696, para. 39.

⁴⁸ See also Ehrke & Zechner, *supra* n. 14, at 498, 508, regarding cryptocurrency exchanges.

⁴⁹ Likewise the German tax authorities regarding cryptocurrency platforms, see Bundesministerium der Finanzen, 3 May 2021, Bundessteuerblatt I 2021, at 713.

⁵⁰ See e.g., OECD, *supra* n. 12, at 13.

⁵¹ See also Commission, *supra* n. 5, at 8–9, regarding digital wallet services for cryptocurrencies.

⁵² See by analogy, CJEU 13 Dec. 2001, Case C-235/00, CSC Financial Services, ECLI:EU:C:2001:696, paras 28–29.

⁵³ Custodial wallet services qualify as electronically supplied services within the meaning of Art. 7 (1) VAT Implementing Regulation.

⁵⁴ Likewise Ehrke & Zechner, *supra* n. 14, at 498, 511, regarding cryptocurrency exchanges.

6 CONCLUSIONS

There is no denial that the EU harmonized system of VAT is in need of modernization in order to better accommodate for the significant economic and technological developments that have occurred since the adoption of the Sixth VAT Directive almost half a century ago. But when it comes to crypto-assets, the traditional VAT rules are surprisingly versatile and can be interpreted so as to respect the principle of technological neutrality. Regarding security tokens in

particular, transactions related to virtual shares and debt instruments should be accorded the same VAT treatment as their functional equivalents in traditional capital markets. The case law of the CJEU would certainly support such an approach. It is now up to tax administrations and courts to confirm this and provide legal certainty to this promising segment of the crypto space.

Joachim Englisch
University of Muenster, joachim.englich@uni-muenster.de