Master's Thesis
LL.M. International Business Tax Law
Tilburg Law School

VAT exemption for financial services:
Applicability assessment to crowdfunding (dis)intermediation

Testing the financial intermediation exemption ex Article 135 VAT Directive against the activity of crowdfunding platforms

LL.M. Candidate: **Giuseppe Guarente**
Anr: 318109

Academic Year 2017-2018

First reader: **Mr. Kevin Van Lierop LL.M. M.Sc.**

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This thesis is dedicated to my mum and my grandma.
The love we share will transcend any loneliness.

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LIST OF ACRONYMS

VAT	Value Added Tax
VAT Directive	Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1
SMEs	Small and Medium Enterprises
CJEU	Court of Justice of the European Union
EC	European Commission
AG	Advocate General
CMU	Capital Market Union
MiFID	Markets in Financial Instruments Directive
MiFIR	Markets in Financial Instruments Regulation
ESMA	European Securities and Markets Authority
FCA	Financial Conduct Authority
EBA	European Banking Authority
CONSOB	Commissione Nazionale per le Società e la Borsa
TUF	Testo unico delle disposizioni in materia di intermediazione finanziaria

1 Introduction

1.1 Research rationale and research question

Crowdfunding constitutes an emerging way of financing small and medium enterprises, the growth of which could be boosted through this disruptive financing model, which is why the European Union considers it as a potential pillar of the Capital Market Union[1] project. In the preparatory *inception impact assessment* to the "Legislative proposal for an EU framework on crowd and peer to peer finance"[2], the European Commission states that by offering a new source of financing both in the form of capital and debt, crowdfunding shall be taken into serious consideration as a new player in capital markets.

From a pure VAT standpoint, except for the Working Paper issued by the VAT Committee in 2015[3], little attention has been given to the VAT treatment of crowdfunding and due to its relatively recent raise there is almost no guidance flowing from national tribunals.

[1] Action Plan on Building a Capital Markets Union, European Commission, 30th September 2015
[2] Inception Impact Assessment related to the 'Legislative proposal for an EU framework on crowd and peer to peer finance', 30th October 2017
[3] Value Added Tax Committee, 'VAT treatment of crowdfunding', Working Paper No.836, 6th February 2015

In the Academia, scholars have addressed some issues related to this theme, for which consensus has been reached to a certain extent. Nonetheless, one point remains obscure at this stage, namely whether the services offered by crowdfunding platforms fall within the scope of the exemption provided by Article 135 VAT Directive[4] [5]. To the end of shedding light on this aspect, the leading research question adopted for this thesis is going to be the following:

"Should the exemption provided by Article 135 be applied to crowdfunding platforms' services?"

The methodology adopted in order to answer this question will be exposed in the following subparagraphs.

1.2 Benchmark

The thesis benchmark will be the concept of negotiation under Article 135 VAT Directive, and it is going to be shaped in the second chapter. The type of activities that might be offered by these platforms, along with their financial regulation, are going to be exposed in the third chapter. In the fourth chapter, the benchmark is then going to be tested against the platforms' activity. Finally, some conclusions will be drawn in the fifth chapter.

1.3 Thesis design

Providing the tax analysis of a specific economic activity must begin from a more general premise. Like any other field of law and perhaps even more than others, tax law is in a relationship of connection and mutual affection with other fields of law, be they civil, penal, administrative or, as we will see especially in this thesis, financial law. One may even think that these definitions are mere labels used by jurists in the attempt to put some order to the law, which remains a uniform concept[6]. In order to shed some light over the tax treatment crowdfunding platforms' services, one must take into account the contractual relationship that is agreed between the parties involved, i.e. the platforms, the investors and the investees. Plus, financial law should also be taken into consideration, since it may shape this activity in a way that differentiates it from the general concept of financial intermediation. This categorisation process, applied to the definition of intermediation under the VAT Directive, will provide us with a clearer landscape and eventually will lead us to an answer which might not be the correct one but will be surely held on arguments.

That said, the second chapter of this thesis is dedicated to the shaping of a benchmark based on the interpretation provided by the CJEU with regard to the concept of negotiation under the VAT Directive. The

[4] Madeleine Merkx, 'The VAT Consequences of Crowdfunding', *International VAT Monitor*, January/February 2016, p.15
[5] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax
[6] Antonio Berliri, "Principi di diritto tributario", Giuffrè editore, Milano, 1952, pp. 4-11

benchmark will provide guidance in the analysis of an activity, such as that one of crowdfunding platforms, which has not been scrutinised by the CJEU yet and for which there still is little experience in national Courts.

The third chapter is dedicated to the analysis of financial crowdfunding campaigns, namely those that involve the provision to contributors of financial instruments representing the capital of the enterprise that recurs to crowdfunding to raise capital, as well as those in which contributors lend money to the investees in exchange for remuneration in the form of interests. Particular attention will be given to the functioning of these services, as well as their financial regulation under the European Law, in particular to the MiFID I[7] and II[8] Directives and their respective implementations in the domestic law. This step is particularly important because it defines how crowdfunding platforms' are regulated and, as a consequence, what activities they are allowed to perform compared to other financial intermediaries.

In the fourth chapter the benchmark will be applied to the outcome resulting from the third chapter. At this stage, we will have both a more detailed concept of financial intermediation under the VAT Directive and a clearer picture of platforms' activity.

In the end, some conclusions will be drawn in the fifth chapter.

1.4 Research methodology

This research aims to provide a VAT assessment of an economic activity, such as that of crowdfunding platforms, by taking into account how in practice this activity takes place. This will be done in light of the contractual relationships of the parties involved and the financial regulation that limits or extends the range of services that a platform may be engaged in. The activity of the interpreter is indeed to identify what are the elements occurring in reality that are relevant in the light of law and, if possible, subsequently subsume them in the *facti species*[9] as defined by the legislator. In this basic observation lies the line of reasoning of this research. First of all, the *facti species* of financial intermediation is defined. Then reality, the activity that actually takes place, is described. Finally, that reality is read in light of the *facti species* and it is investigated under which circumstances all the elements are fulfilled. Then, it is also possible to verify if and how the ordinary outcome might change because of the enrichment of the *facti species*. This is the case, for instance, when the activity of financial intermediation is analysed in light of the underlying service or in light of the composite supplies doctrine. These elements might lead to a different VAT assessment compared to the one that the interpreter might have come up with if he looked at the service of financial intermediation on its own.

[7] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/ECC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC

[8] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

[9] Oskar Henkow, 'Defining the tax object in composite supplies in European VAT', *World Journal of VAT/GST Law*, Volume 2, Issue 3, 2013

More in general, the opinion of influencing scholars will be scrutinized, as well as the information provided by public institutions, in particular those of the European Union.

When possible, data will be exposed in order to provide more clearance with regard to the real development of crowdfunding in capital markets. To this end, data collected by private companies may be used.

1.5 Raise of crowdfunding

In an era in which the technological development is profoundly affecting and reshaping every sphere of human life, the financial sector does not make an exception. Indeed, we are assisting to the reshaping of the relationship between intermediaries, investors, savers and corporations. Nowadays, telecommunications have become a tool through which it is possible to offer services that, from an investor's standpoint, constitute an alternative to the traditional financial intermediation, characterized by efficiency and reliability[10].

In the context of what has been defined as *alternative finance*, crowdfunding is showing outstanding results in terms of expansion in the capital market, which is why it has drawn the attention of both scholars and regulators. With regard to the European context, the success of these financing models can be explained considering the endemic difficulties that European SMEs encounter in accessing traditional sources of funding compared to their foreign competitors[11]. These companies have then found in crowdfunding a new source of collecting money, the exploitation of which has led the European market volumes of alternative finance to increase from €1,127m in 2013 to €2,833 in 2014, ending €5,431m in 2015[12]. Even though its market share is increasing on a slower basis than it used to, the United Kingdom keeps dominating this market, since in 2015 with its market volume of €1,019 it covered 81% of the total European Market[13].

The term *crowdfunding* refers to various innovative ways through which SMEs can seek for financing. Despite the fact that this seems to be an original invention of present days, actually it is not. For instance, even Beethoven and Mozart have financed some of their public performances and music publications through multiple individual donations. The same happened with the Statue of Liberty, the building of which was financed through the donations of American and French citizens[14]. What these anecdotes share with modern crowdfunding campaigns is that the attempt to draw small contributions from an extensive audience of

[10] IMF Staff Discussion Note, *Fintech and financial services: Initial Consideration*, June 2017
[11] Florencio Lopez de Silanes Molina, Joseph Mc Cahery, Dirk Schoenmaker, Dragana Stanisic, 'The European Capital Markets Study: The Estimation of the Financing Gap of SMEs', Duisenberg School of Finance, Amsterdam, July 2015
[12] University of Cambridge, Centre for Alternative Finance in Partnership with KPMG and CME Group Foundation, 'Sustaining momentum', September 2016, p.24
[13] *Ibidem* p.25
[14] Roberto Bottiglia and Flavio Pichler, 'Crowdfunding for SMEs', Palgrave MacMillan Studies in Banking and Financial Instituions, 2016, p.6

investors. However, by tearing down material barriers, Internet has revolutionized also these financing schemes and made possible for an undefined number of individuals to contribute to a common project.

Except for these aspects, the world of crowdfunding is quite diverse. Indeed, on one hand models change according to the project that the founder aims to finance and, on the other hand, the interest that steers the funders will make them decide to contribute or not to a project. In the *reward-based* model, which is popular in artistic ventures, funders are not primarily interested in financial return. Instead, the fundraisers call on people interested in a product prior to its production, so that they can predict the potential of the product itself and foresee the future demand. As said, there is no financial return involved in this case, though the contribution is remunerated with a reward, which is not necessarily a tangible product, since it can also be, for instance, the accreditation in a movie or the opportunity to meet the developers[15].

It is now possible to distinguish the two financial based models, which are the *equity based* and the *lending based* ones. Under the former one, investors get equity stakes in the company, while in the latter the contribution is made in the form of a loan, which means that it is going to be remunerated under the form of interests[16].

This study is focused specifically on crowdfunding platforms operating in these models. Their functioning will be exposed in more details in the third chapter.

2 Defining a benchmark: Financial intermediation in the VAT Directive

This chapter will be focused on the exemptions provided by Article 135 VAT Directive, which encompasses a heterogeneous range of activities performed in the financial sector. As a starting point, the main features of this provision will be briefly exposed, while, afterwards, the analysis will be restricted exclusively to intermediation, taking into account the case law of the CJEU about this activity.

As mentioned in section 1.3, in this chapter will provide the interpretative legal categories necessary to answer the research question.

2.1 Main features of the exemption of financial services

2.1.1 *Rationale*

Starting from the 1960', VAT has become progressively more and more popular as a consumption tax. Its main feature is the imposition on each stage of the supply chain and the right of deduction on input VAT given

[15] Paul Belleflamme, Nessrine Omranu, Martin Peitz, 'The economics of crowdfunding platforms', Information Economics and Policy, 33, Elsevier, 2015, pp.14-15

[16] Ethan Mollick, 'The dynamics of crowdfunding: An exploratory study", *Journal of Business Venturing*, 29, 2014, p. 3

to registered economic actors. The tax is applied until the final stage of consumption, resulting in the final consumer bearing the tax burden. As a result, neutrality should be granted, which means that economic decisions should not be tax driven, as it happens, on the contrary, in the case of cascading taxes, where the tax component of the price of goods increases in the supply chain, leading enterprises to adopt integrated organisational structures[17].

Thanks to its invoice system, which provides precious information to the tax authorities, VAT is considered more evasion-proof compared to retail taxes. Moreover, the deduction system based on the balance between the VAT on output transactions and VAT incurred on purchases[18] makes evasion less attractive. Nevertheless, after its spreading across almost all OECD Countries[19], financial services have proven to be a field in which this levy poses several problems, which is why this has been at centre of the academic discussion. Ironically, what is considered to be as one of the best features of VAT, namely the invoice system, actually turns into a flaw when it comes to financial services. Indeed, this levy is based on a transaction method, which implies the identification of both input and output prices on which to impose VAT on a transaction-by-transaction basis[20]. The financial sector is characterised by a dizzy and increasing number of services[21] and yet, it is possible to draw a line that divides two main categories: on one side services for which explicit fees are charged and on other side services where the fee is the interest rate margin or similar variable fees[22]. In order to explain the latter situation, it is possible to refer to the intermediation between borrowers and lenders provided by banks. Hypothetically, one could conceive separately the two services: on the one hand the lending to the borrowers and, on the other hand, the supply of deposit from savers to the bank, both activities remunerated in the form of interests, which could be regarded as the taxable amount[23]. However, this view is quite simplistic, because it does not take into account, for instance, the risk-pooling process provided by the bank to its savers, which allows them not to benefit from a spread risk over the entire bank's portfolio of loans. As a result, their funds are immune from the default risk of a single loan[24]. On the contrary, financial services

[17] Jeffrey Owens, 'The Move to VAT', *Intertax*, 1996, p.46

[18] Ad van Doesum, Herman Van Kesteren and Gert-Jan van Norden, 'Fundamentals of EU VAT LAW', Wolters Kluwer, 2016, p.348

[19] It was first introduced in France in 1954 and it has now been implemented in all OECD countries with the exception of the United States. For a more detailed review of the spreading of VAT across the globe see Liam Ebrill, Michael Keen, Jean-Paul Bodin and Victoria Summers 'The Modern VAT', Washington D.C., United States, International Monetary Fund, 2001, p.4

[20] Howell H. Zee 'Further Thoughts on Reforming the VAT: Treatment of Financial Intermediation Services' in Rita de la Feira 'VAT Exemptions', Kluwer Law International, Alphen aan den Rijn, The Netherlands, EUCOTAX Series on European Taxation, p. 346

[21] Oskar Henkow, 'Financial Activities in European VAT', Kluwer Law International, Alphen aan den Rijn, The Netherlands, EUCOTAX Series on European Taxation, p.1

[22] 'The Move to VAT', p.49

[23] 'Financial Activities in European VAT', p.6

[24] Arthur Kerrigan, 'The Elusiveness of Neutrality – Why Is It So Difficult To Apply VAT to Financial Services?', *International VAT Monitor*, IBFD, March/April 2010, p.104; in this article other examples of variable fees are provided.

remunerated through explicit fees are not different from any other kind of non-financial service, which is why it has been argued that they should be subject to VAT[25] as it is, to a certain extent, in some countries[26].

Under the VAT Directive the exemption is provided by Article 135(1)(b) to (g)[27]. When the exemption was introduced, the financial sector was profoundly different from the one we have nowadays. Financial institutions were smaller and more focused on local activities and even the financial market could not be considered to be global yet[28].

From the case law of the CJEU, it is possible to infer that the interpreter of the VAT Directive has also acknowledged that in the absence of any guidance in the preamble, the reason of this exemption can be assumed to lie on a technical reason, namely the difficulty in determining the tax base[29]. It is also important to remind that the exemption at hand reduces the right to deduct of the taxpayer. In fact, Article 168 VAT Directive only allows for deduction of input VAT insofar as the goods or services purchased are used for 'taxed transactions'. If there is no direct link between purchased goods and services and the exempt activities performed by the taxpayer, who also carries out taxed activities, the pro-rata mechanism defines the amount of deductible VAT proportionate to the taxable activities performed[30]. Only financial services supplied to costumers established outside the European Union are subject to VAT, but exempt with right of deduction under Article 169(c) VAT Directive. As a consequence, their provision does not decrease the amount of recoverable VAT[31]. The reason of this distinction is the safeguard of external neutrality of European VAT, which would be undermined if European businesses engaged in financial services were subject to VAT burden, while, as it often happens, their foreign competitors were not because their tax jurisdiction does not impose a VAT/GST[32].

[25] Howell H. Zee, 'VAT Treatment of Financial Services: A primer on Conceptual Issues and Country Practices', *INTERTAX*, Volume 34, Issue 10, 2006, p.458

[26] Alan Schenk and Howell H. Zee, 'Financial Services and the Value-Added-Tax, in Zee (ed.), *Taxing the Financial Sector: Concepts, Issues and Practices*, International Monetary Fund, Washington, DC, 2004, cited in 'VAT Treatment of Financial Services: A primer on Conceptual Issues and Country Practices'

[27] Prior to 1 January 2006, the exemption from VAT was provided for by Article 13 (B)(1)(a-e) of the Sixth Directive, i.e. Sixth Council Directive 77/388/EEC of May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment

[28] Ad van Doesum and Gert-Jan van Norden 'Financial Services', in Michael Lang and Ine Lejeune (ed.) *Improving VAT/GST Designing a Simple and Fraud-Proof Tax System*, Amsterdam, The Netherlands, IBDF, 2014

[29] Opinion of Advocate General Sharpston, 8 May 2012, case C-44/11, *Deutsche Bank*, para. 53; Advocate General Kokott, 24 October 2013, case C-461/2012, *Granton Advertising*, paras.29-33; CJEU case C-455/05, Velvet & Steel Immobilien und Handels GmbH v Finanzamt Hamburg-Eimsbüttel, ECLI:EU:C:2007:232 para. 24

[30] 'Fundamentals of EU VAT LAW', p.362

[31] 'Financial Services' in *Improving VAT/GST Designing a Simple and Fraud-Proof Tax System*, p.587

[32] 'Fundamentals of EU VAT LAW', p.371

In light of the spread thought that this exemption is inefficient and increases VAT as a cost to enterprises engaged in these activities, the European Commission submitted a proposal[33] to review the treatment of insurance and financial services and to implement a uniform definition of financial services. After years of inconclusive discussions and once it became clear that it was not possible to reach consensus among Member States, the proposal has been repealed. The Commission aimed to amend the definitions of financial services as set out now in Article 135 VAT Directive, since they are out-dated and lead to inconsistent treatment from one Member State to another[34].

2.1.2 *Effects*

A first consequence of the exemption on financial services is the risk of VAT cascading. As any other VAT exemption without right of deduction, also the one on financial services determines that the VAT on costs related to the exempted transactions cannot be deducted. This mechanism often leads the taxable person to shift the irrecoverable VAT to his clients by increasing the costs accordingly. If the hidden VAT is passed on taxable persons with a full right of deduction, the result will be tax cascading, for these clients will apply VAT also over the hidden VAT that is included in the prices of their supplies[35].

A second effect to remark is the distortion of competition within the European market of financial services, which is the result of the different methods of calculation of the pro-rata deduction provided by Member States. Indeed, VAT can be fully recovered by financial institutions exclusively to the extent that costs on which the tax has been paid can be attributed to their taxed supplies, if any. If that is the case, then the financial institution will have to deduct VAT according to the pro-rata system. This may be done either according to the fall-back system provided by Article 174 VAT Directive, which defines the amount of deductible VAT by putting into relation the taxed turnover without including the VAT collected, which is then divided per the total turnover, also in this case excluding VAT. However, Article 173(2) VAT Directive allows Member States to adopt put at the disposal of their taxable persons different methods. For instance, Article 173(2)(a) VAT Directive provides for the possibility of calculating the deductible VAT separately for different sectors of their activity, while Article 173(2)(c) VAT Directive provides for the pro-rata deduction based on the actual use of goods and services[36].

Perhaps, the consequence of the exemption of financial services that should worry the most is its influence over the group structure decisions. Indeed, financial institutions are driven towards vertical

[33] European Commission's proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services, 28/11 2007, final version 20/2 2008, COM2007 (247) final.
[34] Ine Lejeune and Jeanine Daou, 'VAT neutrality from an EU Perspective' in Michael Lang and Ine Lejeune (ed.) *Improving VAT/GST Designing a Simple and Fraud-Proof Tax System*, Amsterdam, The Netherlands, IBDF, 2014, p.475
[35] 'Financial Services' in *Improving VAT/GST Designing a Simple and Fraud-Proof Tax System*, p. 555
[36] 'Fundamentals of EU VAT LAW', p.384

integration and have no incentive in outsourcing, which means that the system is not in line with the principle of VAT neutrality[37].

2.1.3 *Objective nature*

The exemptions provided by Article 135 VAT Directive are of objective nature, which means that in principle it is irrelevant the *status* of the taxable person carrying out the activity, as it is for subjective exemptions that can be found in the Directive, such as that for medical care. In writing Article 135 VAT Directive, the European legislator has made reference to very general activities to the end of including a broad set of services that might be designed by economic actors.

2.2 Intermediation of financial services[38]

In order to analyse the concept of intermediation, the starting point must be the VAT Directive provisions, namely Article 135(1) letters (b) and (f), which state that the exemption should be applied to:

(b) the granting and the negotiation of credit and the management of credit by the person granting it;
[…]
(f) 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);

First of all, it is important to remark that the CJEU has clarified the distinction between 'transactions' and 'negotiation', stating that 'including negotiation' does not define the principal object of the exemption, but extends the scope to 'negotiation/intermediation''[39]. It is essential to remark that these two concepts must be conceived as synonyms. Despite the fact that exemptions must be strictly interpreted[40], since they constitute an exception to the rule that VAT applies to all goods and services supplied for consideration by taxable persons[41], the provisions of Article 135 VAT Directive seem quite extensive and general. A strict interpretation of the concept of "negotiation", combined with the assumption that negotiation only refers to cases of interactions between involved parties, may lead to hold that it does not include services provided by a third

[37] PwC, *Study to Increase the understanding of the Economic Effects of the VAT exemption for Financial and Insurance Services, Final Report to the European Commission*, 2006
[38] Hereafter with the word *intermediation* reference is made exclusively to financial intermediation
[39] CJEU 13 December 2001, Case C-235/00, *Commissioners of Customs and Excice v CSC Financial Services Ltd*, ECLI:EU:C:2001:696, para.38
[40] CJEU 15 June 1989, Case C-348/87, *Stichting Uitvoering Financiële Acties mod Staatssecretaris van Financiën*, ECLI:EU:C:1989:246; see also CJEU 5 June 1997, Case C-2/95 *Sparekassernes Datacenter (SDC) v Skatteministeriet*, ECLI:EU:C:1997:278, para. 20
[41] 'Financial Activities in European VAT', p.90

party[42]. However, this line of reasoning would not be in line with the literal interpretation of the provisions at hand, since it would conceive negotiation as a synonym of transaction, therefore making a word in the Directive redundant. Instead, the word 'negotiation' must be interpreted as referring to the general concept of favouring the agreement between two parties, which becomes subject to exemption when the underling transaction is one of those mentioned in article 135 VAT Directive[43].

2.2.1 *Intermediation in the VAT Directive*

The VAT Directive includes several hypotheses in which intermediation is regulated, which does not refer solely to the context of financial intermediation. Instead, there are several cases in which a third party is involved in the supply of a good or a service, which raises the issue of defining under which circumstances it is possible to claim that a distinct supply of intermediation is at stake[44]. Therefore, prior to the analysis of intermediation in the context of financial services, it is appropriate to define the elements and boundaries of the general *facti species*, since only if the analysed facts amount the general concept of intermediation, it is then possible to assess whether the elements of financial intermediation are present. In other words, the set of financial intermediation is included in the broader set of intermediation, meaning that everything which is financial intermediation falls within the scope of the intermediation set, yet not everything which is in the former set falls within the latter.

The starting point of this analysis is that a third party to a contract is a party who is not part of the contract between two parties but who interacts between the two parties or towards of the two[45]. Among these third parties, it is possible to mention agents, brokers, mediators, negotiators and intermediaries. It must be stressed that the VAT Directive refers multiple times to the concepts of intermediary, agent and broker[46], which demonstrates that it is a concept well-established in the VAT legal framework. Some examples can be provided: recital 16 VAT Directive refers to the rules applicable to intra-Community transportation of goods and '… services supplied by intermediaries who take part in the supply of various services'. Article 46 refers to intermediaries and determines the place of their supplies for VAT purposes when they act in the name and on behalf of another person. With regard to the exemptions on exportations and international transports, Article

[42] Claus Bohn Jespersen, 'Intermediation of Insurance and Financial Services in European VAT', DJØF Publishing, Copenhagen, Denmark and Kluwer Law International, Alphen aan den Rijn, The Netherlands, EUCOTAX Series on European Taxation, 2011, p. 171

[43] In the CSC case, which is explained in more details in section 2.3.2, the CJEU stated that 'including negotiation does not define the principal object of the exemption, but extends the scope to 'negotiation/intermediation'. In light of this statement, it is possible to contend that 'negotiation' is regarded as a distinct VAT exempt transaction which can be provided within the scope of the exemption.

[44] 'Intermediation of Insurance and Financial Services in European VAT', p.109

[45] *Ibidem*, p. 109

[46] In the 2006 version, the term intermediary/intermediaries was used 22 times, the term agent 31 times and the term broker twice.

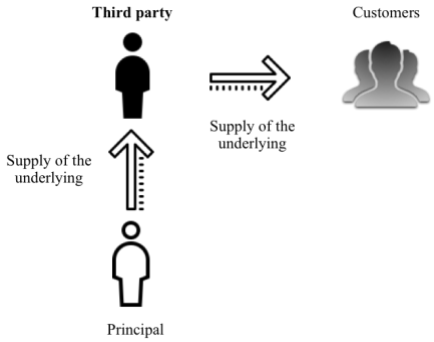
153 VAT Directive extends this exemption to intermediaries involved in these transactions when they act in the name and on behalf of another person.

By looking at these provisions, it emerges that the term intermediary(ies) refers solely to persons acting in the name and on behalf of someone else. This statement finds even more ground if one takes into account the overarching rule regarding intermediation in the VAT context, namely Article 28 VAT Directive, which states: 'Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself'. By acting in their own name, these third parties, who are referred to as commissionaires, do not disclose their principals to their customers. For VAT purposes, differently from intermediaries, these third parties do not supply intermediation services to their principal[47]. Instead, as a consequence of Article 28, if a third party acts in his own name, for VAT purposes that third party himself is deemed to have supplied the underlying service[48], which leads to the conclusion that it would be inappropriate to define him as an intermediary. By contrast, the third party will be deemed to have supplied the same service that he received, which will lead to identical VAT consequences[49].

To sum up, it is possible to say that depending on whether the third party acts in his own name or in the name of the principal, the VAT treatment will change accordingly. In order to provide the reader more clearance, three relevant situations for this thesis are illustrated below[50].

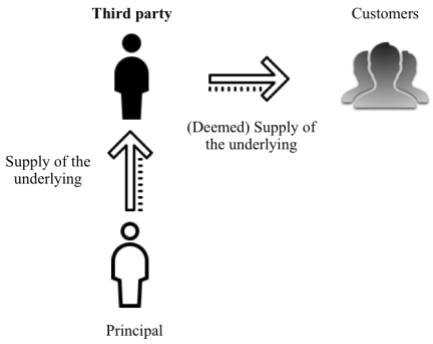
2.2.1.1 *In own name and on own behalf*

In this first scenario, no third party is present, since the person is directly involved in the transaction, resulting in a situation where two supplies take place for VAT purposes.



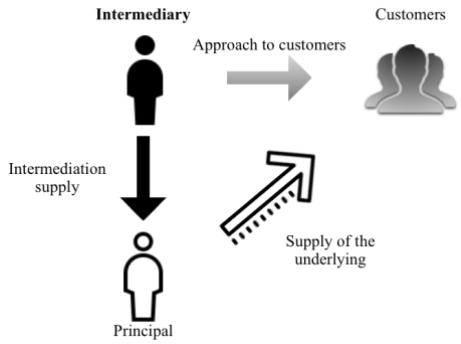
[47] 'Fundamentals of EU VAT LAW', p.112
[48] For underlying service is intended the service object of intermediation, which is a separate service.
[49] 'Fundamentals of EU VAT LAW', p.113
[50] These examples are taken from 'Intermediation of Insurance and Financial Services in European VAT', p.120-122

2.2.1.2 *In own name, but on behalf of another person*



In the second scenario, in accordance with Article 28 VAT Directive, the third party is deemed to supply the underlying service to the purchaser and not providing an intermediation service. To sum up, from a VAT perspective, two supplies of services take place. Furthermore, the two services (both the deemed and the actual ones) are of the same nature.

2.2.1.3 *In the name and on behalf of another person*



In the third scenario, the principal is the supplier of the underlying service to the client, while the third party is supplying a true intermediation service to the principal, which will be separately treated for VAT purposes.

In the light of these examples, it is possible to conclude that in the context of the VAT Directive intermediation only takes place when the third party acts in the name and on behalf of the principal, while in all other circumstances third party will either supply the service that it has received from the principal ('in own name and own behalf', see 2.2.1.1) or he will be deemed to supply such service ('in own name, but on behalf of

another person', see 2.2.1.2)[51]. There is no ground to sustain that the concept of intermediation as set out in Article 135 VAT Directive should have a broader scope.

Later on in this thesis, an investigation will be performed as to under which circumstances a crowdfunding platform performs activities that correspond to the concept of intermediary as set out in the VAT Directive. The analysis will take into account the underlying service which could be, *inter alia*, the provision of credit or the supply of shares. It will be shown that in that context the identification of the principal, combined with the direction of the service (i.e. the definition of which part is the supplier and which one is the recipient) may raise doubts as regard to the VAT treatment of the service supplied by the platform. In the following paragraphs, the basic interpretative categories that are relevant in the context of the financial exemption are set out. They will then guide the study of crowdfunding activities, which VAT treatment is exposed in the fourth chapter.

2.3 VAT exemption of financial intermediation in the case law of the CJEU

In the judgments provided by the CJEU in matter of intermediation, it is possible to highlight some interpretative patterns.

First of all, the Court often stresses that the provisions of Community law have an 'independent Community definition'[52], a principle that can be considered as settled case law[53] and which aim is, considering VAT provisions, to 'avoid divergences in the application of the VAT system from one Member State to another'[54]. In the light of the case law of the CJEU and despite the usage of the word *negotiation*, it must be held that Article 135(1) (b and f) refers to the general concept of intermediation[55] [56]. Although the proposal for a reform of the VAT treatment of insurance and financial services[57] has been repealed, it showed the

[51] 'Intermediation of Insurance and Financial Services in European VAT', p. 125
[52] David Williams, 'EC Tax law', Longman, London, 1998
[53] See, inter alia, CJEU 1 February 1977, Case C-51/76 *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechtem en Accijnzen*, ECLI:EU:C:1977:12; CJEU 6 October 1982, Case C-283/81 *CILFIT v Ministero della Sanità*, ECLI:EU:C:1982:267; CJEU 8 March 1988, Case C-102/86 *Apple and Pear Development Council v Commissioners of Customs and Excise*, ECLI:EU:C:1988:120; CJEU 15 June 1989, Case C-348/87 *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën*, ECLI:EU:C:1989:163
[54] CJEU 25 February 1999, Case C-349/96 *Card Protection Plan Ltd (CPP) v Commissioners of Customs & Excise* ECLI:EU:C:1999:93; CJEU 4 May 2006, Case C-169/04, *Abbey National plc and Inscape Investment Fund v Commissioners of Customs & Excise*, ECLI:EU:C:2006:289
[55] CJEU 13 December 2001, Case C-235/00, *Commissioners of Customs and Excice v CSC Financial Services Ltd*, ECLI:EU:C:2001:696, further explained below.
[56] *Contra* Oskar Henkow in 'Financial Activities in European VAT', p.92. The author argues that the decision of using the term *negotiation* was to treat equally third parties acting in their own name or in the name of the principal. Unfortunately, legislative history explaining the reasons why this term was adopted is absent. Hence, they only guide left is the judiciary one, which, as it will exposed, refers multiples times to the fact that the third party that must act 'in the name of', which gives ground to the theory followed in this thesis.
[57] European Commission's proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services, 28/11 2007, final version 20/2 2008, COM2007 (247) final.

willingness of the European legislator of restoring the required legal clearance that the term 'negotiation' has never granted[58]. In particular, following the new Article 135[59] that would have listed the financial services subject to the exemption, a new Article 135(a) would have been passed. It would have stated that: 'Intermediation in insurance and financial transactions' means the supply of services rendered to, and remunerated by, a contractual party as a distinct act of mediation in relation to the insurance or financial transactions, referred to in points a) to e) of Article 135(1), by a third party intermediary.' As it will be shown below, the new article would have substituted the term 'negotiation' with the concept of intermediation as laid down by the CJEU in the case CSC.

Secondly, the *natura negotii* principle, namely the 'nature of the supply', plays a crucial role in the field of VAT exemptions. Indeed, when the Court must interpret a specific provision it puts emphasis on the object of taxation, meaning the nature of the service or of the transactions considered, irrespective of who executes it[60]. This principle contributes with the first one to provide a VAT system that applies equally, depending exclusively on the nature of the service. With respect to the *natura negotii* of *negotiation*, an important distinction has been provided by Advocate General Maduro in the Arthur Andersen case[61] with respect to insurance intermediation. Indeed, he clarified that two aspects must be analysed: on the one hand, the internal activity, which refers to the actual service of negotiation, and on the other hand, the external position, which relates to the type of relationship that binds the third party with the contractual parties. By investigating the internal activity of the third party, it is possible to verify whether the nature of the service actually consists of negotiation.

Starting from the consideration set out above, according to which the term *negotiation* solely refers to the general concept of intermediation, the first consideration that can be drawn is that the intermediary must act in the name and on behalf of a principal. This means that there is no difference between the general concept of intermediation and intermediation in the context of Article 135 VAT Directive. Secondly, it derives from the categorisation provided by Advocate General Maduro in Arthur Andersen that two aspects must be present to qualify as a financial intermediary. These are the external position of the third party, who must act in the

[58] Francesco Montanari 'Le operazioni esenti nel sistema dell'IVA – Exemptions in the VAT system', Giappichelli Editore, Torino, 2013, p.311

[59] 'Member States shall exempt the following transactions:

a) Insurance and reinsurance
b) Granting of credit and guaranteeing of debts resulting from granting of credit
c) Transactions concerning financial deposits and account operation
d) Exchange of currency and provision of cash
e) Supply of securities
f) Intermediation in insurance and financial transactions as referred to in points a) to e)
g) Management of investment funds'

[60] Opinion of the European Economic and Social Committee on the Proposal for a Council directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services

[61] CJEU 3 March 2005, Case C-472/03, *Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants*, ECLI:EU:C:2005:135, further explained below

name and on behalf of a contractual part and, as regard to the internal perspective, that it has to perform the service of intermediation.[62].

Another relevant criterion of interpretation is the contextual one, which implies that a rule must be interpreted consistently with the principles, the rules and the concepts of the same legal area of the legal system to which the provision belongs[63]. With regard to VAT, it means that exemptions have to be placed in the general context of the common system of VAT[64]. This criterion is extensively used by the Court[65] both with regard to the other provisions of the VAT Directive and to the Community law as a whole. This was the case, for instance, of the Card Protection Plan case[66], when the Court made reference to the Directives on insurance in order to define the concept of insurance transaction under Article 135(1)(a) VAT Directive. When the CJEU refers to legal sources of Community law other than those of the VAT Directive, these provisions are defined as horizontal legislation. This method is applied when there is a close connection between two provisions of secondary legislation and the interpretation of one must take into account the interpretation of the other[67]. This may lead to the erosion of the independence of the VAT Directive, yet relying on horizontal legislation grants both legal certainty and, paraphrasing the words of Advocate General Maduro in Arthur Andersen, that the concrete application of VAT does lack of contact with practice and existing relevant law.

2.3.1 *Ursula Becker, Grendel and Weissgerber*

It is possible to report several judgments of the CJEU regarding financial intermediation under the VAT Directive. Although not all of them deal specifically with the application of the exemption for financial services, they all contribute to the definition of this activity from the perspective of the CJEU. This is true, for instance, in the following three German cases: Ursula Becker[68], Grendel[69] and Weissgerber[70].

Similarly to Grendel, Ursula Becker was a self-employed credit negotiator with the only difference that in the former case there was an undertaking involved. In both cases the question referred to the CJEU did not concerned the applicability of the exemption, yet it is explicitly stated that in the two cases there were credit negotiators involved, which makes possible to infer that their activities felt within the scope of the

[62] 'Intermediation of Insurance and Financial Services in European VAT', p.173
[63] Giulio Itzovich, 'The interpretation of Community law by the European Court of Justice', German law journal, vol.10, no.5, cited in 'Intermediation of Insurance and Financial Services in European VAT', p.56
[64] Lionel David Brown, Francis G. Jacobs, Tom Kennedy, 'The Court of Justice of the European Communities', Sweet & Maxwell, London, 2000, pp. 311-316
[65] 'Financial Activities in European VAT', p.17
[66] CJEU 25 February 1999, Case C-349/96 *Card Protection Plan Ltd (CPP) v Commissioners of Customs & Excise*, ECLI:EU:C:1999:93
[67] 'Judicial Control in the EU', p.396, cited in 'Intermediation of Insurance and Financial Services in European VAT', p.61
[68] CJEU 19 January 1982, Case C-8/81, *Ursula Becker v Finanzamt Münster-Innenstadt*, ECLI:EU:C:1982:7
[69] CJEU 10 June 1982, Case C-255/81, *R.A. Grendel GmbH v Finanzamt für Körperschaften de Hambourg*, ECLI:EU:C:1982:225
[70] CJEU 14 July 1988, Case C-207/87, *Gerd Weissgerber v Finanzamt Beystadt/Weubstraße*, ECLI:EU:C:1988:409

exemption. More clearance is provided in the case Weissgerber, since in this case it is clearly mentioned that the person involved 'had introduced clients who were seeking credit'.

2.3.2 *CSC*

The CSC case[71] can be considered as the milestone of the concept of negotiation under the VAT Directive.

CSC was an undertaking providing call centre services for Sun Alliance Group, meaning that they not only received and processed telephone calls on behalf of the financial institution, but, at the same time, it was also responsible for contacting the general public in order to sell financial products, without being authorized to execute any order. Moreover, they had to provide all the information required by the public with respect to a specific investment product, they had to provide investors with the appropriate investment forms and process the submitted application forms. It is important to remark that CSC was not actively seeking for clients on behalf of the Sun Alliance Group, which autonomously took care of the advertisement of its financial products and asked potential clients to contact CSC. Moreover, CSC was not allowed to provide customers with advice regarding their investment, since UK law explicitly prohibited that. Last but not least, the activity of issuing and transferring securities was carried out by a separate company unrelated with CSC. With respect to the consideration for the activities carried out by CSC, this was partially in the form of a fixed fee and for the remaining part was defined in accordance with the number of calls carried out by CSC.

CSC argued that the services that it provided should not have been subject to VAT, for they had to be regarded as an essential part of the issue of securities by Sun Alliance Group, the activity of which fell indeed under Article 135(1)(f). By contrast, the UK Government held that the exemption was restricted exclusively to the issue of securities performed by the Group, therefore excluding all preliminary steps to that specific activity.

In the request for a preliminary ruling issued by the High Court of Justice of England and Wales, two questions were posed:

'How is the exemption provided by Article 13B(d)(5) [now Article 135(1)(f)] *of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, in respect of "transactions in securities" to be interpreted? In particular,*

1) *does the term "transactions in securities" apply only to transactions in which the parties' legal rights or obligations in respect of the security are altered?*
2) *does the term "transactions, including negotiation, in securities" apply to a service of providing information to potential investors and receiving and processing applications from investors for the*

[71] CJEU 13 December 2001, Case C-235/00, *Commissioners of Customs and Excice v CSC Financial Services Ltd*, ECLI:EU:C:2001:696

issue of a security (but not including preparing and dispatching the document of title to the security), where that service is provided to a person who has legal rights or obligations under the security by a person who does not have any legal right or obligation under the security?'[72]

With respect to the second question, CSC contented that its services should have been regarded as negotiation in securities in the sense of Article 135(1)(f) of the Directive. The UK Government, on the opposite, argued that the concept of negotiation implied acting as an intermediary between potential parties to a particular transaction, with the exclusion of administrative services like those provided by CSC[73].

The European Commission sustained the argument that 'the word negotiation in Article 13B(d)(5) [now Article 135(1)(f)] refers solely to the activities of intermediaries whose role is to procure the completion of, and negotiate the terms of a transaction on behalf of one of the parties. The Commission emphasises that their involvement in transactions may be considered to be of equal importance to that of the parties themselves'[74].

As regard to the analysis of the contractual analysis of intermediation services, the opinion of Advocate General Colomer is enlightening. He argued that CSC's services could not be regarded as 'negotiation' in the sense of the VAT Directive. In particular, he explained the negotiating 'refers to settling, giving way, and dealing: in short, the idea of managing one's own rights and interests in order to arrive at an agreement. The capacity to dispose of legal rights belongs only to the person vested with those rights or to his representative, either by operation of law (*patria potestas* or guardianship), or by agreement (power of attorney or other grant of representative capacity).'[75]. In the case at hand, CSC neither represented Sun Alliance Group nor could it negotiate on its behalf. Plus, it could not even provide financial advice to clients asking for more information. As it often happens, the opinion of the advocate general offers deeper insights as to the arguments that can be found in the decisions of the CJEU. Later in this thesis, it will emerge how important it is the context of intermediation, of which the financial type is part of, the concept of 'acting in the name and on behalf' of a principal. Advocate general Colomer clearly explains that, from a contractual perspective, only those persons vested of the power to dispose of the rights of other persons can act as intermediaries. This might be the case either by operation of law or as a result of the freedom of contract, but in either case, there is one person that can dispose of the rights of another as if he was that person[76].

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[72] *Ibidem*, para.14
[73] *Ibidem*, para.35
[74] *Ibidem*, para.36
[75] Opinion of Advocate General Colomer in Case C-235/00, *Commissioners of Customs & Excise v CSC Financial Services Ltd*, ECLI:EU:C:2001:418
[76] The contractual hypothesis evokes the contract of *agency*, which has been object of study since the origin of roman private law. See Peter Birks 'The Roman Law of Obligations', Oxford, United Kingdom, Oxford University Press, p.118; see also Julius Paulus in the 'Opinions of Julius Paulus addressed to his son' stated that 'An agent is appointed either for the purpose of conducting a suit, or to transact any business, wholly or in part, or for the general administration of affairs', Corpus Iuris Civilis – The Civil Law, Volume 1, Title III, Concerning Agents, AMS Press, New York, 1973, p.260

Following the line of reasoning of the Advocate General, the CJEU stated that negotiation 'refers to the activity of an intermediary who does not occupy the position of any party to a contract relating to a financial product, and whose activity amounts to something other than the provision of contractual services typically undertaken by the parties to such contracts. Negotiation is a service rendered to, and remunerated by a contractual party as a distinct act of mediation. It may consist, amongst other things, in pointing out suitable opportunities for the conclusion of such a contract, making contact with another party or negotiating, in the name of and on behalf of a client, the detail of the payments to be made by either side. The purpose of negotiation is therefore 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.'[77]

In the following paragraph, it further argued that 'it is not negotiation where one of the parties entrusts to a sub-contractor some of the clerical formalities related to the contract, such as providing information to the other party and receiving and processing applications for subscription to the securities which form the subject-matter of the contract. In such a case, the subcontractor occupies the same position as the party selling the financial product and is not therefore an intermediary who does not occupy the position of one of the parties to the contract, within the meaning of the provision in question.'[78]

It is possible to draw some relevant remarks from this case. From a *prima facie* assessment it may seem that CSC did provide negotiation services as described by the CJEU. Indeed, it pointed out potential customers a suitable opportunity for the conclusion of a financial contract, it did have contact with the parties of such a contract and it was not part of the contract itself, thus a third party with respect to it. Moreover, Sun Alliance Group paid a fee to CSC, which is the typical remuneration for intermediaries, the main feature of which consists of being conditional upon the actual closing of the financial deal[79]. However, a closer look leads to different conclusions.

The CJEU did not acknowledge the applicability of the exemption after having performed an overall assessment of the internal activities of CSC, therefore applying the principle of *natura negotii*. According to the CJEU, the nature of the service was not that of an intermediary, as described by Advocate General Colomer, since they merely consisted of providing information and processing applications.

With respect to the concept of *pointing out suitable opportunities*, it must be said that it is not always clear whether an activity consists in the mere provision of financial information, which does not fall within the scope of the Article 135 VAT Directive[80], or in the actual pointing out of suitable opportunities. In the case at

[77] CJEU 13 December 2001, Case C-235/00, *Commissioners of Customs and Excice v CSC Financial Services Ltd*, ECLI:EU:C:2001:696,, para. 39
[78] *Ibidem*, para.40
[79] 'Intermediation of Insurance and Financial Services in European VAT', p.203
[80] CJEU 5 June 1997, Case C-2/95 *Sparekassernes Datacenter (SDC) v Skatteministeriet*, ECLI:EU:C:1997:278, para.70

hand, the Court argued that CSC did not actively canvas customers, since the products were advertised by Sun Alliance Group on its own and CSC did not perform any activities to gain costumers. CSC was merely passive, waiting for costumers to contact them. As it is going to be exposed in more detailed below, both in Arthur Andersen case and in Volker Ludwig case, the CJEU further argued that a crucial aspect of intermediation consists of actively canvassing costumers[81].

2.3.3 *Arthur Andersen*

As it has been mentioned in the paragraph above, in the Arthur Andersen case[82] the CJEU confirms certain aspects of intermediation, in this case in the field of insurance services.

In accordance with a 'sharing agreement' stipulated with an insurance company, Arthur Andersen was responsible for back-office activities on behalf of that company. In concrete, these activities were performed by Accenture Insurance Services, an internal division of Arthur Andersen. The back-office services included the acceptance of new applications for insurance, the determination and payment of commission to insurance agents, the provision of information to the life insurance company and to agents, the preparation of reports, daily contact with the intermediaries. Most important, Accenture was responsible to decide on behalf of the insurance company which applications should be accepted. As an exception, this decision could not be autonomously taken when it was clear from the application that a medical examination had to be carried out. Only in the latter case the acceptance decision was up to the insurance company only.

Arthur Andersen claimed that it should have been subject to the exemption provided by Article 135 VAT Directive, in contrast with the opinion of the Dutch Tax authorities. The dispute was brought before the Dutch Supreme Court, which asked for a preliminary ruling regarding the following question:

'Where a taxable person has concluded an agreement with a (life) assurance company, such as the agreement at issue between ACMC and UL, under which that taxable person undertakes, for a certain remuneration and with the aid of qualified personnel who are expert in the insurance field, most of the actual activities related to insurance — including, as a rule, the taking of decisions that bind the insurance company to enter into insurance contracts and maintaining contact with the agents and, as the occasion arises, with the insured — while the insurance contracts are concluded in the name of the insurance company and the insurance risk is borne by the latter, are the activities undertaken by that taxable person in execution of the agreement "related services performed by insurance brokers and insurance agents" within the meaning of Article 13B(a) [now 135(1)(a)] *of the Sixth Directive?'*

[81] 'Intermediation of Insurance and Financial Services in European VAT', p.206
[82] CJEU 3 March 2005, Case C-472/03, *Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants*, ECLI:EU:C:2005:135

A first issue that was scrutinized by Advocate General Maduro concerned the concept of 'related services' under Article 135(1)(a) VAT Directive, which exempts 'insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents'. The Advocate General stresses that the community legislator has made an express reference to brokers and insurance agents, meaning that the subjective element is relevant when it comes to insurance services[83]. Moreover, the horizontal legislation doctrine acquires particular importance in this case, since in order to define the concept of broker and insurance agent, he argues that reference must be made to the Directive on insurance intermediation[84]. He contends that although the exemptions from VAT constitute an independent concept of community law, their interpretation should not lack contact with practice and existing insurance law. In particular, by referring to the decision taken by the CJEU in Taksatorringen[85], Maduro reports that an insurance broker must have a relationship both with the policyholder and the insurance company[86]. As a result, in order to have an insurance agent, there must be his own declarations, adopted as such and addressed to the policyholder before whom he presents himself as an insurance agent acting on behalf of and possibly in the name of the insurer[87]. Maduro argued that this was not the case of Accenture – the internal unit of Arthur Andersen – because only the independent insurance agents and brokers had the legal relationship with the insured. Furthermore, with respect to the fact that Arthur Andersen claimed that Accenture, its intern division, should have been subject to the exemption just because it was able to make the insurance company liable vis-à-vis third parties, the Advocate General held that even though Article 2(1)(b) of Directive 77/92 refers to agents only acting 'on behalf' of the insurer, they make the principal insurer liable only if they act in his name. This means that holding power to make the insurer liable is not sufficient *per se* to qualify as an insurance agent for VAT purposes[88]. Plus, in the opinion of the Advocate General, acting in the name of the insurer shall not be separated from the broader context of the business of distribution of insurance products, which necessarily presupposes that the intermediary engages actively in finding and introducing costumers and insurers[89]. In this case, the canvassing of potential clients was an activity performed by insurance agents others than Accenture.

In the decision of the CJEU it is possible to find, as a premise, that the only fact that the employees of Arthur Andersen were expert in the insurance sector and that their activities were related to insurance transactions was not enough to consider it as an insurance agent. The CJEU confirmed the Opinion of the Advocate General Maduro, stating that acting in the name of the insurer is not decisive *per se*, since an overall

[83] Opinion of Advocate General Maduro in Case C-472/03, *Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants*, ECLI:EU:C:2005:8
[84] Council Directive 77/92/ECC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex ISIC Group 630) and, in particular, transitional measures in respect of those activities
[85] CJEU 20 November 2003, Case C-8/01, *Assurandør-Societetet acting on behalf of Taksatorringen v Skatteministeriet*, ECLI:EU:C:2003:621
[86] Opinion of Advocate General Maduro in Case C-472/03, *Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants*, ECLI:EU:C:2005:8, para.24
[87] *Ibidem*, para.28
[88] *Ibidem*, para.31
[89] *Ibidem*, para.32

assessment based on the *natura negotii* principle of the activities must be performed. In particular, in denying the applicability of the exemption *ex* Article 135 VAT Directive, the CJEU contended that Arthur Andersen was lacking the essential aspects of the work performed by insurance agents, namely the fact that it did not find prospects to be introduced to the insurer, which in the case at hand was an activity performed by other independent insurance agents on account of the insurance company. In conclusion, especially if one refers to the Opinion of the Advocate General, the distinction between the external position and internal activities emerges: the former refers to the representative power held by the intermediary. In the case considered, this requirement was perfectly fulfilled, since Accenture was in the position to make the insurer liable vis-à-vis third parties. However, the CJEU derives from the concept of negotiation as laid down in Article 135 VAT Directive an additional requirement of intermediaries. This can be regarded as the result of a creative interpretation of the CJEU, since while the external position finds its ground in the overarching rule of intermediation, namely article 28 VAT Directive, the internal activity has no positive ground but the term negotiation. In the opinion of the CJEU, this internal activity may consist of various actions, but from the entire body of the related case law it is possible to derive that an active role of the intermediary is required.

2.3.4 *Volker Ludwig*[90]

Volker Ludwig was an independent financial adviser that used to work on behalf of Deutsch Vermögensberatung (DVGA) as an agent. In particular, he was one of the agents engaged by DVGA to seek for clients interested in financial products, which contracts were defined in advance by the company itself. Agents were responsible for the review of the financial position of potential clients and the provision of financial advice in accordance with their situation and needs. DVGA always maintained the power to accept, reject or amend the terms of the contractual offer.

Mr. Ludwig claimed that the commission he received for the services provided to DVGA was subject to the exemption provided by Article 13B(d)(1) [now Article 135(1)(b)] VAT Directive. By contrast, the German Tax authorities argued that these services were subject to VAT.

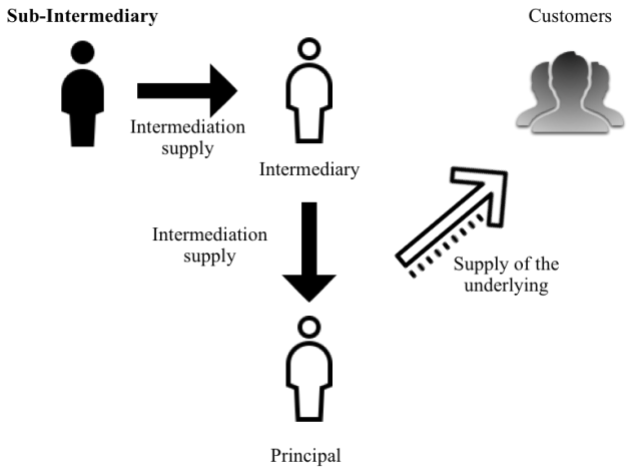
In this case the Court referred to the composite supplies doctrine, stating that negotiation should be regarded as the principal service and giving of advice as merely ancillary. In fact, the activity of giving financial advice occurred only in a preliminary phase and that the commission (i.e. the consideration) was paid conditionally upon the actual stipulation of the contract between clients and lenders[91].

The CJEU also recalled the concept of 'negotiation' as it described it in CSC[92], but in the case at hand was called to explain whether a contractual relationship between the negotiation provider and the parties involved is required and, if not so, whether direct contact between both parties is required. With regard to the first question, the CJEU stated that the concept of negotiation as provided in the Directive makes no reference

[90] CJEU 21 June 2007, Case C-453/05, *Volker Ludwig v Finanzamt Luckenwalde*, ECLI:EU:C:2007:369
[91] *Ibidem*, para.19
[92] *Ibidem*, para.23

to a formal contractual relationship existing between the parties involved, therefore it is no necessary to the end of applying the exemption. Regarding the second question, namely whether direct contact between both parties is required, the CJEU derived from the principle of neutrality that irrespective of the form of organization that economic operators choose, if their activity is objectively one of those mentioned in Article 135 VAT Directive, they must be subject to the exemption. In the case considered, the service was splitted between DVAG, which was the main agent negotiating the terms of the contract, and Mr Ludwig, acting as a financial adviser in the context of negotiation with borrowers. The CJEU concluded that negotiation 'does not, therefore, necessarily presuppose that the negotiator, as subagent of the main agent, enters into direct contact with both parties to the contract, in order to negotiate its terms, provided, however, that his activity is not limited to dealing with some of the clerical formalities related to the contract'[93]. Moreover, the fact that the terms of the contract were fixed in advance by the principal agent did not hinder the possibility to qualify as negotiation the service provided by Ludwig, as long as the activity of pointing out suitable opportunities to costumers was present.

It is possible to state that after three years, differently from the Arthur Andersen case, where the CJEU required the presence of a contractual relationship with both parties, which is part of external position concept, in the Volker Ludwig case the CJEU put more emphasis on the internal activity, meaning the effective activity of intermediation, which in this case was present in the form of pointing out suitable opportunities. However, acknowledging the application of the exemption to the activity performed by Mr Ludwig seems to find no justification. Indeed, this was a case of sub-intermediation, which can be explained more easily through the following illustration:



In this case, the CJEU provided relevant guidance with regard to the applicability of the exemption to the activity performed by the sub-intermediary, who has no direct contact with one the contractual part. Acknowledging this seems fair because, as stated above, there is no textual ground to sustain a counterargument. Notwithstanding, this scheme holds as long as both the intermediary and the sub-intermediary act in the name and on behalf of their respective principal (the sub-intermediary towards the intermediary and the latter towards the contractual part). It is questionable whether Mr Ludwig was able to act

[93] *Ibidem*, para.38

in the name of DVAG, since once the client signed the proposal, it had to be sent back to DVAG, which solely could formulate a counteroffer.

It is also questionable that the need of a contractual relationship with both contractual parties is eroded. Indeed, the starting point is always that this was a case of sub-intermediation, which has some peculiarities that must be considered by the interpreter. It is true that no legal relationship is established between the sub-intermediator and the principal. However, it cannot be disowned that the sub-intermediator has a contractual relationship between two parties, namely the intermediator and the customers, resulting in a shift of this connection from the principal to the intermediator. At the end of the day, the sub-intermediaries still maintains a relationship with two parties, meaning that the erosion of this requirement seems at least arguable.

2.4 *Conclusive VAT assessment of financial intermediation*

2.4.1 *Intermediation as a taxable supply*

Assuming that financial intermediation is performed in the territory of a Member State, it must be considered an economic activity in the sense of Article 2(1)(c) VAT Directive, because it is a supply of services for consideration. If a taxable person (acting as such) supplies this service in the sense of Article 9(1) of the VAT Directive, namely by a person acting independently, who carries out in any place an economic activity, whatever the purpose or results of that activity, then European VAT will apply.

In the light of the CSC case, intermediation is a service rendered to and remunerated by a contractual party as a distinct act of mediation, which emphasises the alterity between the intermediation service and the underlying service.

2.4.2 *Performed in the name and on behalf of another person*

As abovementioned, an intermediary performing a distinct intermediation supply is performing an economic activity, which means that he will be regarded as a taxable person. In light of Article 28 VAT Directive, when a third party acts in his own name and on behalf of another person and that third party takes part in the supply of a service, he is deemed to supply the underlying service himself, which means it cannot be regarded as an intermediary in the sense of VAT Directive. Nevertheless, a question may be raised as to what amounts to *taking part in the supply*, since it could be claimed that that implies a actual provision of the supply by the person involved.[94]. However, this view seems to disown the use of the term 'deem' by the Directive, which implies that something is considered to exist or to take place irrespective of the fact it actually does. For this

[94] That seems the position of Jespersen in 'Intermediation of Insurance and Financial Services in European VAT', p.250

reason, it seems more logical to say that even a little involvement in the supply by the third party may amount to *taking part in the supply*.

The definition as to whether a third party is acting in his own name or in the name of another person becomes crucial, especially because the VAT Directive does not provide any guidance in this sense. Acting 'in own name' can be considered as an independent community concept[95], which must be then applied in domestic situations. In a case[96] concerning Article 306 VAT Directive, which provides that travel agents must act in their own name and not as intermediary, the CJEU stated that it is for national courts, having taken into account all the details of the case (i.e. all the facts involved) and in particular the contractual obligations assumed by the parties involved, to determine whether or not a person is acting in his own name or as an intermediary.

2.4.3 *External position and internal activity of the intermediary*

Both the elements of the external position and of the internal activity must be met to trigger the applicability of the exemption for financial services.

With regard to the external position of the intermediary, reference is made to the role that he plays towards the two contractual parties involved in the underlying contract. The importance of this aspect emerged in the CSC case, where it was questionable whether CSC was entitled to act on behalf of Sun Alliance Group, since it had no legal relationship with clients, but only a material contact, which was also passive. In other words, CSC did not actively seek for them.

In Arthur Andersen, Accenture (the internal division) was considered to have a potential contractual relationship with the principal (Arthur Andersen), since it had the power to make it liable. However, it lacked of the relationship with clients, since only independent insurance agents had contact with them.

It has been argued that the CJEU has overruled this in the subsequent Volker Ludwick case, where it decided that a direct contractual contact between the two contractual parties is not always required[97].

Another element that concurs to define the concept of external position flows from the CSC case, where the CJEU mentioned that the intermediary must not have 'an interest of his own in the terms of the contract'. Actually, this principle this specification only stresses that the intermediation supply is strongly separated from the underlying contract, from which the intermediary must not gain any right nor assume any obligation. Therefore, 'interest' must be interpreted in a legal sense, since it is clear that the intermediary will

[95] *Ibidem*, p.251

[96] CJEU 12 November 1992, Case C-163/91, *Van Ginkel Waddinxveen BV, Reis- en Passagebureau Van Ginkel BV and others v Inspecteur der Omzetbelasting Utrecht*, ECLI:EU:C:1992:435; see also CJEU 13 October 2005, Case C-200/04, *Finanzamt Heidelberg v ISt internationale Sprach- und Studienreisen GmbH*, ECLI:EU:C:2005:608

[97] But take into account the critical assessment exposed in 2.3.4

often have a material interest in the parties concluding the contract, given that its remuneration is almost always dependent upon the conclusion of that contract.

Turning to the internal relationship, which refers to the *natura negotii* of the activity performed by the third party, it may consist of different activities. In the CSC case, the CJEU stated that an intermediation service may consist of pointing out suitable opportunities for the conclusion of a contract that relates to an insurance or financial service[98]. Also in Volker Ludwick there was an intermediary providing this kind of service[99], since it proposed to potential clients financial products suiting their needs. Also from the CSC case it emerges the blurred line that separates the activity of pointing out suitable opportunities and the mere provision of information, which cannot be considered to amount to a supply of intermediation. The same line of reasoning applies to advisory services, which *per se* do not amount to intermediation services, but could be regarded as part of a single supply in the light of the composite supply doctrine. Conclusively, also marketing services exclusively related to the brand of a company do not amount to financial intermediation. However, the situation could become more blurred when the object of the marketing is the financial product itself[100]. Probably this is an assessment that can be performed *ex post* exclusively, in the sense that even though the marketing activity relates to a specific financial product, it cannot be regarded *per se* as intermediation for VAT purposes. However, if such an activity has led parties to conclude a contract, one could consider the intermediation activity as having started from the marketing one, which would then be regarded as part of it.

A more general activity, which actually includes the pointing out of suitable opportunities, is the making contact with another party, which means that the third party must actively seek and make contact with potential clients[101]. In CSC, Arthur Andersen and Taksatorringen this element was absent. CSC was passively waiting for calls and, more in general, was not responsible for canvassing potential clients, given that Sun Alliance Group advertised on its own the financial product, namely unit trusts. The same situation occurred in Arthur Andersen, where the CJEU stated that Accenture (the internal division of Arthur Andersen) did not actively seek potential clients, since independent insurance agents ran that operation..

Another activity that can be regarded as intermediation is negotiation[102], namely the activity of the intermediary in guiding the parties towards the conclusion of a contract. It does not seem to be an essential element of the internal position, but it might concur to conclude that the third party is performing intermediation services. This is demonstrated by the case of Volker Ludwig, where Mr. Ludwick had no involvement in the definition of the contract, since the content of the contracts was defined in advance by the financial institution issuing the financial product, meaning that the person involved had no negotiating role. Despite that, he was considered to be a financial intermediary in the sense of the VAT Directive.

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[98] CJEU 13 December 2001, Case C-235/00, *Commissioners of Customs and Excice v CSC Financial Services Ltd*, ECLI:EU:C:2001:696

[99] But take into account the critical assessment exposed in 2.3.4

[100] 'Intermediation of Insurance and Financial Services in European VAT', p.271

[101] In the context of insurance services, this argument finds even more ground in the 2002/92/EC Directive, where it is explicitly provided the insurance intermediary activities consist of the brining together of persons.

[102] Provided that the term 'negotiation' in Article 135 refers to intermediation

3 Financial crowdfunding models in light of financial regulation

As anticipated, this chapter aims to provide the reader with an overview of the activities performed by crowdfunding platforms engaged in financial-return crowdfunding, taking into account the relevant secondary legislation at the European level and their implementation within the European Union, with a specific focus on two countries, namely the United Kingdom and Italy. The former has been chosen for its leading role in the crowdfunding development, as mentioned in the introduction, while the choice of the latter country is due to its long-dated regulatory activity in the crowdfunding context, which dates back to 2012.

Regulation of financial return crowdfunding is fragmented within the EU, except for the common trend of distinguishing between loan based and equity-based crowdfunding, which is the categorization that is adopted in this section.

3.1 Equity-crowdfunding – Regulatory overview

As it has been concisely described at the beginning of this research, when platforms provide financial models of crowdfunding, they host SMEs seeking for debt financing or issue quotas representing capital to investors seeking for return. The offer is addressed to the public on the Internet through digital platforms, where investors have access to information regarding both the company and the offered instruments.

In this context, from a financial law standpoint, the need to incentive a new and complementary source of financing for SMEs must be balanced with investors protection, since several risks are at stake. For instance, the secondary market for the equity of start-up companies is underdeveloped, which may prevent investors from selling their participations in a second moment[103] (so-called liquidity problem[104]). Moreover, investors may run the risk of exposure to a single asset, since they are not always aware of the importance of diversification[105]. The degree of disclosure required in this field is also problematic, since who makes use of crowdfunding platforms in order to acquire securities has often little financial experience and takes his decisions based on personal biases and persuasive narrative[106]. Financial regulation is intended to reduce the mentioned risks.

[103] Eleanor Kirby and Shane Worner, 'Crowdfunding: An Infant Industry Growing Fast', Staff Working Paper of the International Organization od Securities Commissions Research Department, 2014, cited in 'Regulation of the EU Financial Markets', p.664

[104] Investments in the capital of unlisted companies are defined illiquid. That is because of the absence of a secondary market, the only chance that an investor might have of getting rid of his participation is the sale of the company.

[105] Niamh Moloney 'How to Protect Investors: Lessons from the EC and the UK, Cambridge University Press, 2010, cited in 'Regulation of the EU Financial Markets', p.665

[106] FCA, 'A review of the Regulatory Regime for Crowdfunding and the Promotion of Non-readily Realizable Securities by Other Media', 2015, cited in 'Regulation of the EU Financial Markets', p.665

3.1.1 *Ad hoc regulation in the MiFID framework*

Since equity-crowdfunding is based on investments in the capital of companies, it implies a potentially high degree of risk for investors, which calls for a protective regulation. In the European context, such regulation is provided by the Markets in Financial Instruments Directive[107] and its Implementing Regulation[108], which, in order avoid their burdensome application, also allow for deviations under certain circumstances. However, even when these deviations apply, the MiFID rules remain a benchmark for domestic regulations.

The MiFID aims to provide a high level of harmonized investor protection, financial market transparency and greater competition between trading venues. As a direct consequence of the financial crisis, as of January 3rd 2018 the MiFID I has been replaced by MiFID II[109], which aims to fill the gaps of MiFID I especially with respect to investors' protection, as well as the functioning and transparency of financial markets[110]. The MiFID scope is objectively defined, meaning that only the provision of financial services listed in its Annex I[111] can trigger the applicability of the relevant provisions. The concept of financial instrument is also crucial, because only them can give rise to an investment service or an activity performed by an investment firm. If that is not the case, the MiFID provisions do not apply.

In the case of crowdfunding, MiFID becomes relevant when 'transferable securities' are involved, such as shares or 'mini-bonds. With regard to loan-based crowdfunding, the absence of a financial instrument excludes the MiFID relevance, unless the granted loans are first securitized and then sold to clients[112]. Once it is ascertained that there is financial instrument at stake, the following step is to determine whether the activity performed by the platform falls under one of the investment services listed in the Annex I. Following the guidance provided by the ESMA, the activity most likely to be performed by a platform is the 'reception and transmission of orders', since it 'receives orders from investors and transmits them to the issuer or another third party intermediary'[113]. It is less likely that it provides investment advice, yet a case-by-case evaluation could lead to a different outcome depending on the type of the rendered recommendations[114].

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[107] Directive 2004/39/EC, OJ L 145, 30 April (MiFID I)
[108] Regulation (EC) No 1287/2006, 2 September 2006 (MiFID I Implementing Regulation)
[109] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
[110] Danny Busch and Guido Ferrarini 'Who's afraid of MiFID II?: An Introduction', in Danny Busch and Guido Ferrarini (ed.) 'Regulation of the EU Financial Markets', Oxford, United Kingdom, Oxford University Press, 2017, p.5
[111] Article 4 MiFID II in conjunction with Annex I, Sections A and C. The listed financial services are (1) reception and transmission of orders in financial instruments; (2) execution of orders in financial instruments on behalf of clients; (3) dealing on own account (4) portfolio management; (5) investment advice; (6) underwriting of financial instruments on a firm commitment basis (7) placing of financial instruments without a firm commitment basis (8) operation of a MTF (9) operation of an OTF
[112] 'Crowdfunding: An Infant Industry Growing Fast', cited in cited 'Regulation of the EU Financial Markets', p.669
[113] European Securities and Markets Authority 'Opinion: Investment-based crowdfunding, 2014, p.16
[114] *Ibidem*, p.17

3.1.2 *National legislations*

An analysis of the crowdfunding regulations at domestic level shows a common pattern, which is the tendency to deviate from the pure application of the MiFID provisions, proving that MSs consider them too burdensome and potentially able to prevent crowdfunding from entirely developing[115]. As it will be shown in the following subparagraphs, the degree of this deviation is not consistent within the European context, thus being a source of regulatory fragmentation that might also have consequences over the VAT treatment.

Article 3 MiFID provides for the conditions to be met in order for a person not to be subject to the MiFID provisions. In particular, these persons shall not hold clients' funds or securities and are exclusively allowed to perform the investment service of receiving and transmitting orders in transferable securities and units in collective investment undertakings.

When the abovementioned conditions are met, crowdfunding platforms can benefit from a lighter regime. Nevertheless, even when this deviation is at stake, it does not break the connection with the MiFID framework, since domestic legislations follow that model and try to satisfy the same need of investors' protection.

Italy has been the first country to have introduced a systematic regulation of equity-crowdfunding and, in doing so, it made use of the optional exemption provided by Article 3 MiFID, which allows to provide a lighter regime for crowdfunding platforms [116]. According to the Italian Consolidated Law on Financial Intermediation[117], crowdfunding activity may be performed only by authorised entities, such as banks and investment companies, and by platform managers expressly authorised by CONSOB, the Italian financial watchdog.

In line with the exemption *ex* Article 3 MiFID, these platforms shall not hold sums or financial instruments pertaining to third parties. Plus, with regard to the received subscriptions of quotas representing capital, these must be transmitted to a bank or an authorised investment firms, which are the only ones allowed to execute the orders on behalf of clients[118].

[115] Guido Ferrarini and Eugenia Macchiavello, 'Investment-based crowdfunding: is MiFID II Enough?', p.673, in Danny Busch and Guido Ferrarini (ed.) 'Regulation of the EU Financial Markets', Oxford, United Kingdom, Oxford University Press, 2017

[116] Eugenia Macchiavello, 'Financial-return Crowdfunding and Regulatory Approaches in the Shadow Banking, FinTech and Collaborative Finance Era', *European Company and Financial Law Review*, 2017, p.700; see also Law 221/2012, CONSOB Regulation 18592/2013, Law 99/2013 and Law 33/2015

[117] Testo unico delle disposizioni in materia di intermediazione finanziaria, Legislative Decree 58/1998 in conjuction with Article 50-*quinquies*, paragraph 2, in conjunction with Article 16, paragraph 1, CONSOB Regulation

[118] European Commission 'Identifying market and regulatory obstacles to cross-border development of crowdfunding in the EU: Final report', 2017, p.53

Similarly to the American crowdfunding regulation[119], the Italian regime is characterized for being particularly strict in terms of financial promotion. Indeed, it is forbidden for platforms to influence potential investors by recommending or suggesting financial instruments offered on the platform itself[120]. To a certain extent, this approach seems coherent with the softer regulatory regime from which these intermediaries can benefit. On the one hand, the legislator acknowledges the peculiarities involved and provides for an adapted regime, but on the other hand it is concerned with the activity actually performed and makes sure that it does not reflect the one of firms subject to the stricter regime. As a result of this, platforms operating in the Italian context are forced to assume a passive role, as if they were mere shop windows[121]. Indeed, irrespective of the contractual terms agreed between the issuer and the platform, all the hosted campaigns should have the same visibility and be presented with similar layouts, to the end of easing their comparison[122]. Unsurprisingly, any kind of advertisement is prohibited and it is also questionable whether the platform is allowed to perform due diligence activities and provide comments on their basis, since, to a certain extent, they can influence investors' decisions[123].

Conclusively, the roles played by traditional financial intermediaries and crowdfunding platforms are quite different. As said, the formers are bound to adopt all the actions needed to achieve a successful campaign and usually try to persuade client in investing. By contrast, crowdfunding platforms are prevented from influencing the investors, with the effect that they are supposed to adopt their decisions exclusively on the basis of the attractiveness of the project.

Among the domestic legislations that have been implemented by some Member States, the British legal framework for equity-crowdfunding is considered to be the more in line with the MiFID, even though some exemptions are present. Platforms operating in the UK are subject to the regime of FCA-regulated firms, which implies that they are subject to the disclosure, risk management and conflict-of-interest rules. According to the FCA, the activities performed by the platforms include 'financial promotion', which can be defined as invitation or inducement to engage in investment activities and does not fall within the scope of the MiFID. Plus, they can also perform the service of 'arranging deals in investments', which in the MiFID refers to the 'reception and transmission of orders'.

Some platforms also offer the due diligence service, which consists of selecting issuers and providing rating information based on the project that they propose to investors.

[119] According to the Securities Exchange, in the United States inducement activities can be performed only by brokers
[120] Article 13, paragraph 3, CONSOB Regulation
[121] With respect to the American context, they have been described as 'interactive bulletin board services' by Stuart Cohn in 'The New Crowdfunding Registration Exemption: Good Idea, Bad Execution', *Financial Law Review*, 2012
[122] Annex III, n.5, CONSOB Regulation
[123] Article 13, paragraph 3, CONSOB Regulation

Other platforms operate as 'tied agents', which enable them to operate as non-regulated firms under the condition that they operate as representative of authorised investment firms[124].

Considering the high risk[125] of investing in equity-crowdfunding, in 2014 the FCA amended the already existing regulation of crowdfunding in order to increase investors' protection. In particular, they concern financial promotion, which now can be performed exclusively towards retail investors that are assumed to be aware of the risks involved and capable of facing a possible fail[126]. FCA has also provided more guidance with respect to the content of financial promotion, which must be 'clear, fair and not misleading, with regard to both the nature and performance of the assets invested in and the exit opportunities for investors'[127] [128]. It is clear that the UK authority aims to create an environment in which financial promotion is allowed and where investors can mature an informed decision, which would not be possible if misleading information were provided.

3.1.3 *Real estate crowdfunding*

A peculiar business model that is emerging in practice is the real estate crowdfunding[129]. Small investors are usually not able to invest in real estates, due to the high initial capital requirements that this kind of investment requires. However, by collecting small contributions from the crowd, crowdfunding platforms make this possible. This type of crowdfunding is analysed in the context of equity-crowdfunding because normally the platform intermediates between a real estate company, namely a company that is predominantly engaged in real estate investments, and investors. Profits are realised either by letting the acquired real estates, or by restoring an acquired building which is then sold for a higher price, with the aim of realising a yield.

[124] In 2015, eleven British platforms were operating as tied agent, see 'Investment-based crowdfunding - Insights from regulators in the EU', ESMA, 2015, p.2; see also 'Investment-based crowdfunding: is MiFID II Enough?', p.674

[125] 'The FCA's Regulatory Approach to Crowdfunding (and similar activities)', 2013

[126] Yet, the system is designed on self-awareness, since it accepts self-certifications by retail investors.

[127] 'The FCA Regulatory Approach to Crowdfunding over the Internet, and the Promotion of Non-Readily Realisable Securities by Other Media', paragraph 48

[128] Conduct of Business Sourcebook, Chapter 4 'Communicating with clients, including financial promotions', paragraph 4.2 'Fair, clear and not misleading communications', 2018

[129] European Commission, 'Assessing the potential for crowdfunding and other forms of alternative finance to support research and innovation', 2017, p.35; see also European Commission 'Identifying market and regulatory obstacles to cross-border development of crowdfunding in the EU: Final report', 2017, p.40; in 2015, the European market volume of this type of crowdfunding amounted to €26,97m, see University of Cambridge, Centre for Alternative Finance in Partnership with KPMG and CME Group Foundation, 'Sustaining momentum', September 2016, p.31

3.1.4 *Final remarks*

In conclusion, it is possible to say that compared to the Italian regime, the British one is more liberal and hinges on investors' self-awareness. If, in the light of the relevant rules, retail investors can be considered to be sufficiently aware of the risks involved, platforms are allowed to execute financial promotion, which must be performed in line with the relevant criteria. By contrast, the Italian regime is far more paternalistic and radically excludes this possibility.

3.2 Crowdlending – Regulatory overview

As a result of the distrust towards banks and mainstream financial operators following the financial crisis, combined with the credit-crunch phenomenon, peer-to-peer lending platforms have emerged as new financial (dis)intermediaries of debt financing.

Although loan-based crowdfunding platforms may adopt very different business models, it is possible to list some common services. Generally, they screen the borrowers seeking financing based on certain pre-established criteria. Then they match them with online lenders, provide the parties with boiler-plate contracts and transfer the money from the lenders to the borrowers[131].

As said, various business models may be adopted. A first one is based on the facilitation of loans among individuals, which sometimes becomes more sophisticated through the intervention of a bank, which uses the platform as a vehicle. In this scenario, the bank provides a loan to a borrower, which is then splitted, securitized and distributed among lenders[132]. Some platforms also take part in the loans that are given to the borrowers[133].

Another type of activity is based on the pooling of money from lenders to generate loans, which could be regarded as a collective investment scheme. The platform here provides for the possibility of hedging the risk of individual defaults, but at the same time lenders run a collective risk[134].

Prior to a deeper analysis, from a *prima facie* assessment is already evident that these business schemes present peculiarities that distinguish the one from the other, resulting in a fragmented regulatory regime. The activity of crowdlending platforms could remind that of banks, since some of them receive repayable funds from the public which, along with the provision of loans, constitute the activities covered by the bank monopoly under the European law[135]. However, qualifying the activity of these platforms as of payment service

[130] *Ibidem*, paragraphs 53 and 54
[131] 'Financial-return Crowdfunding and Regulatory Approaches in the Shadow Banking, FinTech and Collaborative Finance Era', p.681
[132] From a VAT perspective, this model would shift the VAT regime from the provision of credit to transactions in securities
[133] *Ibidem*, p.682
[134] FCA, 'Call for input to the post-implementation review of the FCA's crowdfunding rules', 2016
[135] Art. 4 Capital Requirements Regulation

seems more feasible and it is indeed the approach supported by the EBA[136] and adopted in Italy[137], given that certain conditions are fulfilled[138].

In the Italian context, consistently with the European Law, the banking activity is reserved to banks, as well as the activity of collecting deposits and other repayable funds from the public[139]. In light of this regulation, Banca d'Italia, the Italian banking authority, raised concerns regarding the compatibility of peer-to-peer lending platforms and banking law. The collection of money from a high number of people through the Internet, with the final objective of lend this money, may lead the interpreter to the conclusion that all the elements of banking activity are at stake.

In order to avoid the pure application of the banking law, the banking authority admitted platforms to operate either as payment institutions or as non-bank intermediaries, which are also allowed to perform payment services. This beneficial treatment can be applied on the condition that the platform recurs to banks for the opening of accounts where the collected money must be placed (i.e. platform cannot hold clients' money)[140].

Recently, Banca d'Italia has established new rules[141] that may undermine the development of the Italian crowdlending. According to the authority, borrowers (not the platforms) may violate the bank monopoly if they are not put in the condition to negotiate the terms of the contract. The reason for such restriction is that debt collection not performed by banks is allowed exclusively if the lender can be presumed to have a sufficient degree of financial awareness, which is assumed to exist when he is involved in the negotiation of the contractual terms. This interpretation has the potential to restrict significantly the Italian loan based crowdfunding, since platforms usually adopt automatic diversification models and use boilerplate contracts[142].

Qualifying platforms as payment institutions achieves the objective of avoiding the application banking the regime, but it is incredibly simplistic, since it is only concerned with the celerity of payments, while it ignores the very distinguishing features of crowdfunding intermediation, namely credit checks, due diligence on borrowers and clearly the matching between demand and offer[143]. It is then possible to assume that in the absence of more restrictive rule, platforms are more allowed to perform inducement activities and therefore adopting an active approach.

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[136] EBA 'Opinion of the European Banking Authority on lending-based crowdfunding', 2015

[137] 'Financial-return Crowdfunding and Regulatory Approaches in the Shadow Banking, FinTech and Collaborative Finance Era', p.683

[138] There must be a complete separation between the funds of the platform and of the users and those of the users themselves. Plus, the collected funds shall not assume the form of deposits.

[139] Parliament and Council Regulation 575/2013/EU, On Prudential Requirements for Credit Institutions and Investment Firms

[140] Eugenia Macchiavello, 'La problematica regolazione del lending-based crowdfunding in Italia', *Banca Borsa Titoli di Credito*, 2018

[141] Banca d'Italia , Provvedimento recante Disposizioni per la raccolta del risparmio dei soggetti diversi dalle banche, 2016

[142] 'Financial-return Crowdfunding and Regulatory Approaches in the Shadow Banking, FinTech and Collaborative Finance Era', p.684

[143] *Ibidem*, p.686

As opposed to the Italian legislator, after an initial period of *laissez-faire* that contributed to the development of crowdlending, the British FCA has dedicated much more attention to lenders protection, thus providing rules that affect the activity of platforms engaged in this type of crowdfunding. In all likelihood, this is due to the spread usage of crowdlending in the UK, which holds the most significant share of the European market.

At the beginning, platforms only needed a license as debt-distractors and debt-collectors, without being subject to any other specific rules, whereas now the credit agreement must be adequately explained prior to its conclusion and the same financial promotion rules relevant for equity-crowdfunding must be respected.[144]

'Operating an electronic system in relation to lending' has become a regulated activity by FSMA[145], with the main aim of the legislator to implement a disclosure-based regime to ensure that investors have the information they require to make informed investment decisions. This is achieved by bringing the activities of lending platforms within the definition of 'controlled activities' in the Financial Promotion Order, where it is expressively stated that the provision of information in connection with peer-to-peer loans is expressly included as a controlled activity[146]. As a result, platforms must comply with the FCA guideline, in particular with the core rule that all communications must be fair, clear and not misleading. For instance, a platform must explain the expected and actual default rates, assumptions used to predict default rates and a description of how a loan risk is assessed.

Differently from the Italian regime, platforms are allowed to hold the money collected from the lenders, even though that implies that they are subject to specific rules, designed to ensure adequate protection of clients' funds when given into the hands of the firm[147].

3.3 Article 3 MiFID II: An exemption that might shelter crowdfunding platforms from upcoming radical changes in the VAT treatment of financial intermediaries

It has been exposed that the across Europe crowdfunding platforms frequently benefit from Article 3 MiFID II, which allows member states to exempt qualifying firms from the burdensome regime of this Directive.

MiFID II is imposing profound changes to the activity of financial intermediaries, raising concerns also with regard to the influence that these changes might have over the VAT regime of financial intermediation[148]. In particular, with the aim of granting both transparency and independence of financial intermediaries' activity, MiFID I already prevented MiFID firms, namely intermediaries, from receiving

[144] Eugenia Macchiavello, 'Peer-to-peer Lending and the "Democratization" of Credit Markets: Another Financial Innovation Puzzling Regulators', *Columbia Journal of European* Law, 2015, p.562
[145] Article 36H FSMA (Financial Services and Markets Act, 2000)
[146] Louise Gullifer and Jennifer Payne, 'Corporate Finance Law: Principles and Policy', Hart Publishing, Oxford, United Kingdom, 2015, p.673
[147] Clients Assets Sourcebook (CASS)
[148] Quentin Warscotte, 'MiFID II and VAT: what to expect', KPMG Luxembourg, 30 November 2017 https://blog.kpmg.lu/mifid-ii-and-vat-what-to-expect/

inducement from third parties[149]. After having realised that inducements could occur by paying MiFID firms for financial research[150], the European legislator with the MiFID II has finally imposed to provide and price separately intermediation services and financial research services[151]. Previously, the provision of these two services under the same bill offered for the possibility of extending the exemption for financial services also to financial research. This was possible in the light of the composite supplies doctrine[152], which allows extending the VAT treatment of a principal supply, in this case the financial service, to an ancillary supply that otherwise would be subject to VAT. The unbundling of intermediation and financial research services imposed by MiFID II will call for a new analysis of the services rendered by financial intermediaries, where the leading question will be whether the composite supplies doctrine will still be applicable. If that will not be the case, also from a VAT perspective there will be two separate supplies, one taxed (i.e. the financial research) and the other exempt.

By benefitting from the exemption ex Article 3 of MiFID and provided that similar rules will not be implemented in the domestic law, these changes will not affect the VAT treatment of crowdfunding platforms engaged in financial return crowdfunding. While traditional financial intermediaries will be subject to a transparency regime that potentially will restrict the possibility to benefit from the composite supplies doctrine, crowdfunding platforms will keep being subject to a softer regulatory regime that might offer the opportunity to use the intermediation service as a cap for other related services potentially subject to VAT.

4 Testing the concept of financial intermediation against the activity of crowdfunding platforms

This chapter aims to provide a VAT assessment of the activity of crowdfunding platforms through the findings exposed in the second chapter and by taking into account their business model in the light of the financial regulation shown in the third chapter.

At this point, an essential premise must be made. The VAT assessment exposed in the following paragraphs refers exclusively to the provisions of the VAT Directive, without reference to its concrete implementation. Nevertheless, in dealing with the exemption for financial services, a crucial aspect must be taken into account. As stated by the CJEU, the contractual relationship that is established between the parties

[149] Larissa Silverentand, Jasha Sprecher and Lisette Simons, 'Inducements', in Danny Busch and Guido Ferrarini (ed.) 'Regulation of the EU Financial Markets', Oxford, United Kingdom, Oxford University Press, 2017

[150] Financial research may consist, among other things, of providing market predictions concerning products or sectors

[151] Article 24 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

[152] CJEU 25 February 1999, Case C-349/96, *Card Protection Plan Ltd v. Commissioners of Customs and Excise*, ECLI:EU:C:1999:93.; for more insights regarding the composite supplies doctrine, see section 4.6

involved becomes relevant when it comes to determining how the third party is acting[153](i.e. in his name or in the name of the principal) and the national judge is called to assess this aspect taking into account all the circumstances of the case[154]. The latter was aware that the provisions of the VAT Directive would have been applied in 28 Member States, most of them with different legal traditions. Indeed, the VAT law framework is common for all Member States, but that framework is applied in a continent where civil law categories are far from being common[155]. As a result, in order to pursue the same objective that brought the CJEU to develop the doctrine of independent legal concepts, namely the uniform application of VAT, the VAT Directive does not refer to nominate contracts. Instead, VAT consequences are determined in accordance with the effects of legal phenomena, irrespective of their source[156]. This is the case, for instance, of commissionaires and intermediaries: the VAT Directive does not determine when, from a civil law perspective, a third person is actually acting in his own name or in the name of the principal. Despite the fact that it is the contractual relationship binding the two parties to determine the tax object, which is the activity that might trigger – if and how – the application of the VAT, the CJEU often adopts an 'economic' approach[157]. It focuses on the economic reasons and effects of the contract, rather than exclusively on its literal content[158]. In his opinion[159] concerning the joined cases *Mirror Group*[160] and *Fitzgerald International*[161], Advocate General Tizzano, called to discuss the interpretation of contractual relationships in a VAT context, offered the perfect synthesis of this dialectic: 'In order to identify the key features of a contract … we must go beyond an abstract or purely formal analysis. It is necessary to find the contract's economic purpose, that is to say, the precise way in which performance satisfies the interests of the parties. In other words, we must identify the element which the legal traditions of various European countries term the cause of the contract and understand as the economic purpose, calculated to realise the parties' respective interests, lying at the heart of the contract.' In the case of commissionaires and intermediaries, this means that in order to determine which VAT regime applies, it must be verified what are the effective contractual obligations flowing from the contract, without taking the

[153] See section 2.4.2; in particular Case C-163/91, *Van Ginkel Waddinxveen BV, Reis- en Passagebureau Van Ginkel BV and others v Inspecteur der Omzetbelasting Utrech*, ECLI:EU:C:1992:435

[154]

[155] Piera Filippi, 'I profili oggettivi del presupposto' in 'L'importa sul Valore Aggiunto – Aspetti economici e giuridici', Atti del convegno Assonime-LUISS del 21 e 22 Settembre 2009, *Giurisprudenza delle imposte*, Volume LXXXII – 2009, p.35

[156] Andrea Carinci, 'La rilevanza fiscale del contratto tra modelli impositivi, timori antielusivi e fraintendimenti interpretativi', *Rassegna Tributaria*, 2014, p.966; see also Francesco Montanari 'Le operazioni esenti nel sistema dell'IVA – Exemptions in the VAT system', Giappichelli Editore, Torino, 2013, p.285

[157] 'Defining the tax object in composite supplies in European VAT', p.201

[158] CJEU 27 September 2012, Case C-392/11 *Field Fisher Waterhouse, Field Fisher Waterhouse*, ECLI:EU:C:2012:597, para. 23 where the CJEU refers to the economic reasons for concluding a contract; CJEU 13 July 1989, Case C-173/88 *Skatteministeriet v Henriksen*, ECLI:EU:C:1989:329, para.15 where the CJEU refers to the economic transaction; CJEU 28 October 2010, Case C-175/09 *AXA UK*, ECLI:EU:C:2010:646, para. 23 where the CJEU refers to the economic purpose

[159] Opinion of Advocate General Tizzano, Case C-409/98 *Commissioners of Customs and Excise v Mirror Group*, ECLI:EU:C:2001:49 and Case C-108/99 *Commissioners of Customs and Excise v Cantor Fitzgerald International*, ECLI:EU:C:2001:49, para.28

[160] CJEU 9 October 2001, Case C-409/98 *Mirror Group*, ECLI:EU:C:2001:524

[161] CJEU 9 October 2001, Case C-108/99 *Cantor Fitzgerald International*, ECLI:EU:2001:526

definitions used by a Member State. If that was not case, similar situations could be subject to different VAT treatment exclusively because of the legal definitions adopted.

In conclusion, when it comes to determine the VAT treatment of crowdfunding platforms, the interpreter will have to investigate both the type of contractual relationship established between the two parties, for that concours to define the tax object, and the economic substances of the activity that is performed.

Prior to this analysis, the author wishes to expose the positions that have been taken concerning the topic object of this thesis.

4.1 Position of the VAT Committee

Article 398 VAT Directive provides for the setting up of the VAT Committee, which is an advisory body that promotes the uniform application of the provisions of the VAT Directive. It is composed of the representatives of national Governments (often officials of the Ministries of Finance) and of the European Commission. It holds no legislative power, but it provides for some guidance with respect to the application of European VAT[162].

As to crowdfunding and in accordance with Article 398(4) VAT Directive, on the 6th of April 2015 the Committee issued a Working Paper. With regard to the question raised in this thesis, the Committee argues that insofar as the intermediation service supplied by the platform relates to one of the financial services listed in Article 135 VAT Directive, that activity will fall within the scope of VAT. Therefore, this will be the case when through the platform a company issues shares representing equity, in accordance with Article 135(1)(b), or when the platform matches the demand and offer of debt financing, in accordance with Article 135(1)(f). Considering that the activity of negotiation refers to the two mentioned exempt supply, the VAT Committee concludes that the exemption will also apply to the activity of crowdfunding platforms. No further guidance is provided and reference to the case law is absent[163].

4.2 Position of the doctrine

It has already been said that due to its relatively recent raise, few contributions have been provided with respect to the VAT treatment of crowdfunding. As regard to financial crowdfunding , it has been argued that the activity of platforms might be considered as an intermediation service, as such falling within the scope of the exemption provided by Article 135 VAT Directive. This solution is contended to be in line with the cases CSC, Arthur Andersen and Volker Ludwick[164]. Among these, specific reference is made to the CSC case, where the Court found that the activity of negotiation may be limited to the pointing out of suitable opportunities for the conclusion of a contract, which would be the case of crowdfunding platforms. It is contempt that no indication

[162] European Commission website, visited on April 6th 2018
[163] Value Added Tax Committee, 'VAT treatment of crowdfunding', Working Paper No.836, February 6 2015, p.18
[164] For a more extended explanation of these cases, see section 2.3

can be found in the case law regarding how active an intermediary should be in order to fall within the scope of the exemption[165]. Other authors also hold that the activity of the platforms shall be regarded as that of intermediaries for VAT purposes[166], as such falling within the exemption for financial intermediation.

4.3 Proposal for a twofold step analysis

In light of the analysis of the financial intermediation exemption provided by Article 135 VAT Directive, it stands to reason to follow the same line of reasoning that has emerged in that context to the end of providing a VAT analysis of the (supposed) intermediation service provided by crowdfunding platforms. This approach assumes the form of a twofold step analysis. First of all, starting from the abovementioned assumption, according to which financial intermediation shall not be considered other than the general concept of intermediation as laid down in the overarching rule *ex* Article 28 VAT Directive, it must be verified whether all the elements of the external position[167] of the intermediary are fulfilled. The starting point of this analysis is the type of contractual relationship that binds the crowdfunding platform with its principal, who depending on the circumstances will be the company issuing quotas representing capital, or the borrowers seeking for debt financing.

The first analysis could lead to different hypotheses. Either, the crowdfunding platform can be considered as acting in the name and on behalf of another person or in its own name. Only in this scenario, the question will then become whether all the elements of the internal activity[168] are fulfilled. In the second scenario, by acting in its own name, the platform will be subject to the consequences of Article 28, which will be exposed later on. However, it could also be the case that the platform cannot be regarded as a third party at all.

4.3.1 *Crowdfunding platforms 'acting in the name and on behalf' of a principal*

4.3.1.1 *External position*

It has been exposed that when it comes to assessing the VAT treatment of an economic activity the contractual relationship between the parties involved might assume a crucial role in defining the taxable object. When it

[165] Madeleine Merkx, 'The VAT Consequences of Crowdfunding', *International VAT Monitor*, January/February 2016, p.15

[166] Sebastian Pfeiffer, 'A VAT/GST Perspective on Crowdfunding' in Robert F. van Brederode and Richard Krever (ed.) *VAT and Financial Services – Comparative Law and Economic Perspectives*, Atlanta, USA – Melbourne, Australia, Springer, 2017, p. 237; with reference to the Italian domestic legislation, this is also the opinion of Piera Santin exposed in 'Il crowdfunding alla sfida delle qualificazioni fiscali', *Rassegna Tributaria*, 2017, p.692

[167] For an explanation of this concept, see section 2.4.3

[168] For an explanation of this concept, see section 2.4.3

comes to crowdfunding platforms, the starting point is then that the concepts set out in Article 28 VAT Directive have an independent European Union Law meaning. The national judge has then to verify whether, according to all the details of the case and the contractual relationship established between the two parties, a platform is acting as a third party in the sense of Article 28 VAT Directive and, if so, whether it is acting in in its own name or in the name of another person[169].

It is now assumed that a national judge has concluded that a crowdfunding platform is acting in the name and on behalf of a principal. In analysing the external position of the platform as an intermediary for VAT purposes, this is the first step that shall be taken into account. However, other aspects concur to define this position. First of all, as it emerged in CSC, Arthur Andersen and Volker Ludwig, the intermediary must maintain a contractual relationship with both contractual parties involved, which seems like a requirement that will most likely be fulfilled by platforms.

In the third chapter reference has been made to the fact that some platforms active in the UK market operate as tied agents of authorised investment firms[170]. From a VAT perspective, in such a scheme the platform would operate as a sub-intermediary of the investment firm (i.e. a MiFID firm) and the service that it performs will be likely to be exempt. In fact, in light of the Volker Ludwick case, even when the third party, acting as sub-intermediator, does not have a direct relationship with the principal of the intermediary, it can still benefit from the exemption *ex* Article 135 VAT Directive. In the opinion of the author, this is true insofar as the sub-intermediary acts in the name and on behalf of the intermediary[171], even though it seems that the CJEU did not take into consideration this aspect.

Turning to another aspect of the external position of the intermediary, it was mentioned that the CJEU requires that the intermediary should not have any interest in the terms of the contract[172]. It has been explained that this interest must be intended as a legal interest, therefore not a material one[173]. This aspect assumes importance when platforms operating in the context of crowdlending participate in the provision of loans, which makes them part of the groups of lenders. It is self-evident that being part of a contract, like in the case considered, breaches the requirement of not 'having any interest of his own [the negotiator] in the terms of the contract'[174].

It is now time to remark again the relevance of the contractual relationship that binds the platform and its principal, because there lies the answer as to whether the platform is 'acting in the name and on behalf' of the principal. These words may sound general and be lacking of a legal tradition background, resulting in an undefined concept. Notwithstanding, the author believes that the way this provision has been drawn is not a

[169] CJEU 12 November 1992, Case C-163/91, *Van Ginkel Waddinxveen BV, Reis- en Passagebureau Van Ginkel BV and others v Inspecteur der Omzetbelasting Utrecht*, ECLI:EU:C:1992:435
[170] See section 3.1.2.2
[171] See section 2.3.4
[172] CJEU 13 December 2001, Case C-235/00, *Commissioners of Customs and Excice v CSC Financial Services Ltd*, ECLI:EU:C:2001:696
[173] See section 2.4.3
[174] *Contra* Sebastian Pfeiffer, 'A VAT/GST Perspective on Crowdfunding' in Robert F. van Brederode and Richard Krever (ed.) *VAT and Financial Services – Comparative Law and Economic Perspectives*, Atlanta, USA – Melbourne, Australia, Springer, 2017, p. 237

weakness. On the opposite, it covers the economic substance of various contractual relationships that might be ruled very differently from one member state to another. From the perspective of the VAT Directive, the tax object of intermediation lies first in these words and only those are relevant. From them, it can be derived that the European legislator was referring not merely to persons that simply put into contact with potential contractual parties. That becomes relevant when it comes to analysing the internal activity of the intermediary, but in the first place, it must be verified whether that intermediary is legally entitled to manage one's own rights and interests to come at an agreement[175].

In a crowdfunding campaign, a preliminary question comes up, as to who shall be regarded as the principal. Indeed, usually this will be the company seeking for financing, which entitles the crowdfunding platform to place its shares or to stipulate in its name a loan agreement. When this is the case, the platform seems to fulfil the elements of the external position, because it will be acting in the name and on behalf of a principal, in this case, the company seeking for financing. In other words, the company will engage the platform in order to allocate the shares representing its capital, so that the platform will be entitled to contractually bind the company as if it was the company itself.

From a different perspective, it could be argued that when the investor entrusts the platform to invest his funds, he shall be regarded as the principal. This situation does not seem likely to occur in the Italian regime, where platforms do not manage the investment decisions of investors, but merely provide for a digital investment place, where individuals can evaluate projects. By contrast, it seems possible to state that in those models in which the platforms takes the investments decisions on behalf of the investors, the former will be considered in the position of managing someone else's rights. Furthermore, the situation does not seem to change when the investor only decides, for instance, the sector in which to invest, or the level of risk that he believes being able to afford, or the type of instrument in which to invest. If the final investment decision is up to the platform and even when that decision is determined by using pre-established algorithms developed by the platform itself, it can still be regarded as managing the rights of the investor. Therefore, in these circumstances, it will be regarded as an intermediary in the sense of the VAT Directive.

4.3.1.2 *Internal activity*

Assuming now that all the requirements of the external position are met, namely that the platform is acting in the name and on behalf of the principal, that it has a contractual relationship with both contractual parties and that it has no legal interest in the terms of the contract, it is possible to turn to the analysis of the internal position.

The starting point is the definition of the intermediary activity that might be performed by platforms. As a premise, it is useful to report that the CJEU has stated that the tool through which a service is provided

[175] CJEU 13 December 2001, Case C-235/00, *Commissioners of Customs and Excice v CSC Financial Services Ltd*, ECLI:EU:C:2001:696, para. 39

does not affect the applicability of the exemption, insofar it can be objectively considered as one of those listed in Article 135 VAT Directive[176]. Hence, the fact that the service considered is supplied through online platforms does not prevent *per se* the applicability of the exemption. Turning back to the nature of the service performed, it seems that the activity of the platform will generally consist of pointing out suitable opportunities. However, this cannot be considered as sufficient for the exemption to apply, since considering the relevant case law of the CJEU, it emerges how essential it is whether an intermediary is acting passively or actively[177]. It is possible to draw a *line rouge* that connects all the decisions adopted by the CJEU in the field of financial intermediation, a line that commenced with the Weissgerber case, where activity of introducing clients 'who were seeking for credit' was considered to be as a typical feature of an intermediary[178]. However, the most remarkable decision in the field of intermediation remains the CSC case, which might even lead to the conclusion that at the turn of the century the CJEU gave a decision that divided financial intermediation before and after it[179]. Nonetheless, several years have passed and in the meantime the financial sector has profoundly changed and keeps changing at an outstanding pace, creating new products and services in the attempt to increase efficiency. From a tax law perspective, when the interpreter encounters a phenomenon that stresses the existing categories, and even in the absence of specific guidance from the judiciary, he cannot abdicate to the role of providing an assessment. The latter shall be provided by taking into account the existing legislation and the relevant case law, which can be combined and interpreted even in a functional way . In our case, it would be simplistic both stating that for the sole fact that the activity of crowdfunding platforms is performed through a technological device it cannot amount to an active role the intermediary[180]. The same must be said as to the statement that the activity does amount *per se* to an active role, as such leading to the conclusion that they can always be regarded as financial intermediaries. Conclusively, the interpreter should adapt the concept of active role to an activity that did not exist in the past and target the relevant elements that concur to reshape this concept when is considered in the field of crowdfunding.

As said, the activity most likely to be performed by crowdfunding platforms is the pointing out of suitable opportunities, which is the case exclusively when the intermediary actively canvasses customers. In this sense, the presence of marketing activities may be regarded as an element that concurs to argue that the third party, supposedly an intermediary, is an active one. Yet, this cannot be considered enough to state that effectively intermediation is at stake. In the third chapter of this thesis two jurisdictions have been taken into consideration to show the fragmented regulation of crowdfunding across Europe, at least at this stage. By looking in parallel the regulation of crowdfunding in the UK and in Italy, it emerges how different the activity of the platforms is shaped by financial regulation. It was argued that the British regulation seems inspired by

[176] CJEU 5 June 1997, Case C-2/95 *Sparekassernes Datacenter (SDC) v Skatteministeriet*, ECLI:EU:C:1997:278
[177] *Contra* Merkx in 'The VAT Consequences of Crowdfunding', p.15
[178] See section 2.3.1
[179] For a more detailed analysis of the CSC case, see section 2.3.2
[180] It could be argued that such a view has no ground if one considers the SDC decision, where the Court provided that the device used to perform an activity does not affect *per se* the question whether or not an exemption should apply.

a principle of self-responsibility of retail investors, who are those that the usually legislators aim to protect, based on the assumption that they lack the knowledge that professional investors, on the other hand, do have. By placing products that are not valued by the market, differently from shares listed on a stock exchange, this risk is even higher in the case of financial crowdfunding. However, the British legislator and the Italian one[181] have dealt differently with this problem. The British legislator does not radically prevent platforms from inviting or inducing potential investors from engaging in investment activities, but it only regulates to whom this financial promotion can be performed and, when this is possible, how that is done. We have seen that outstanding attention is put on the concrete content of the information that clients are provided with, which must be 'clear, fair and not misleading'[182]. At the end of the day, it seems fair to state in the regulatory framework of the UK, platforms are able to seek for potential investors actively, therefore effectively falling within the concept of active intermediary as defined by the CJEU with respect to VAT.

It is interesting to notice that the same problem posed by financial crowdfunding has been dealt with in a totally different way by the Italian legislator. The regulation that has been provided, especially if looked in comparison with the British one, seems far more prudent. Instead of defining under which circumstances an inducement activity might be performed by platforms, both in terms of what kind of investors and what kind of information to be provided, financial regulation completely prevents platforms from any inducement activity. The result is that this third party may only offer a passive environment where different kind of investments are proposed. Furthermore, these financial products must be presented consistently, adopting the same standards and avoiding the provision of any kind of investment suggestions. The final result is that if one assumes that the inducement activity defines when a platform is acting actively to the end of VAT intermediation, then it seems fair to conclude that in the Italian context this will not be the case, because platforms do not actively seek for clients. Instead, they merely provide visibility in the web. By contrast, in the UK the analysed third party seems much closer to the concept of intermediary in the sense of the VAT Directive, which leads to the conclusion that the exemption might apply only in this context and not in the Italian one.

Due to the mentioned fragmented scenario in the context of financial crowdfunding across Europe, these findings might be applied with the required adjustments to any other jurisdiction, to end of providing a VAT assessment consistent with the case law and the concrete activity performed.

4.3.2 *Crowdfunding platforms 'acting in their own name and on behalf of' – Extension of the underlying service*

Although it does not seem to be a situation likely to be found in reality, to the end of providing a holistic analysis and for theoretical purposes, it is now taken into consideration the case in which the domestic judge

[181] As explained above, when the Italian legislation is cited, reference is made to the crowdfunding legislation, which is the only one that has been provided at this stage.
[182] This is the case for both crowdlending and equity-crowdfunding. For more details, see section 3.1.2.2

has come to the conclusion that the crowdfunding platform is 'acting in its own name and on behalf of' a principal. This is not likely to happen because the business model of platforms seems to exclude that they can act on behalf of a principal, but in their own name, namely as undisclosed agents. Indeed, that would imply that the potential client is not aware of the principal, but it has been shown that both in the case of equity-crowdfunding, where investors can choose in which companies to invest, and in the case of crowdlending, where the lender can typically choose to which borrower put funds at disposal, that will not be the case. Some doubts might be raised when the investor can be regarded as the principal and entrusts the platform to invest his funds, as it was mentioned above. In that scenario, it could be possible for the platform to invest these funds as if they were its.

As it has been exposed, according to Article 28 VAT Directive, when a third party is acting in its own name and on behalf of another person in relation to a supply of a service, that third party is deemed to have supplied the same service. Under these circumstances, the VAT treatment of the service provided by the platform will follow the treatment of the service provided by its principal. Thus, it becomes relevant to analyse the VAT treatment of this underlying supply.

In the context of crowdfunding, different situations might be considered. It was mentioned that the situation in which it is more likely for the platform to act in its own name and on behalf of a principal is when the investor can be regarded as the principal who entrusts the platform for his investments. In this scenario, if the platform is not acting in the name of the investor, it will be deemed to supply the same underlying service, instead of an intermediation service.

If, for VAT purposes, the investors is a taxable person acting as such, who entrusts the platform for the provision of loans on his behalf, that service will be considered as provision of credit, as such exempt in accordance with Article 135(1)(b) VAT Directive. Following Article 28 VAT Directive, the service provided by the platform will be then subject to the same exemption. By contrast, when an investor entrusts the platform for the purchasing of shares on his behalf, the consequences for VAT purposes are entirely different. Since a similar situation may happen when the borrower is considered to be the principal of platform, the two situations will be analysed together below.

The situation becomes quite peculiar both when, in the context of crowdlending, the principal of the platform is the borrower and when, in the context of equity-crowdfunding, the principal is the investor who entrusts the platform for the purchasing of shares on his behalf. In fact, in order to determine the VAT regime of the intermediation supply, one would normally look at the VAT treatment of the underlying service. The problem is that in these two scenarios, the recipient of the platform's supply, so either the borrower or the investor that aims to purchase shares, are not the supplier of the underlying service. In fact, in the former case the lender is the service supplier, while in the latter case the company selling or issuing shares is the supplier of the service. Therefore, both the borrower and the investor are regarded as the recipient of the service provided by the platform, but at the same time, they are also both recipients of the respective underlying services. It seems then that there will be principals on both sides: on one side, there will be either the borrower or the investor that entrust the platform, whereas on the other side there will be either the lender or the investee.

Article 28 VAT Directive does not explicitly deal with this situation, which at first sight becomes a *cul de sac*. Notwithstanding, an interpretation that aims to give substance to a given provision might be proposed. It stands to reason to argue in both situations reference should be made to the actual service that is supplied either by the lender or the investee, irrespective of the fact that either the borrower or the investor have entrusted the platform. Therefore, the service that the platform provides to them should either be the exemption *ex* Article 135(1)(b) VAT Directive in the case of provision of credit, or it should be considered to be out of the scope of European VAT when the investee issues shares. When the shares are sold on the secondary market, i.e. when they are not issued, the service provided by the platform will be exempt in accordance with Article 135(1)(f).

4.3.3 *Crowdfunding platforms, not even a third party*

It is now considered the case in which in light of the concrete circumstances and taking into account the contractual relationship between the parties, it can be concluded that the platform is not acting on behalf of any principal. In this scenario, only from a material perspective the platform can be regarded as involved in the supply of a service between two parties, but from a juridical perspective there are no legal obligations binding the platform to act on behalf of a principal, which consequently excludes the relevance of the name in which it is acting. However, a VAT assessment is still required, since there still is a remunerated activity performed by a taxable person. Once it is excluded that the service can be considered as an intermediary one, the supply assumes the form of a general service[183] that, as such, should be subject to VAT. The way in which this service is defined from a civil law perspective in different Member States has a limited relevance at this point, insofar as it can be concluded that the tax object, which the contract concurs to determine, does not fall within the scope of the *facti specie* ex Article 135 VAT Directive as described in this thesis.

4.4 Financial intermediation in real estate crowdfunding: is it always financial?

Reference has been made to a specific model of equity crowdfunding, namely the real estate one. As a premise, it must be said that the VAT treatment of real estates in the context of the VAT Directive is quite peculiar. Indeed, it is possible to find exceptions upon exceptions and multiple optional rules, among which it is possible to find Article 15(2)(c) VAT Directive. This provision allows member states to regard as tangible property 'shares or interests equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof.' As a result of this provision, if the crowdfunding platform is operating in a member state that has opted in for this provision, shares of a real estate company that are sold or issued to investors will be regarded as supply of goods and the VAT treatment will the change

[183] Francesco Accettella e Nicoletta Ciocca, 'Emittente e portale nell'equity-based crowdfunding', *Giurisprudenza Commerciale*, Fasc.2, 2017, p.251

accordingly[184]. In particular, if the supply of immovable property is performed by a taxable person acting as such, it will fall within the scope of European VAT. This supply might be subject to VAT if the Member State has made use of the option to tax *ex* Article 137(1)(b).

When it comes to assessing a supply, the CJEU has often made reference to the objective character of the transaction, which raises the question as to whether the analysis should refer to the economic substance or exclusively to the juridical form of the transaction at stake. Looking at the guidance provided by the CJEU, the answer might depend on the text of the Directive. In some cases[185], the CJEU has considered the economic substance to be decisive, especially considering the principle of neutrality. However, when there is an explicit provision at stake, as it is the case of Article 15 VAT Directive, the principle of legal certainty has to prevail[186]. Therefore, if the member state has not made use of Article 15(2)(c)[187], even when the transfer of shares takes the form, *de facto*, of a transfer of immovable property, it must still be regarded as a transfer of shares[188]. It is possible to derive from the case law that when an optional provision of the VAT Directive is at stake, as in the case considered but also with regard to Article 11 VAT Directive on VAT grouping, the CJEU limits its interpretative power because optional provisions extend the fiscal sovereignty of Member States[189].

Nevertheless, in the context of crowdfunding, it is less likely that the transfer of shares takes the form of an indirect supply of immovable property, due to the fragmented participation in the real estate company. Instead, one aspect is worth analysing, namely the financial intermediation provided by the crowdfunding platform regarding the shares. Indeed, when the platform is operating in a Member State that did not make use of Article 15(2)(c), the transfer of shares will be regarded as such, resulting in the intermediation related to that sale as financial intermediation, as such exempt under Article 135(1)(f) VAT Directive[190]. However, a question may now be raised: could the VAT treatment of the intermediation service be influenced by the VAT treatment of the underlying services? In the case considered in this paragraph, it has been shown that under Article 15(2)(c) VAT Directive a legal fiction can be established. In particular, despite the fact that shares are transferred, the transaction would be regarded as a supply of goods, instead of a supply of services. Therefore, the underlying service, for VAT purposes, will not be considered as a financial service.

Due to the fact that this question relates to the more general issue regarding the relationship between the underlying service object of the intermediation service, it is appropriate to dedicate a separate subparagraph to this topic, which might also involve other crowdfunding-related hypothesis.

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[184] 'Fundamentals of EU VAT LAW', p.324

[185] CJEU 9 October 2001, Case C-108/99 *Commissioners of Customs & Excise v Cantor Fitzgerald International*, ECLI:EU:C:2001:526

[186] CJEU 5 July 2012, Case C-259/11 *DTZ Zadelhoff vof v Staatssecretaris van Fianancië*n, ECLI:EU:C:2012:423

[187] In *DTZ Zadelhoff* the member state involved was The Netherlands, which did not make use of Article 15(2)(c) VAT Directive

[188] Ad van Doesum, 'What looks like a duck is a duck: economic purpose and legal reality in EU VAT law', *World Journal of VAT(GST Law*, 2015, p.204

[189] Albert H. Bomer, 'From *Skandia to Larentia*: National Jurisdiction to Deviate from the VAT Directive', *Intertax*, Volume 44, Issue 8 and 9, 2016

[190] *Ibidem*; see also 'Fundamentals of EU VAT LAW', p.324

4.5 Relationship between the underlying supply and the intermediation provided by the platforms

As anticipated in the previous paragraph, it is worth analysing the relationship between the intermediation service and the underlying service in the context of crowdfunding. In other words, the question relates to the extent to which the underlying service can influence the VAT treatment of the intermediation service.

With regard to real estate crowdfunding, it was said that under certain circumstances a transaction in shares, which normally is considered as a supply of services, might be regarded as a supply of goods subject to VAT. Therefore, instead of a service exempt under Article 135(1)(f) VAT Directive, for VAT purposes there will be a supply of goods subject to VAT. In this scenario, the intermediation service provided by the platform would refer, from a concrete standpoint, to a transaction in shares, which for VAT is regarded as a supply of goods.

The relationship between the two supplies becomes relevant also when the underlying service falls outside the scope of VAT. With respect to crowdfunding, this may often happen in the equity model, where shares are often issued instead of being sold on the secondary market. It is now crucial to remark that from a juridical perspective no difference exists between the general activity of issuing of shares and the activity that takes place when companies seek for capital financing through crowdfunding platforms. It is settled case law[191] that the issuing of shares is not an economic activity, as such falling outside the scope of VAT. Nevertheless, with respect to equity crowdfunding, the VAT Committee seems to re-invoke doubts in relation to the qualification of the issuing of shares that the CJEU apparently put to rest[192]. Before the decision provided by the CJEU in *Kretztechnik*, there was a fragmented VAT treatment of the issuing of shares across Europe. Some Member States, by way of analogy, treated this operation as a sale of shares, therefore as an economic activity exempt from VAT under Article 135(1)(f) VAT Directive. On the contrary, others looked at issuing of shares as a non-economic activity, like the CJEU eventually ruled. Despite this clear decision, the VAT Committee agreed that 'such operations should either remain outside the scope of VAT or should be exempt as financial transactions'[193], as if doubts between the two solutions were still present. Turning back to the problem object of this paragraph, crowdfunding platforms might then perform an intermediation service related to an underlying activity that falls outside the scope of the VAT.

A third scenario that might be considered is less likely to occur in practice, but it is interesting to consider it from a theoretical perspective. It has been said that normally platforms are remunerated under the condition that the campaign is successful. It is even possible that the remuneration is proportionate to the debt or capital collected. However, it is now assumed that the intermediation service offered by the platform is separately remunerated, therefore in this situation the principal pays for the opportunity of seeking for

[191] CJEU 26 May 2005, Case C-465/03 *Kretztechnik*, ECLI:EU:C:2005:320
[192] Rita de la Feira, 'When do dealings in shares fall within the scope of VAT?', *EC Tax Review*, 2008, p.34; see also Stanley A. Esajas, 'The Issue of Shares', *VAT Monitor*, 1999
[193] Value Added Tax Committee, 'VAT treatment of crowdfunding', Working Paper No.836, February 6 2015, p.15

financing through the platform irrespective of the final result of the campaign. Hence, a question emerges, namely what are the consequences for a financial intermediation service when the underlying transaction, which was in the process to be performed, does not come to existence. Indeed, if the company fails to reach the amount the was intended to be raised, all the subscriptions are annulled and from a juridical perspective nothing would have happened[194].

The solution to all these cases depends on the relevance that is given to the connection between the intermediation service and its underlying.

4.5.1 *Three hypothesis*

4.5.1.1 *The underlying supply is subject to VAT*

It has been argued that the intermediation service is by its nature connected to the underlying service, resulting in the former to be exempt only if the latter is effectively exempt from VAT[195]. In the case of real estate crowdfunding as described in the previous paragraph[196], this situation may occur. Despite the fact that shares are materially transferred, for VAT purposes they are regarded as a supply of goods, as such subject to VAT. The solution proposed would then lead to the unsatisfactory outcome that the intermediation service is subject to VAT as well.

4.5.1.2 *The underlying supply falls outside the scope of VAT*

As regards to the case in which the underlying supply falls outside the scope of VAT and similarly to the position presented in the subparagraph above, it has been contended that also the in these circumstances the intermediation service would no longer relate to an exempt financial service, resulting in the intermediation service being subject to VAT[197]. It was mentioned that this may happen in the context of equity crowdfunding, but the same situation could also occur when a holding company not engaged in economic activity sells some

[194] A similar situation that involves a conditioned event that eventually does not realise has been recently referred by the Irish Supreme Court to the CJEU (Case C-249/17, *Ryanair Ltd v Revenue Commissioners*). In this case, the CJEU has been asked whether a company is entitled to input VAT recovery in relation to an unsuccessful bid to acquire a target company. Under the condition laid down in CIBO (CJEU 27 September 2001, Case C-16/00 *Cibo participations SA v Directeur regional des impôts du Nord-Pas-de-Calais*, ECLI:EU:C:2001:495), VAT on costs related to a bid are in principle deductible. On the 3rd of May 2018, the opinion of Advocate General Kokott was delivered (Opinion of Advocate General Kokott, 3 May 2018, Case C-249/17 *Ryanair Ltd v Revenue Commissioners*, ECLI:EU:C:2018:301), and, unsurprisingly, she has stated that the right of deduction should be granted in this case. It is more interesting to notice that according to the Advocate General costs involved should be fully deductible. If the CJEU will follow the reasoning of the Advocate General, that would constitute an evolution in the case law regarding the link with overall economic activity, since in this circumstances the CJEU has always acknowledged the right of deduction according to the pro-rata system, hence qualifying the costs involved as general.

[195] 'Intermediation of Insurance and Financial Services in European VAT', p.285

[196] Intermediation is performed in a member state that has both opted in for Article 15(2)(c) VAT Directive and has made use of the option to tax ex Article 137 VAT Directive

[197] 'Intermediation of Insurance and Financial Services in European VAT', p.285

participations in one of its subsidiaries. The intermediation service is also in this case related to an activity that falls outside the scope of VAT.

4.5.1.3 *The underlying supply does not take place*

When intermediation refers to a supply that eventually does not come to existence, as it is in the case of an unsuccessful raise of capital in equity crowdfunding, a literal interpretation of Article 135 could lead to the conclusion that the intermediation service is not VAT exempt. An example has been proposed to explain this situation. It is assumed that after the negotiation performed by the intermediary, a principal eventually decides not to conclude an agreement related to a financial supply (e.g. purchasing of shares)[198]. However, this example does not seem perfectly appropriate, especially if one takes into account the basic rule of intermediation, according to which the intermediary acts in the name of the principal. Indeed, it seems quite odd that once that the agreement has been reached between the intermediary and an investor, the principal could revoke the consensus that has been expressed.

Instead, it seems more appropriate to consider another example similar to the unsuccessful capital increase. The intermediary, acting on behalf of the principal, is about to come to an agreement with an investor, but before the conclusion of the agreement the principal revokes the order to act on his own behalf. Since intermediaries are usually paid conditionally upon the conclusion of an agreement, no VAT consequences would be present in that case. However, if in this scenario the intermediary is remunerated, the service becomes closer to the an advisory service, as such subject to VAT[199].

4.5.2 *Related, yet parallel services*

Providing a case by case analysis does not seem the optimal solution[200]. At the end of the day, all the above-exposed situations refer to the general activity of intermediation, thus taking a step back might put the interpreter in the conditions to provide different VAT assessments consistent with a common line of reasoning. First of all, the VAT interpreter should bear in mind the stressed point of departure in the field of financial intermediation, namely the fact that it is inserted in the broader context of VAT intermediation. In that context, it emerged the profound difference existing between the intermediation service and the underlying service, which could be regarded as being closed, performed in parallel, and yet diverse, autonomous and independent from each other. In light of these thoughts, there seems to be little ground to argue that the influence of the underlying service could be so intense to affect, as a general rule, the intermediation service that lives in symbiosis with it. This line of reasoning finds even more ground if viewed in light of the analysis of Article 28 VAT Directive. In the context, it was shown that a third party acting in his own name is not actually

[198] '*Ibidem*, p.282
[199] CJEU 21 June 2007, Case C-453/05, *Volker Ludwig v Finanzamt Luckenwalde*, ECLI:EU:C:2007:369
[200] This is the approach that emerges in 'Intermediation of Insurance and Financial Services in European VAT', p.279-287

performing an intermediation service. In this scenario, the consequence *ex* Article 28 VAT Directive is that the service provided by the third party follows the VAT treatment of the underlying service. At the end of the day, it can be stated that the VAT Directive is inspired by a consistent view of the intermediation service, according to which only when a third party is involved in the supply of a service, yet not performing a proper intermediation supply, the underlying service becomes relevant in determining the VAT treatment of the intermediation service. If that is not the case, the intermediation service must be regarded as a distinct service.

Considering the case in which the underlying service is subject to VAT, it seems not possible to draw that as a general rule the intermediation service will be consequently subject to VAT as well. Clearly, every time that the underlying supply is by its nature other than a financial service, there will be no reason to exempt the service of the intermediary. Nonetheless, in some circumstances, things are more complex. In the case of real estate crowdfunding, it was shown that only by virtue of a legal fiction the transfer of shares might be regarded to be a supply of goods. Arguing that such a legal fiction, which does not change the nature of the underlying supply, provides sufficient ground to sustain that the intermediation service should be considered as intervening on a supply of goods, as such taxed, seems to overestimate the influence of the VAT treatment of the underlying supply. After all, shares remain shares, irrespective of how they are treated under certain conditions.

The same line of reasoning can be followed when it comes to the case in which the underlying service falls outside the scope of VAT, as it happens in the case of equity crowdfunding. The intermediation service of the platform always refers to transactions in shares, both in the case of the primary market (i.e. issuing of new shares) and in the case of the secondary market (i.e. platforms offering the possibility of selling shares). Excluding the exemption for intermediation for the sole fact that the VAT treatment of the underlying supply in the former situation is different from the latter, seems also in this case artificial. At the end of the day, the intermediation service relates in both cases to transactions in shares. The fact that these two different transactions in shares are treated for VAT purposes does not seem to have influence over the intermediation service.

Perhaps, the final case is more complicated, namely the situation in which the underlying service does not take place. The problem emerges exclusively when the service provided by the platform is remunerated irrespective of the final result of the campaign, otherwise, in the absence of any kind of consideration, the activity could not be regarded as an economic one for VAT purposes. Also in this case, it seems quite helpful to bear in mind the distinction between the two services. Indeed, if the platform arranges several deals with potential investors, who subscribe the shares that principal is willing to issue, it could be argued that the intermediation service is performed in all its aspects. Therefore, the fact that the subscriptions are annulled – or, even more appropriately, that never came to existence – seems sufficient to sustain that in that case, the intermediation service relates no longer to a financial service.

4.6 Composite supplies doctrine in the context of crowdfunding intermediation

Various business models can be adopted by crowdfunding platforms, depending on the type of services that they decide to – and are allowed to – offer in addition to the intermediation between investors and investees. Among these, it was mentioned that some platforms in the UK provide for due diligence activities, consisting in rating the issuers and providing investors with advice concerning their investments. The question then comes up as to the VAT treatment of these additional services. In all likelihood, in this scenario the platform would issue an invoice that includes both services: on the one hand, the advisory service, which is typically subject to VAT, and on the other hand the intermediation service, which is exempt under Article 135 VAT Directive. Thus, it must be verified whether in the light of the composite supply doctrine it is possible to consider the advisory service as an ancillary supply related to the principal intermediation supply, which would provide for the possibility of applying the exemption to both services[201].

Looking at the case law of the CJEU in the financial sector, it emerges that most of the times, even when multiple services are supplied to the customer, the CJEU considers them as constituting a single supply for VAT purposes, subject to the VAT regime of the principal one. Most likely, this is due to the complexity that often characterises the financial sector, where multiple services are often so bound to each other in a way that makes it difficult to draw their borders[202].

In the case of crowdfunding platforms, one may be persuaded to think that the advisory services should be regarded as separated from the intermediation service, on the ground that the advisory service does not constitute a mere means to enjoy the principal's service in a better way, because not all platforms offer this service. However, in the composite supplies assessment, the comparison between different suppliers engaged in similar activities does not seem to be taken into account by the CJEU, which is then a criterion that shall be excluded.

Instead, when it comes to advisory service related to an intermediation service, specific guidance might be found in the Ludwig[203] decision, where the CJEU held that since the advisory service was provided only in a preliminary phase and was remunerated conditionally upon the provision of the intermediation service, the latter should have been regarded as the principal supply, which VAT regime had to be extended to the advisory services. This situation seems applicable, by analogy, to the case of crowdfunding platform supplying both kinds of services.

It has been argued that if the provision of collection services is present, which consists in the receiving of money on blocked accounts on behalf of the investees, that service should be regarded as the principal service. As that service would be subject to VAT, in these circumstances the entire supply, including the intermediation, should be subject to VAT[204]. However, in practice, such distinction between the intermediation

[201] Howard Liebman and Olivier Rousselle, 'VAT Treatment of Composite Supplies', *International VAT Monitor*, March/April 2006
[202] 'Defining the tax object in composite supplies in European VAT', p.194
[203] CJEU 21 June 2007, Case C-453/05, *Volker Ludwig v Finanzamt Luckenwalde*, ECLI:EU:C:2007:369
[204] 'The VAT Consequences of Crowdfunding', p.16

service and the intermediation service seems unlikely to occur. Indeed, it would be inefficient for an investee to refer to the platform only to find potential investors and paying separately for the collection of money. Moreover, even if such a division were present, there would be no ground to use it as a term of comparison to argue that when such collection practice is present, it assumes the role of principal supply. By contrast, when it comes to the assessment of composite supplies, the analysis of the CJEU strongly hinges on the essential features of the transaction, taking into account all the circumstances in which the transaction takes place[205]. In light of this observations and considering that the intermediation supply is the one sought by the investee, the service characterizing the activity of crowdfunding platform, it stands to reason to argue that if the condition exposed in this thesis are met, the exemption provided by Article 135(1) VAT Directive should be extended to all the services related – and ancillary – to it, including the collection service.

4.7 Place of supply of the intermediation service

Some words can be dedicated to the analysis of the place of supply for VAT purposes. This will primarily depend on the direction of the transaction, thus on who shall be regarded as the recipient of the intermediation service. It stands to reason to argue that in the context of financial crowdfunding, three situations might take place in practice. First, the case in which a company that already qualifies as a taxable person in accordance with Article 9 VAT Directive issues shares. Second, the case in which a company is still in the process of actually starting the economic activity and is collecting the initial capital. In this scenario, it might not qualify as a taxable person yet. Third, in the case of crowdlending, the lender might be regarded as the recipient of the intermediation service. Considering that most likely only retail investors engage in crowdfunding campaigns, they most likely will not qualify as taxable persons for VAT purposes.

Assessing whether the recipient is a taxable person acting as such is crucial to determine the place of supply of the intermediation service. When the recipient qualifies as a taxable person, like in the first case considered, Article 44 VAT Directive will apply. Therefore, following the principle of destination, the place of supply will be where the recipient has established his business. On the opposite, when the recipient does not qualify as a taxable person, Article 45 VAT Directive will apply, which means that the place of supply will be where the crowdfunding platform is established[206].

Sometimes in the context of crowdfunding Article 9a VAT Regulation[207] might become relevant. This rule provides some clarification as to the place of supply of electronically supplied services. In the context of crowdfunding, this might occur in the reward-based model, where the reward is in the form of an electronic

[205] 'Defining the tax object in composite supplies in European VAT', p.199
[206] 'A VAT/GST Perspective on Crowdfunding', p. 237
[207] Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast) [2011] OJ L 77/1 as amended by Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services [2013] OJ L284/1

service[208], like in the case, for instance, of a music track. It must be stressed that this special provisions regarding intermediation services apply when the underlying service can be regarded as an electronically supplied one. In the opinion of the author, this is not the case neither when the company issues shares nor when debt financing is put at the disposal of the company by lenders. In conclusion, the general rule *ex* Article 44 VAT Directive should then apply.

5 Conclusions

This thesis aimed to shed some light over the VAT treatment of crowdfunding platforms supplying a new type of financial intermediation, an innovation that raised the question as to the circumstances under which the VAT treatment should be the same of traditional financial intermediaries. In the attempt to provide the reader with a realistic picture of the activities that are emerging in practice, the most popular business models have been described, taking into account how financial law shapes them by determining the kind of services that a platform is allowed to supply.

The VAT assessment has been exposed after having defined the characteristics of Article 135 VAT Directive and its interpretation resulting from the case law of the CJEU. It was exposed that due to the vague and general content of this provision, the CJEU has progressively pointed out the elements that must be present in the context of financial intermediation for the exemption to apply. In particular, two main aspects are of special importance, namely the external position and the internal activity of the intermediary. The latter aspect relates to the *natura negotii*, namely the 'nature of the supply', whereas the former concerns the contractual relationship that is established between the parties involved. It was then argued that in this context the contract plays a crucial role in determining the taxable object, since only through it is possible to assess whether the platform is entitled to act in the name of its principal, which would qualify the platform as a true intermediary in the sense of the Directive. Only this feature can trigger the application of the exemption *ex* Article 135 VAT Directive and it is up to the national judge to assess whether, considering all the circumstances, such element is at stake. This line of reasoning is believed to be the most in line with the case law of the CJEU regarding the concept of 'negotiation'. However, the author believes that a systematic reform of the exemption for financial services would have provided more certainty as to the application of VAT in this ever-changing sector. Unfortunately, reciprocal vetoes within the European Council have prevented the implementation of the proposed reform, but the flaws of Article 135 VAT Directive are still in place. It may be also true that the lost chance of reforming the VAT treatment of financial services offers the opportunity to the European Union legislator to reform the system by taking into account how the financial sector has changed over time, thus setting the new rules accordingly.

The analysis also showed what implications derive from the relationship between the intermediation service and the underlying service, which, in the context of financial crowdfunding, will be either the supply

[208] 'A VAT/GST Perspective on Crowdfunding', p. 237

of shares or the provision of loans. Under certain circumstances, the underlying service might not fall within the scope of the exemption *ex* Article 135 VAT Directive, which leads to the question as to whether this should have some consequences over the applicability of the same exemption to the intermediation service supplied by the platform. As a general rule, the author believes that due to the dichotomy between the two services involved, the influence of the VAT treatment of the underlying service over the intermediation service should not be overestimated. Notwithstanding, a different line of reasoning might be followed and perhaps some additional guidance will result from future case law.

As a conclusion, it was challenging to explore the world of financial crowdfunding through the lens of VAT. Through this journey, it was possible to see how important it is to maintain constant attention to the details of the activity that is analysed, since little differences might lead to radical changes in the VAT regime. Analysing the same phenomenon from different standpoints as it was the case, for instance, when it came to the definition of who shall be regarded as the principal, hopefully provided the reader with a clearer overview and, possibly, stimulated more questions for the ongoing discussion.

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