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**UBER’S INTERNATIONAL TAX SCHEME: INNOVATIVE TAX  
AVOIDANCE OR SIMPLE TAX EVASION?**

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\* J.D. Candidate, Syracuse University College of Law, 2019. I would like to thank Professor Robert Nassau for his time and support in this process and for always challenging me along the way.

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## INTRODUCTION

The city of Edinburgh lays in a deep blue shadow, not yet awoken by the sun. However, a young man is already scurrying about his apartment, dragging his luggage down the wooden steps as his phone rings. He clasps the gold door knob, swinging the door open to see his Uber car waiting to take him to the airport. The Uber driver rushes out of the heated car, grabs the man's luggage, tosses it in the trunk, and within minutes both are off to the airport.

Raindrops coalesce and then separate, streaming down a large window reflecting a hunched-over barrister with his fingers dancing across the keyboard. With one click of the mouse, he rushes to the printer and snatches the freshly-printed documents. He clasps on his leather briefcase "click" and he storms out of his London office as his phone jingles inside his suit pocket. He pushes his umbrella open and darts to his identified Uber—he is already late for a meeting.

Foam sloshes and oozes down the pints of Guinness as the glasses "clink" together. A group of freshly-graduated university students celebrate the last stop on their Belfast bar crawl. A young man grabs his worn jean pocket as his phone vibrates frantically. "Uber's here!" The belligerent graduates saunter down the cobblestone walkway to the car. A hand

clutches the door handle and jerks the car door open. The young man bends over and projectile vomits onto the interior of the car—that's a fine.

Customarily, individuals would obtain a traditional taxi by phone, by hailing one on the street, or at a cab stand. Today, those methods are “out-of-date” as the debut of e-hailing services expands into the international domain. Uber is a technology powerhouse that developed digitally convenient e-hailing taxi services from its headquarters in San Francisco, California to the United Kingdom, and beyond. Whether an individual needs a ride to the airport, a ride home, or a ride to another city, he or she uses Uber to order and pay for a taxi on-demand. Uber is now an international 70-billion-dollar technology company known for its unique services and business model, which has fundamentally transformed the market for “point-to-point” transportation.<sup>1</sup> Despite the positives, Uber's innovative business model disrupts the traditional value-added tax (“VAT”) regulatory framework in the European Union (“EU”), specifically in the United Kingdom (“UK”).

This Note explores both the European Union Council Directive (“EU VAT Directive”) and the UK's Value Added Tax Act 1994 (“UK VAT Act”), and their regulatory application to Uber. First, the Background will examine the evolution of VAT legislation in the EU, the history of Uber and the sharing economy in the 21<sup>st</sup> century, and Uber's international business and tax structure. Second, the Analysis breaks apart the UK VAT Act and its applicability to Uber's business structure. Finally, this Note will articulate how Uber commits tax evasion in the UK and will explore the Digital Single Market Strategy for Europe (“Digital Single Market”), which will go into full effect in 2021, aiming to simplify the VAT registration process and prevent tax evasion.

## I. BACKGROUND

### A. History of VAT Legislation in the UK

In 1970, the Chancellor of the Exchequer of the UK (the head of Her Majesty's Treasury) enacted the VAT to replace the Purchase Tax.<sup>2</sup> As part of the UK's reform of the tax system, the UK introduced VAT that applies to both goods and services without distorting the consumer's

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1. Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 4 (2017).

2. Chancellor of the Exchequer, *Value-Added Tax*, CAB\129\153 NAT'L ARCHIVES 1, 1 (Oct. 30, 1970), available at <http://filestore.nationalarchives.gov.uk/pdfs/small/cab-129-153-cp-70-99.pdf> (last visited Nov. 22, 2018).

expenditures.<sup>3</sup> Today, the EU VAT Directive requires all Member States to adopt VAT legislation that conforms to EU standards, specifying that each Member State applies its own VAT rate of at least 15 percent.<sup>4</sup> Currently, the UK VAT Act is the controlling legislation regulating VAT throughout the UK (comprised of England, Wales, Scotland, and Northern Ireland).<sup>5</sup> According to Section 4(1) of the UK VAT Act, “VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.”<sup>6</sup>

### 1. VAT Calculation

VAT acts as a type of consumption tax, meaning the supplier charges the tax against the consumer on the purchase of the good or service.<sup>7</sup> The UK charges VAT on goods and services when value is added at each stage along the production chain, starting from raw materials and extending to the final sale.<sup>8</sup> At each stage, an individual or business that purchases goods or services for business use may be reimbursed for the VAT it paid or claim the reverse charge (specifically for business-to-business transactions), discussed below in Section III(C)(1). In short, the end consumer who buys a good or service pays the supplier the sale price plus the 20 percent VAT amount, and the supplier pays the VAT amount to Her Majesty’s Revenue and Customs (“HMRC”), the UK’s government department responsible for collecting taxes.

Since the United States does not use this type of taxation system, an example follows to illustrate how the UK applies the VAT in commerce. A farmer produces wheat and sells one pound to a baker for 20 pence.<sup>9</sup>

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3. *Id.*

4. Walter Hellerstein & Timothy H. Gillis, *The VAT in the European Union*, 127 TAX NOTES 461, 462-64 (2010). “Each Member State has its own national VAT controlled by its own rules and ‘derogations’ from the EU standard.” *Id.*

5. *United Kingdom, THE COMMONWEALTH*, available at <http://thecommonwealth.org/our-member-countries/united-kingdom> (last visited Nov. 21, 2018); see generally Value Added Tax Act 1994, c. 23 (UK).

6. Value Added Tax Act 1994, c. 23, § 4(1) (UK).

7. *What Is Value-Added Tax (VAT) and Who Pays It?*, INVESTOPEDIA (May 2018), available at <https://www.investopedia.com/ask/answers/011915/what-value-added-tax-vat-and-who-pays-it.asp> (last visited Nov. 22, 2018).

8. Charles C. Engel II, *Revisiting the Value Added Tax: A Clear Solution to the Murky United States Corporate Tax Structure*, 22 IND. INT’L & COMP. L. REV. 347, 350 (2012).

9. Derek Thompson, *How Does a ‘Value Added Tax’ Work, Anyway?*, THE ATLANTIC (Mar. 1, 2010), available at <https://www.theatlantic.com/business/archive/2010/03/how-does-a-value-added-tax-work-anyway/36834/> (last visited Nov. 22, 2018).

At a 20 percent VAT rate, the VAT is four pence.<sup>10</sup> The baker pays the farmer 24 pence.<sup>11</sup> The farmer pays HMRC four pence in VAT.<sup>12</sup>

The baker makes a loaf of bread out of the wheat and sells it to a store for 60 pence.<sup>13</sup> At a 20 percent VAT rate, the VAT is 12 pence.<sup>14</sup> The store pays the baker 72 pence.<sup>15</sup> The baker pays HMRC eight pence in VAT—he pays 12 pence in VAT but receives a four pence credit from the government.<sup>16</sup>

The store sells the loaf of bread to an individual for £1.<sup>17</sup> At a 20 percent VAT rate, the VAT is 20 pence.<sup>18</sup> The individual pays £1.20 to the store for the loaf of bread.<sup>19</sup> The store pays HMRC eight pence in VAT—the store pays 20 pence in VAT but receives a 12 pence paid credit from the government.<sup>20</sup>

In total, the HMRC receives four pence from the farmer, eight pence from the baker, and eight pence from the store.<sup>21</sup> The government collected its 20 percent VAT of 20 pence on the £1 final sale.<sup>22</sup>

## 2. Who Can Reclaim VAT

The general rule is that an individual or business can reclaim VAT paid on goods and services purchased for the use of its business.<sup>23</sup> If the purchase is both for business and personal or private use, then the individual or business (“Buyer”) can only reclaim the business portion of the VAT.<sup>24</sup> The Buyer must file a VAT return with HMRC to reclaim the VAT.<sup>25</sup> The Buyer must record all transactions of goods and services purchased for business purposes and a total VAT amount to be refunded

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *See* Thompson, *supra* note 9.

15. *Id.*

16. *Id.* This is an example of how the baker used the goods (wheat) for business purposes and reclaimed the VAT it paid.

17. *Id.*

18. *Id.*

19. *See* Thompson, *supra* note 9.

20. *Id.* This is an example of how the store used the goods (bread) for business purposes and reclaimed the VAT it paid.

21. *Id.*

22. *Id.*

23. *Reclaiming VAT*, Gov.UK, available at <https://www.gov.uk/reclaim-vat> (last visited Nov. 22, 2018).

24. *Id.*

25. *Id.*

on the VAT return.<sup>26</sup> The Buyer calculates the VAT amount from VAT invoices issued by the suppliers to the Buyer.<sup>27</sup> After the Buyer files the VAT return, HMRC refunds the Buyer the VAT amount indicated on the return, assuming the return contains correct information.<sup>28</sup>

On the other side of the transaction, suppliers need to be cognizant as to whether the transaction is a business-to-consumer transaction (“B2C Transaction”) or a business-to-business transaction (“B2B Transaction”) to issue valid VAT invoices. B2C Transactions are transactions between a business (the supplier) and a consumer (the buyer), who is usually a natural person not registered for VAT.<sup>29</sup> B2B Transactions are transactions between two businesses who are both VAT registered.<sup>30</sup> In B2B Transactions, the “reverse charge” will most likely apply (as discussed further in Section III(C)(1)). However, a natural person may register for VAT and, in that case, is regarded as a VAT taxable person.<sup>31</sup> All sales between the VAT-registered business and individual are now treated as B2B Transactions.<sup>32</sup> It is important that suppliers always issue a VAT invoice because, at first glance, it is not clear as to whether an individual is registered for VAT.

### ***B. History of Uber: Accelerating from San Francisco to the UK***

Unable to hail a cab on the streets of Paris, two friends attending an annual tech conference mulled over the idea of a limo service that they could order via an application (“app”) on a smartphone and, as a result, Uber was born.<sup>33</sup> Uber, a mobile-compatible app, connects riders with drivers utilizing a smartphone’s GPS capabilities.<sup>34</sup> Founded in May 2010,<sup>35</sup> Uber Technologies Inc. (“Uber Technologies”) began as a start-up tech company in San Francisco and has quickly conquered the taxicab industry with an international presence by operating in 858 cities in 84

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26. *Id.*

27. *VAT Record Keeping*, GOV.UK, available at <https://www.gov.uk/vat-record-keeping> (last visited Nov. 22, 2018); see also *Reclaiming VAT*, *supra* note 23.

28. *Reclaiming VAT*, *supra* note 23.

29. PwC, *Who Are B2C Clients for VAT Purposes?*, PwC (Oct. 9, 2012), available at <http://ebiz.pwc.com/2012/10/who-are-b2c-clients-for-vat-purposes/> (last visited Nov. 22, 2018).

30. *Id.*

31. *Id.*

32. *Id.*

33. Dan Blystone, *The Story of Uber*, INVESTOPEDIA (Aug. 9, 2018), available at <https://www.investopedia.com/articles/personal-finance/111015/story-uber.asp> (last visited Nov. 22, 2018).

34. *Id.*

35. *Id.*

countries.<sup>36</sup> Uber entered the EU transportation market in late-2011, making its debut in Paris.<sup>37</sup>

To operate the Uber app, a user must first download and open the app.<sup>38</sup> Next, the rider must enter his or her name, credit card information, address, and submit a request for pickup.<sup>39</sup> The app will alert the rider to the cost of the ride (the fare) prior to submitting the ride request, which is determined by the rider's car and service preference.<sup>40</sup> Uber calculates the fare by recording the driving time, subject to discounts or multiplied by a "surge-charge" based on high demand.<sup>41</sup> After the rider makes the ride request, the app notifies a nearby Uber driver who can accept or reject the ride request.<sup>42</sup> If accepted, the app provides the driver with the rider's name, location, and rating; in turn, the rider receives the driver's name, location, picture of driver's vehicle, and license plate number.<sup>43</sup> The driver arrives at the designated pick-up location and the rider hops in the vehicle and enjoys the ride.<sup>44</sup> At the end of the journey, the rider exits the vehicle and the app takes care of payment, asks the rider to rate the driver, and prompts the rider to leave feedback on the ride.

### C. Taxing the Sharing Economy

Technological innovation paves the way for startups—from Uber to companies such as Airbnb—to create a new model of production and consumption of goods and services, known as the sharing economy. The sharing economy enables individuals to obtain rides, rent

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36. *Uber Cities*, UBER ESTIMATOR, available at <https://uberestimator.com/cities> (last visited Dec. 2, 2018) (quoting an estimate as of Dec. 2, 2018).

37. Blystone, *supra* note 33.

38. "An app is computer software, or a program, most commonly a small, specific one used for mobile devices." *Definition—What Does App Mean?*, TECHOPEDIA, available at <https://www.techopedia.com/definition/28104/app> (last visited Dec. 2, 2018).

39. Rebecca Elaine Elliott, *Sharing App or Regulation Hack(ney)?: Defining Uber Technologies, Inc.*, 41 IOWA J. CORP. L. 727, 734 (2016).

40. Passengers may select an "UberX" (sedan), "UberXL" (van or SUV), or "Select" (high-end cars). *Always the Ride You Want*, UBER, available at <https://www.uber.com/us/en/ride/> (last visited Nov. 20, 2018). Also, passengers may select to ride in the car by themselves or use "UberPool," which matches passengers with one another who are traveling in the same direction. UberPool operates like a carpool function. *uberPOOL: Together, We Save*, UBER, available at <https://www.uber.com/ride/uberpool/> (last visited Nov. 20, 2018).

41. See Elliott, *supra* note 39, at 735 & 742.

42. See *id.* at 734.

43. *Id.*

44. See *id.*

accommodations, or hire services from peers via their electronic devices (a computer or mobile app) in exchange for payment.<sup>45</sup>

Within the sharing economy, consumers and suppliers conduct transactions electronically, falling into the broad category of electronic commerce (“e-commerce”).<sup>46</sup> E-commerce is the purchase and sale of tangibles, intangibles, and services through electronic means (Internet or app).<sup>47</sup> This new business concept of collaborative consumption has significantly impacted traditional industries and challenges the international tax regime.<sup>48</sup> Lawmakers and professionals argue that the tax laws for brick and mortar locations do not strictly apply to transactions conducted via electronic devices, namely e-commerce.<sup>49</sup> Additionally, the EU’s imposition of VAT on these goods and services purchased electronically face numerous challenges, such as whether the “thing” being purchased qualifies as a good or service, who constitutes a “taxable person,” distinguishing the “place of supply” of the supplier, and which VAT rate applies to the electronic transaction.<sup>50</sup>

#### ***D. Uber’s Tax Scheme***

Uber is headquartered in San Francisco and used in 858 cities in 84 countries.<sup>51</sup> In 2013, Uber negotiated new venture capital financing to multiply its worth ten-fold, from \$330 million to \$3.5 billion.<sup>52</sup> Uber created a complex business and tax structure to limit its tax liabilities by using a well-known arrangement called the “Double Dutch” tax model.<sup>53</sup> Uber formed multiple Dutch subsidiaries (Uber International C.V., Uber

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45. Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989, 989 (2016).

46. See Rifat Azam, *Global Taxation of Cross Border E-Commerce Income*, 31 VA. TAX REV. 639, 647 (2012).

47. See *id.*

48. See *id.* at 652.

49. See *id.*; see also Subhajit Basu, *International Taxation of E-Commerce: Persistent Problems and Possible Developments*, J. INFO. L. TECH. 1, 7 (2008), available at [https://warwick.ac.uk/fac/soc/law/elj/jilt/2008\\_1/basu/basu.pdf](https://warwick.ac.uk/fac/soc/law/elj/jilt/2008_1/basu/basu.pdf) (last visited Nov. 25, 2018).

50. See Basu, *supra* note 49.

51. *Uber Cities*, *supra* note 36.

52. Brian O’Keefe & Marty Jones, *How Uber Plays the Tax Shell Game*, FORTUNE (Oct. 22, 2015), available at <http://fortune.com/2015/10/22/uber-tax-shell/> (last visited Nov. 22, 2018).

53. *Id.*; see also Nino Sichinava, *How to Lose Friends and Alienate People. Five Lessons from Uber*, POL. CRITIQUE (Sept. 21, 2017), available at <http://politicalcritique.org/world/2017/how-to-lose-friends-and-alienate-people-five-lessons-from-uber/> (last visited Nov. 22, 2018).



B.V., and other local subsidiaries)<sup>54</sup> to effectively shield all its ride-share income outside the United States from domestic and foreign taxes.<sup>55</sup>

Beginning at the starting line stands Uber Technologies, the parent company of Uber and headquartered in San Francisco, CA.<sup>56</sup> Uber Technologies established its presence in Europe as Uber International C.V. ("Uber C.V."), incorporated in the Netherlands but headquartered in Bermuda as a law firm with no employees.<sup>57</sup> Uber Technologies and Uber C.V. negotiated a cost-sharing deal to split the profits from Uber Technologies' intellectual property.<sup>58</sup> This cost-sharing deal states that Uber C.V. retains the right to use Uber Technologies' intellectual property outside of the United States for a one-time fee of approximately \$1 million, and in turn Uber Technologies receives a royalty of 1.45 percent of future net revenue.<sup>59</sup>

Next in line is Uber B.V. and the other local Uber subsidiaries. Uber B.V. is a private limited liability company located in the Netherlands that hires employees to process the transactions conducted in Europe.<sup>60</sup> Additionally, Uber has strategically placed local subsidiaries, such as Uber London Limited (incorporated in the UK), in Member States in which it operates.<sup>61</sup>

Uber B.V. processes 100 percent of passengers' payments for the Uber rides they take outside of the United States.<sup>62</sup> Off the top, Uber B.V. keeps 20 percent of the fare price.<sup>63</sup> Uber C.V. and Uber B.V. contracted in such a way that Uber B.V. retains one percent of the 20 percent cut of each transaction as income and pays the rest of the profits (the other 19 percent) to Uber C.V. as a royalty fee for the use of Uber Technologies' intellectual property.<sup>64</sup> Then, Uber C.V. pays its 1.45 percent of royalties to Uber Technologies.<sup>65</sup>

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54. O'Keefe & Jones, *supra* note 52; *see also* Sichinava, *supra* note 53.

55. O'Keefe & Jones, *supra* note 52.

56. *See id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Sichinava, *supra* note 53; *see also* O'Keefe & Jones, *supra* note 52.

61. *See* O'Keefe & Jones, *supra* note 52; *see also* *Legal: Terms and Conditions (UK)*, UBER (Mar. 14, 2018), *available at* <https://www.uber.com/legal/terms/gb/> (last visited Nov. 22, 2018).

62. *See* O'Keefe & Jones, *supra* note 52.

63. *See id.*; *see also* Sichinava, *supra* note 53.

64. O'Keefe & Jones, *supra* note 52.

65. *See id.*

In the end, Uber (through a third subsidiary called Rasier Operations B.V.) sends back 80 percent of the initial fee to the individual Uber driver who charged the fare.<sup>66</sup> Therefore, Uber C.V., Uber B.V., and its other international subsidiaries maintain links to Uber Technologies in San Francisco, CA through the slew of contracts. The international subsidiaries, such as Uber C.V. and Uber B.V., represent the nuts and bolts to Uber's international business and tax infrastructure in Europe.

## II. ANALYSIS

The sharing economy created an efficient, expedient, and collaborative business model to fulfill life's demands without the need to own property outright. Uber leads the ride-sharing business with increasing popularity, as individuals can use the Uber app for on-demand rides. Nonetheless, Uber received harsh criticism over the last five years, domestically and internationally, that transpired into tremendous international opposition and litigation. Recently, the controversy concerns Uber's refusal to pay VAT in the UK. Uber argues that it is not required to charge VAT because it is not providing a good or service, its place of supply is not in the UK, and the Uber drivers are taxable persons as independent contractors.<sup>67</sup> I strongly disagree with Uber's stance, and a court would most likely disagree as well.

To determine whether Uber must charge VAT in the UK, a court must establish the following elements: (1) Uber supplies a good or service;<sup>68</sup> (2) its place of supply is in the UK;<sup>69</sup> and (3) Uber represents a taxable person with a total VAT taxable revenue over £85,000.<sup>70</sup> This Section discusses how Uber satisfies each of these elements, and, therefore, must charge VAT in the UK.

### A. *Uber Supplies a Transportation Service*

First, a court must determine whether Uber supplies a good or service. Uber contends that it represents a "technology platform" and not a

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66. Sichinava, *supra* note 53.

67. *See* Uber B.V. v. Aslam (2017) Appeal No. UKEAT/0056/17/DA (appeal taken from ET) (UK); *see generally* Case C-434/15, Asociación Profesional Elite Taxi v. Uber Systems Spain SL, 2017 EUR-Lex CELEX LEXIS 981 (Dec. 20, 2017).

68. Value Added Tax Act 1994, c. 23, § 1 (UK).

69. *Id.* § 7A.

70. *Id.* § 3; *see also* Policy Paper VAT: Maintain Thresholds for 2 Years From 1 April 2018, Gov.UK (Nov. 22, 2017), available at <https://www.gov.uk/government/publications/vat-maintain-thresholds-for-2-years-from-1-april-2018/vat-maintain-thresholds-for-2-years-from-1-april-2018> (last visited Nov. 22, 2018).

service, which only acts as an intermediary to connect drivers with riders through its smartphone app.<sup>71</sup> Recently, the Court of Justice of the European Union (“CJEU”), Europe’s highest court, rejected Uber’s technology platform claim and ruled that Uber is a “transportation service” because it inherently links itself to a transport service.<sup>72</sup>

The CJEU highlights two essential arguments: (1) Uber’s app is imperative for both the drivers and riders; and (2) Uber exercises authority over its drivers.<sup>73</sup> First, Uber acts as more than an intermediary, due to the importance of the Uber app for both the drivers and riders.<sup>74</sup> The app remains an “integral part of an overall service whose main component is a transport service.”<sup>75</sup> Second, Uber exercises authority over the conditions under which its drivers provide the service, such as quality of vehicles, fare rate through the app, and receiving revenue before paying the drivers.<sup>76</sup> The CJEU ruling confirmed precedent that a transportation service includes any service inherently linked to the physical act of transporting persons from one place to another.<sup>77</sup> Therefore, the Uber app acts as a transportation service because the Uber app is a necessity to connect drivers and riders, Uber exerts control over its drivers, and the Uber app links directly to the physical act of transporting individuals.<sup>78</sup> Since the CJEU ruled that the Uber app is a transportation service under EU law, Uber faces heightened pressure to charge VAT.

### ***B. Uber Supplies a Transportation Service in the UK***

Second, a court must determine whether Uber supplies a transportation service in the UK.<sup>79</sup> Uber argues it is not obligated to charge VAT because its place of supply is located in the Netherlands; thus, Uber abides by the Dutch VAT rate of zero percent (since its Dutch subsidiaries—Uber C.V. and Uber B.V.—process its UK revenue).<sup>80</sup> According

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71. See Erin Mitchell, Comment, *Uber’s Loophole in the Regulatory System*, 6 HOUS. L. REV. 75 (2015).

72. *Asociación Profesional Élite Taxi v. Uber Systems Spain SL*, 2017 EUR-Lex CELEX LEXIS 981.

73. *Id.*; see also Court of Justice of the European Union Press Release No. 136/17, *The Service Provided by Uber Connecting Individuals With Non-Professional Drivers Is Covered by Services in the Field of Transport* (Dec. 20, 2017).

74. *Asociación Profesional Élite Taxi*, 2017 EUR-Lex CELEX LEXIS 981.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Value Added Tax Act 1994, c. 23, § 7A (UK).

80. Oscar Williams-Grut, *EXCLUSIVE: Uber’s Rival Says It Uses ‘Tax Avoidance on an Industrial Scale,’ and Wants Europe to Investigate*, BUS. INSIDER (July

to Section 7A of the UK VAT Act, “[a] supply of services is to be treated as made: in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs, and, otherwise, in the country in which the supplier belongs.”<sup>81</sup> Section 7A is subject to Schedule 4A.<sup>82</sup> According to Schedule 4A, “[a] supply of services consisting of the transportation of passengers . . . is to be treated as made in the country in which the transportation takes place . . .”<sup>83</sup> The place of supply is the “country in which the recipient belongs” (Section 7A),<sup>84</sup> which is “the country in which the transportation takes place” (Schedule 4A).<sup>85</sup> To determine Uber’s place of supply, a court must ask: In what country does the transportation take place?

*1. Uber’s “Place of Supply” is the UK*

Generally, the location where the transport physically takes place represents the place of supply for passenger transport services.<sup>86</sup> If the transport services are conducted physically inside the UK, then the supply of those services are within the scope of the UK VAT.<sup>87</sup> Uber hires drivers throughout the UK to transport individuals (recipients) throughout the UK. Accordingly, the transport physically takes place in the countries that comprise the UK; therefore, Uber’s place of supply is the UK. As a result, the services Uber provides fall within the scope of the UK VAT and are subject to the UK VAT rate of 20 percent.<sup>88</sup>

***C. Uber is a “Taxable Person”***

Lastly, a court must determine whether Uber is a “taxable person [entity].”<sup>89</sup> Uber asserts that its drivers are the taxable persons (i.e. independent contractors) and required to charge VAT on the bookings (thereby transferring Uber’s VAT obligation onto the drivers by using the

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31, 2015), available at <https://www.businessinsider.com/uber-tax-in-europe-2015-7> (last visited Nov. 22, 2018).

81. Value Added Tax Act 1994, c. 23, § 7A(2) (UK).

82. *Id.* § 7A(5).

83. *Id.* at sch. 4A(1)(2)(1) (UK); see also *id.* § 7A(5) (UK).

84. *Id.* § 7A(2) (UK).

85. Value Added Tax Act 1994, c. 23, sch. 4A(1)(2)(1) (UK).

86. *Id.*; see also *The VAT Treatment of Passenger Transport (VAT Notice 744A)*, Gov.UK (Dec. 24, 2009), available at <https://www.gov.uk/guidance/the-vat-treatment-of-passenger-transport-notice-744a> (last visited Nov. 22, 2018).

87. *The VAT Treatment of Passenger Transport (VAT Notice 744A)*, *supra* note 86.

88. *Id.*; see also Value Added Tax Act 1994, c. 23, § 2(1) (UK).

89. Value Added Tax Act 1994, c. 23, § 3(1) (UK).

reverse charge).<sup>90</sup> However, I find that Uber's argument falters. My contention is that Uber is the employer of its drivers, meaning Uber cannot label the drivers as taxable persons because they are employees of Uber. Consequently, Uber is the taxable person as the employer of its drivers and cannot take advantage of the reverse charge.

### 1. Reverse Charge

VAT legislation includes a concept called the "reverse charge." The reverse charge eliminates a supplier's obligation to register for VAT in the Member State where they supply their services in a B2B transaction.<sup>91</sup> It applies to transactions involving two businesses, where one business, located outside of the UK, supplies a good/service ("Supplier Business") to the other business ("Buyer Business"), located inside the UK.<sup>92</sup> Usually, the responsibility falls upon the Supplier Business to report VAT on a transaction.<sup>93</sup> However, when a Supplier Business applies the reverse charge to a transaction, the obligation to report the VAT shifts from the Supplier Business to the Buyer Business.<sup>94</sup> The Buyer Business reports both its purchase and the supplier's sale on its VAT return; as a result, the two entries cancel each other.<sup>95</sup> In the end, the VAT reverse charge allows businesses to sell goods and services to other businesses located in other EU countries without paying VAT, simplifying trade within the EU Single Market.<sup>96</sup>

Uber implements the reverse charge method in its transactions with each Uber driver.<sup>97</sup> Application of the reverse charge can only occur in

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90. Tom Bergin, *Exclusive-Loophole Allows Uber to Avoid UK Tax, Undercut Rivals*, REUTERS (June 7, 2017), available at <https://uk.reuters.com/article/uk-uber-tax-britain/exclusive-loophole-allows-uber-to-avoid-uk-tax-undercut-rivals-idUK-KBN18Y1Z6> (last visited Nov. 22, 2018) (noting that Uber uses the "reverse charge" by treating the drivers as independent contractors and billing the drivers across EU borders from one of its Dutch subsidiaries).

91. See Value Added Tax Act 1994, c. 23, § 8 (UK); see also *Place of Supply of Services (VAT Notice 741A)*, Gov.UK, (Feb. 24, 2010), available at <https://www.gov.uk/guidance/vat-place-of-supply-of-services-notice-741a#sec5> (last visited Dec. 2, 2018).

92. Value Added Tax Act 1994, c. 23, § 8(1) (UK); see also *Reverse Charge on EU VAT*, AVALARA, available at <https://www.vatlive.com/eu-vat-rules/eu-vat-returns/reverse-charge-on-eu-vat/> (last visited Nov. 20, 2018).

93. See *Reverse Charge on EU VAT*, *supra* note 92.

94. *Id.*

95. *Id.*

96. Bergin, *supra* note 90; see also *The Reverse Charge Mechanism*, VATGLOBAL, available at <https://www.vatglobal.com/reporting-obligations-vat-guides/the-reverse-charge-mechanism> (last visited Nov. 22, 2018).

97. Bergin, *supra* note 90.

a transaction between two businesses that are registered for VAT. Uber labels each driver as an independent contractor, meaning Uber treats each driver as a separate business.<sup>98</sup> Uber shifts the responsibility to register and report VAT to each individual driver, treating them as a Buyer Business using its app.<sup>99</sup> The drivers cannot register, charge, or report VAT because most Uber drivers generate less than the required £85,000 or more in revenue a year and do not qualify for VAT.<sup>100</sup> Therefore, Uber does not charge VAT on the billions of pounds in Uber-trip sales. The UK introduced the VAT reverse charge to combat fraud, but instead it seems to enable fraud.<sup>101</sup> Uber, and other sharing economy powerhouses such as Google and Facebook, manipulate this provision.<sup>102</sup> Laurent Lattman, a VAT partner with Taxand, said that the reverse charge “was not intended to allow companies to escape VAT altogether.”<sup>103</sup>

## 2. *Uber is an Employer (Taxable Person)*

Uber should not be utilizing the reverse charge because it is the employer of the drivers (employees) and the drivers are not separate businesses. As an employer, Uber is a taxable person with a VAT taxable revenue of more than £85,000 and is obliged to charge the 20 percent VAT rate on every booking in the UK. Article 9(1) of the EU VAT Directive defines a taxable person as “any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.”<sup>104</sup> To establish whether Uber is a taxable person under the EU VAT Directive, Uber must carry out an economic activity, and must do so independently.<sup>105</sup>

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98. *Id.*

99. *See id.*; *see also The Reverse Charge Mechanism, supra* note 96.

100. Bergin, *supra* note 90.

101. *Legislative Train Schedule: VAT Reverse Mechanism*, EUR. PARLIAMENT, available at <http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-taxation/file-vat-reverse-mechanism> (last visited Nov. 25, 2018).

102. Bergin, *supra* note 90.

103. *Id.*

104. Council Directive 2006/112, art. 9(1), 2006 O.J. (L 347) 1, 11 (EU). “For the purposes of this [UK VAT] Act a person is a relevant business person in relation to a supply of services if the person—(a) is a taxable person within the meaning of Article 9 of Council Directive 2006/112/EC.” Value Added Tax Act 1994, c. 23, § 7A(4)(a) (UK).

105. Value Added Tax Committee, *Working Paper No. 878: Question Concerning the Application of EU VAT Provisions*, taxud.c.1(2015)4370160–EN (Sept. 22, 2015), available at <https://circabc.europa.eu/sd/a/878e0591-80c9-4c58-baf3-b9fda1094338/878%20-%20VAT%20treatment%20of%20sharing%20economy.pdf> (last visited Nov. 22,

a. Uber Carries Out an Economic Activity

Article 9(1) of the EU VAT Directive defines an economic activity as “any activity of producers, traders, or persons supplying services, including mining and agricultural activities and activities of the professions.”<sup>106</sup> In particular, an economic activity, “exploit[s] [] tangible or intangible property for the purpose of obtaining income . . . on a continuing basis.”<sup>107</sup> The “exploitation of tangible or intangible property” must be for some form of consideration, and, generally, must be done on a continuing basis.<sup>108</sup>

*i. Uber Supplies Service for Consideration*

Settled EU case law concludes that for consideration to exist in such circumstances “there must be a direct link between the supply of goods or services made and the consideration received.”<sup>109</sup> There is a direct link if a legal relationship exists between the provider and the recipient.<sup>110</sup>

Pursuant to Uber’s “UK Terms and Conditions” (“Contract”), “[y]our [passenger] access and use of the Services constitutes your [passenger] agreement to be bound by the Terms, which establishes a contractual relationship between you [passenger] and Uber.”<sup>111</sup> The Contract further explains that the services will only be supplied in exchange for compensation.<sup>112</sup> According to the Contract, “[a]fter you have received services or goods obtained through your use of the Services, Uber will facilitate your payment of the applicable Charges.”<sup>113</sup> This Contract represents a legal relationship between Uber and the passengers. A passenger can schedule a ride through the Uber app, but Uber will only fulfill the booking if the passenger pays Uber the predetermined amount as compensation; otherwise, Uber will not schedule the booking and no driver will arrive to transport the passenger. Uber receives its revenue by first collecting a percentage of the booking fee and then dispersing the remaining funds to the driver. As a result, Uber supplies this transportation service for the purpose of obtaining revenue, where Uber (the

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2018); *see also* *VAT Taxable Person Manual*, Gov.UK, available at <https://www.gov.uk/hmrc-internal-manuals/vat-taxable-person/vtaxper33000> (last visited Nov. 25, 2018).

106. Council Directive 2006/112, art. 9(1), 2006 O.J. (L 347) 1, 11 (EU).

107. *Id.*; *see also* Value Added Tax Committee, *supra* note 105, at 5.

108. Council Directive 2006/112, art. 9(1), 2006 O.J. (L 347) 1, 11 (EU).

109. Value Added Tax Committee, *supra* note 105, at 9.

110. *Id.*

111. *Legal: Terms and Conditions (UK)*, *supra* note 61.

112. *Id.*

113. *Id.*

provider) provides its service to passengers (the recipients) in exchange for consideration through the existence of a legal relationship.

*ii. Uber Supplies Service on a Continuing Basis*

Generally, “joining a sharing economy platform through which goods or services are provided in return for remuneration, implies some continuity. The activities in question would therefore meet the requirements for inclusion in the concept of “economic activity” as set out in Article 9(1) of the [EU] VAT Directive.”<sup>114</sup> Uber provides transportation services in return for money and, thus, continuity is implied. In conclusion, the transportation services Uber provides to passengers is an economic activity under Article 9(1) of the EU VAT Directive.

**b. Uber Carries Out the Economic Activity Independently**

According to Article 10 of the EU VAT Directive, the taxable person must conduct the economic activity “independently,” which “exclude[s] employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration, and the employer’s liability.”<sup>115</sup> The question of employment status is a question of fact evidenced by a contract or similar legal document.<sup>116</sup>

*i. The Drivers are Bound to Uber by an Employment Contract*

A recent court decision ruled that Uber drivers are Uber’s “workers”—not independent contractors.<sup>117</sup> In response to earning less than minimum wage and knowing that Uber pockets a large portion of each booking fee, Uber drivers protested around the world.<sup>118</sup> Two former Uber drivers took things even further and sued Uber so that it would classify them as workers instead of self-employed independent contractors.<sup>119</sup> On November 10, 2017, the Employment Appeal Tribunal (“EAT”) upheld a decision that classifies Uber drivers as workers when they (1) switch on the app (2) in territory where they are authorized to work and

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114. Value Added Tax Committee, *supra* note 105, at 6.

115. Council Directive 2006/112, art. 10, 2006 O.J. (L 347) 1, 11 (EU).

116. JUDITH FREEDMAN, EMPLOYED OR SELF-EMPLOYED?: TAX CLASSIFICATION OF WORKERS AND THE CHANGING LABOUR MARKET 36 (2001).

117. Uber B.V. v. Aslam, Appeal No. UKEAT/0056/17/DA ¶ 3.

118. Bergin, *supra* note 90; see also Mark Harris, *Uber: Why the World’s Biggest Ride-Sharing Company Has No Drivers*, THE GUARDIAN (Nov. 16, 2015), available at <https://www.theguardian.com/technology/2015/nov/16/uber-worlds-biggest-ride-sharing-company-no-drivers> (last visited Nov. 22, 2018).

119. Uber B.V., UKEAT/0056/17/DA ¶¶ 3, 6.



(3) are “able and willing to accept assignments;” therefore entitling them to certain employment rights.<sup>120</sup>

*a) Switch on the App*

Drivers must switch on the Uber app to commence “working time.”<sup>121</sup> The EAT acknowledged that once the driver turns on the app, the driver enters into a legally binding “worker[’s] contract.”<sup>122</sup> In October 2015, Uber issued a New Partner-Driver Agreement (“New Agreement”) which states that “[an Uber driver is] an independent company in the business of providing Transportation Services . . . [that provides] passenger transportation services to Users via the Uber Services in the Territory by [the] Customer and its Drivers using the vehicles.”<sup>123</sup> Uber interprets this provision as representing an agency relationship, where Uber acts as the drivers’ agent in supplying transportation services to passengers.<sup>124</sup> Rejecting the agency-relationship language that Uber uses in its contracts with its drivers, the EAT determined that the relationship finds its basis in the “reality of the situation.”<sup>125</sup> The court articulated that the drivers are Uber’s workers, incorporated into Uber’s business of providing transportation services and undertaking work for Uber by entering into a contractual relationship with each passenger on Uber’s behalf when the drivers switch on the app and accept trips.<sup>126</sup>

*b) Authorized Territory*

Drivers must be in territory in which they are authorized to work.<sup>127</sup> Territory is presumed to be all the cities in which Uber is active.<sup>128</sup> Importantly, Uber holds that its drivers perform “unmeasured work” when they return home after completing a trip outside the territory.<sup>129</sup> Therefore, the drivers participate in “working time” once they switch on the app in the territory in which Uber authorizes them to work.

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120. *Id.* ¶ 103.

121. *Id.* ¶ 126.

122. *Id.* ¶ 122.

123. *Id.* ¶¶ 45-46.

124. Uber B.V., UKEAT/0056/17/DA ¶ 83.

125. *Id.* ¶ 99.

126. *Id.*

127. *Id.* ¶ 65.

128. *See generally id.* ¶ 65.

129. Uber B.V., UKEAT/0056/17/DA ¶ 78.

c) *Able and Willing to Accept Assignments*

Drivers must be “on-duty,” meaning they are “able and willing to accept assignments.”<sup>130</sup> The EAT emphasized that going “on duty” means that each driver is able and willing “to accept trip requests,” defined in Uber’s “Welcome Packet.”<sup>131</sup> Even when the Uber driver does not carry a passenger in the vehicle, the driver remains “on duty” so long as the driver satisfies the three aforementioned conditions.<sup>132</sup> In the capacity of being “on duty,” the drivers are at Uber’s disposal.<sup>133</sup> Therefore, an Uber driver who (1) switches on the app (2) in the territory in which the driver is authorized to work and (3) is “able and willing to accept trips” is a worker of Uber and bound by its worker contract with Uber.<sup>134</sup>

ii. *A Court Will Find that the Drivers are Employees for VAT Purposes*

The recent EAT decision concludes that Uber drivers are workers for purposes of employment rights, which entitles them to: (1) the guaranteed minimum wage; (2) holiday pay; (3) minimum length of rest breaks; (4) protections against unlawful deductions from wages; (5) unlawful discrimination; and (6) whistleblowing.<sup>135</sup> Qualifying as a worker for purposes of employment law does not automatically assume the individual is a worker or employee for VAT purposes. This case is persuasive but not binding in a court deciding employment status for VAT purposes, and it remains unclear whether a court would agree.

Articles 9 and 10 of the EU VAT Directive explain that employees are not taxable persons in regards to VAT, due to the fact that they are “bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration, and the employer’s liability.”<sup>136</sup> To determine whether there is an employer-employee relationship between Uber and its drivers, a court must look at the nature of the relationship in light of the valid contracts and then consider whether the relationship concluded by the contracts is false, based on the economic reality of the

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130. *Id.* ¶ 115.

131. *Id.*

132. *Id.* ¶ 124.

133. *Id.* ¶ 124.

134. Uber B.V., UKEAT/0056/17/DA ¶ 126.

135. *See id.* ¶¶ 3 & 126; *see also Employment Status*, Gov.UK, available at <https://www.gov.uk/employment-status/worker> (last visited Nov. 22, 2018).

136. Council Directive 2006/112, art. 9 & 10, 2006 O.J. (L 347) 1, 11 (EU).

relationship considering the relevant facts.<sup>137</sup> Courts stress that every case must be decided on its own particular facts.<sup>138</sup>

Analysis of the contract begins with the “contract of service” test, which states that a contract of service implies employment and a contract for services implies self-employment.<sup>139</sup> When interpreting a contract, the court must consider the language used, the provisions of the agreement, the surrounding circumstances known to both parties, and common sense.<sup>140</sup> The Contract contains language that identifies the rights and obligations of the drivers, which makes it possible to conclude whether the Contract constitutes a contract of service or a contract for services.<sup>141</sup> Below is an analysis of the main factors a court would examine to decipher whether Uber drivers are employees or independent contractors under the Contract.

*a) Uber Requires the Drivers to Work Regularly and Complete a Minimum Number of Hours*

Uber requires employees to work regularly and complete a minimum number of hours, and, in exchange, the employees receive compensation.<sup>142</sup> Uber drivers enjoy a flexible schedule, but they must complete at least one ride every 30 days to continue working for Uber.<sup>143</sup> Uber drivers expect compensation for the trips they complete. Thus, a court would find that this factor weighs in favor of an employer-employee relationship.

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137. See Comm'n for HM Revenue & Customs v. Secret Hotels2 Ltd. [2014] UKSC 16, [11]-[12] (appeal taken from EWCA (Civ)).

138. Walls v. Sinnett [1987] BTC 206.

139. See *Employment Status Manual: Massey v Crown Life Insurance Company*, Gov.UK (Mar. 7, 2016), available at <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm7055> (last visited Nov. 22, 2018) (stating that a “contract of service” is coterminous with “employment”); see also *Employment Status Manual: Market Investigations Ltd v Minister of Social Security*, Gov.UK (Mar. 7, 2016), available at <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm7040> (last visited Nov. 22, 2018) (defining employment as being “under a contract of service”).

140. Secret Hotels2 Ltd. [2014] UKSC 16, [32].

141. The Contract was last updated on March 14, 2018. See generally *Legal: Terms and Conditions (UK)*, *supra* note 61.

142. *Employment Status*, Gov.UK, available at <https://www.gov.uk/employment-status/employee> (last visited Nov. 22, 2018).

143. Avery Hartmans, *10 Ways Uber Drivers Can Get Kicked Off the App*, BUS. INSIDER (July 23, 2017), available at <https://www.businessinsider.com/how-uber-drivers-get-deactivated-2017-7?r=UK&IR=T> (last visited Nov. 22, 2018).

b) *A Manager is Responsible for the Drivers' Workload*

Responsibility falls onto managers to maintain the Uber drivers' workload, as well as how and when work should be done.<sup>144</sup> This factor mirrors "mutuality of obligation," meaning that the employer bears the obligation to provide work to the employee, and the employee must complete the work that comes "down the pipe."<sup>145</sup> This represents a fundamental distinction between defining an individual as an employee or contractor.<sup>146</sup>

Uber has the responsibility for the drivers' workload because it delegates ride requests to them. The Contract states, "[i]f you are consistently not confirming trips sent to you through the app you may temporarily be logged out of the app for a limited period of time as Uber will assume that you are not available to take trips at that time."<sup>147</sup> Uber drivers are inclined to take the requests that are sent to them on the app, and if they do not accept a few in a row they are "disciplined" and lose access to the app.<sup>148</sup> Uber directs how drivers will complete trips by mapping out the route in the navigation system in the Uber app.<sup>149</sup> The Uber app records every trip and sends passengers a map of the route.<sup>150</sup> Therefore, a court would find that this factor weighs in favor of an employer-employee relationship.

c) *Substitutes Cannot Perform the Drivers' Work*

An employee cannot send a substitute to do his or her work, and the same is true for Uber drivers.<sup>151</sup> Each Uber driver in the UK must obtain a Private Hire Driver's License, attend an onboarding session, own or lease a vehicle, and have proof of both vehicle registration and vehicle

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144. *Employment Status*, *supra* note 142.

145. *IR35 Explained: 'Contract of Service' and 'Contract for Services,'* CONTRACTOR CALCULATOR (Oct. 23, 2017), available at [https://www.contractor-calculator.co.uk/difference\\_contract\\_for\\_services\\_of\\_services\\_ir35.aspx](https://www.contractor-calculator.co.uk/difference_contract_for_services_of_services_ir35.aspx) (last visited Nov. 22, 2018).

146. *Id.*

147. *Uber Community Guidelines*, UBER, available at <https://www.uber.com/legal/community-guidelines/uk-en/> (last visited Oct. 19, 2018).

148. *Id.*

149. Jordan Golson, *Uber Rebuilt Its Navigation App With Drivers in Mind*, THE VERGE (Mar. 16, 2017), available at <https://www.theverge.com/2017/3/16/14940886/uber-driver-navigation-app-maps-ride-pickup> (last visited Nov. 22, 2018).

150. Ashitha Nagesh, *What to Do If You Think Your Uber Has Taken You on the Wrong Route*, METRO (Mar. 1, 2017), available at <https://metro.co.uk/2017/03/01/what-to-do-if-you-think-your-uber-has-taken-you-on-the-wrong-route-6481482/> (last visited Nov. 22, 2018).

151. *Employment Status*, *supra* note 142.

insurance.<sup>152</sup> Uber drivers cannot designate their work to others since Uber hires drivers based on their individual qualifications and specifically sends certain requests to certain drivers. The Contract explicitly states, “[y]ou [the Uber Driver], may not authorize third parties to use your Account . . . [and] [y]ou may not assign or otherwise transfer your Account to any other person or entity.”<sup>153</sup> Due to Uber’s selective process, the drivers are not allowed to assign their work to anyone. A court would find that this factor favors an employer-employee relationship.

*d) Drivers Have Statutory Rights*

The employer gives the employee holiday pay, sick pay, and maternity or paternity pay.<sup>154</sup> As explained in Section III(C)(2)(b)(2), Uber drivers recently received worker status, which gave Uber drivers: (1) the guaranteed minimum wage; (2) holiday pay; (3) minimum length of rest breaks; (4) protections against unlawful deductions from wages; (5) unlawful discrimination; and (6) whistleblowing.<sup>155</sup> Uber gives drivers more statutory rights than the those necessary to establish that the drivers are employees. Thus, a court would find that this factor weighs in favor of an employer-employee relationship.

*e) Uber's Disciplinary and Grievance Procedures Apply to the Drivers*

Uber drivers are subject to Uber’s disciplinary and grievance procedures.<sup>156</sup> Uber maintains the authority to temporarily or permanently deactivate an Uber driver’s account, specifically when a driver’s rating falls below 4.6 out of 5, when the driver consistently does not confirm trips, and when the driver cancels rides too often.<sup>157</sup> If a driver’s rating falls below 4.6, the driver will lose access to his or her account and will only

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152. *Partner-Driver Requirements: How to Drive on the Uber APP*, UBER, available at <https://www.uber.com/en-GB/drive/requirements/> (last visited Nov. 22, 2018); see also *How to Upload Documents*, UBER, available at <https://www.uber.com/en-GB/drive/resources/how-to-upload-documents/> (last visited Nov. 22, 2018).

153. *Legal: Terms and Conditions (UK)*, *supra* note 61; see also *Express & Echo Publ’n Ltd. v. Tanton* [1999] EWCA (Civ) 949, [19] (Eng.) (ruling that a limited right of substitution in the contract is compatible with an employment contract). In this case, a clause of the contract stated that a substitute could only be used when the employer had expressly agreed to it. The court said, “[t]he AA [employer] did not want any competent tester [position], it wanted Mr. Bessell [employee].” *Id.*

154. *Employment Status*, *supra* note 142.

155. See *id.*; see generally *Uber B.V. v. Aslam*, Appeal No. UAEAT/0056/17/DA at ¶¶ 3 & 126.

156. *Employment Status*, *supra* note 142.

157. *Hartmans*, *supra* note 143.

regain access after completing one of Uber's quality improvement courses.<sup>158</sup> The Contract also contains multiple grievance procedures in regard to respecting riders and other drivers, physical or abusive contact with riders, and abiding by safety regulations (including following the speed limit, not texting while driving, using a phone mount, and not driving under the influence of alcohol or drugs).<sup>159</sup> Uber encourages riders to send feedback or complaints about his or her ride and driver. If Uber receives a complaint about an Uber driver, it will open an investigation and decide whether to temporarily or permanently deactivate that driver's account. Consequently, a court would find that this factor is in favor of an employer-employee relationship.

*f) Drivers Complete Work at Uber's Premises or Address*

In most cases, work is completed at the employer's premises or at an address specified by the business.<sup>160</sup> However, an Uber driver does not complete his or her work at the employer's premises, but rather at any location in which Uber is authorized to operate and where the app is accessible. Uber never discloses drivers' personal addresses, only its own business locations. Therefore, a court would find that this factor is in favor of an employer-employee relationship.

*g) Uber Provides Materials, Tools, and Equipment*

The employer provides materials, tools, and equipment for the employee's job.<sup>161</sup> Uber does not provide the vehicle or vehicle accessories for its drivers to use in their day-to-day operation. However, Uber does provide the app technology that drivers use—the software used on the job which, when turned on, signifies that drivers are “working.” Thus, a court would find this factor neutral.

*h) The Contract Uses the Terms “Employer” and “Employee”*

An employment contract that uses terms such as “employer” and “employee” signifies an employer-employee relationship.<sup>162</sup> In this circumstance, the Contract does not use these terms and instead uses

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158. *Legal: Uber Community Guidelines (UK)*, UBER, available at <https://www.uber.com/legal/community-guidelines/uk-en/> (last visited Nov. 22, 2018); see also *Quality Improvement Classes*, UBER, available at <https://www.uber.com/drive/orange-county/resources/quality-course/> (last visited Nov. 22, 2018).

159. *Legal: Uber Community Guidelines (UK)*, *supra* note 158.

160. *Employment Status*, *supra* note 142.

161. *Id.*

162. *Id.*

“Partner/Principal” and “Agent.”<sup>163</sup> The EAT already dismissed the use of these titles in the Contract, ruling that titles are not determinative and the relationship between Uber and its drivers is one like an employer-employee relationship.<sup>164</sup> The labels assigned to the parties in a contract to describe the relationship are not conclusive and hold little weight.<sup>165</sup> Therefore, this factor favors an employer-employee relationship.

Based on this balancing test of factors, a court deciding the employment status of Uber drivers for VAT purposes would most likely rule that the Contract constitutes a contract of services, coterminous with employment—not the superficial partnership Uber contends, as it disguises its employees as “partners.”

Next, a court must assess whether the employer-employee relationship concluded by the Contract is vitiated by the economic reality of the relationship in light of the relevant facts, including: (1) working conditions; (2) remuneration; (3) employer's liability; (4) who supplies the service to the customer; and (5) control.<sup>166</sup> Precedent holds that the mutual-ity of obligation discussed above and the requirement of control by the employer remain the irreducible minimum for a contract of service to exist.<sup>167</sup> The focus turns on whether the Uber driver performs his or her service as a person in business on his or her own account.<sup>168</sup>

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163. *Legal: Terms and Conditions (UK)*, *supra* note 61.

164. *Uber B.V. v. Aslam*, Appeal No. UKEAT/0056/17/DA ¶ 3.

165. *Comm'n for HM Revenue & Customs v. Secret Hotels2 Ltd.* [2014] UKSC 16, [10] (appeal taken from EWCA (Civ)).

166. Council Directive 2006/112, art. 10, 2006 O.J. (L 347) 1, 11 (EU); *see also* *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and Nat'l Ins.* [1968] QB 497, (Eng.) (deciding that a contract of service exists if three conditions are fulfilled: 1) remuneration in return for personal service; 2) employer has right of control; and 3) the other provisions of the contract are consistent with its being a contract of service.); *Employment Status Manual: Market Investigations Ltd v Minister of Social Security*, *supra* note 139 (reasoning that “control” is not a decisive factor and introducing the “in business on own account” test that asks whether the individual in question is performing the services as a person in business on his or her own account. No exhaustive list has been compiled of the considerations that are relevant in determining whether there is a contract of employment and there are no strict rules as to the weight of each of the factors. Other factors that are of importance include whether the person has his own equipment, whether he hires his own helpers, and the degree of financial risk that he takes.)

167. *Employment Status Manual: Nethermere (St. Neots) Ltd. v Gardiner and Taverna*, GOV.UK, available at <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm7110> (last visited Nov. 22, 2018).

168. *Employment Status Manual: Market Investigations Ltd v Minister of Social Security*, *supra* note 139.

### 1) *Working Conditions*

Regarding working conditions, Uber drivers do not have a designated address or office; technically, their vehicles are their offices. However, the drivers complete their work only at locations where Uber retains authorization to operate and where customers may access the app. Uber provides its contact information—including its address—in place of that of its drivers'. Working conditions also include the app that drivers must activate to begin and end working time. Drivers activate the app through their own cellular devices. The app is their “virtual office” and Uber maintains and updates all content on the app. This situation equates to employees who use their own laptops to work remotely and access a remote desktop. Although the drivers maintain the working conditions of their physical place of work (i.e. their cars), Uber is responsible for the working conditions of the Uber app where the drivers conduct all their business virtually.

### 2) *Remuneration*

For a contract of employment—or just a contract in general—to exist, there must be consideration, specifically in the form of a wage or other remuneration.<sup>169</sup> All transactions between drivers and passengers are conducted through the Uber app. Uber's business structure, discussed in Section I(D), describes how Uber first receives the fare, keeps its percentage, and then pays the drivers. In the UK, Uber deducts 20 percent of each ride and pays the remainder back to the driver.<sup>170</sup> Thus, Uber pays the drivers remuneration for all trips they complete.

### 3) *Employer's Liability*

According to the Contract, there is no provision that states that Uber claims or disclaims liability for its drivers.<sup>171</sup> Despite this lack of information in the Contract, on June 1, 2018, Uber launched “Partner Protection Insurance with AXA” (“Insurance”) in the UK.<sup>172</sup> This Insurance protects eligible drivers from the “financial cost of life-changing events with insurance from AXA... events like injury, sickness, or having a baby don't have to come with all of the additional financial stress.”<sup>173</sup> Uber automatically insures its drivers through the Insurance, which covers,

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169. *Employment Status Manual: Nethermere (St. Neots) Ltd. v. Gardiner and Taverna*, *supra* note 167.

170. O'Keefe & Jones, *supra* note 52.

171. *Legal: Terms and Conditions (UK)*, *supra* note 61.

172. *Partner Protection Insurance With AXA*, UBER, available at <https://www.uber.com/en-GB/drive/insurance/> (last visited Nov. 22, 2018).

173. *Id.*



subject to limits: medical expenses, death, permanent disability, hospitalization and injuries, maternity/paternity leave, and jury service.<sup>174</sup> The Insurance covers events that happen during “working time” and events that happen not during “working time.”<sup>175</sup> This is persuasive evidence that Uber claims liability as an employer for its employees.

#### 4) *Supplier of Service*

Uber attempts to argue that it does not provide a transportation service, but that the drivers provide a transportation service. The Contract states that “Uber UK is not a Transportation Provider and does not provide transportation services. Transportation services are provided to you under a contract (the “Transportation Contract”) between you and the Transportation Provider [driver] that is identified to you in the booking confirmation provided by Uber UK.”<sup>176</sup> Despite Uber’s efforts, it has already been determined that plain titles are not determinative and a court will look at the economic reality of the relationship.<sup>177</sup> As concluded in Section III(A), Uber provides a transportation service (Uber app), because a transportation service includes any service inherently linked to the physical act of transporting persons from one place to another and that is an integral part of the overall service.<sup>178</sup> Therefore, Uber provides the transportation service.

#### 5) *Control*

In assessing whether an employer-employee relationship exists, one must establish control, which is vital in VAT cases.<sup>179</sup> Passengers pay for their rides and drivers receive payment through the Uber app. Uber sets the rate per ride and may increase the rate with “surge pricing.” Uber triggers surge pricing when there is high demand from customers, coupled with low supply of rides, such as on Friday and Saturday nights from 12-3 A.M. The Employment Tribunal in the UK stated that “[t]he notion that Uber in London is a mosaic of 30,000 small businesses linked by a common “platform” is to our minds faintly ridiculous . . . But drivers do

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174. *Id.*

175. *Id.*

176. *Legal: Terms and Conditions (UK)*, *supra* note 61.

177. *Uber B.V. v. Aslam*, Appeal No. UKEAT/0056/17/DA ¶ 99; *see also* *Comm’n for HM Revenue & Customs v. Secret Hotels2 Ltd.* [2014] UKSC 16, [10] (appeal taken from EWCA (Civ)).

178. *Asociación Profesional Élite Taxi v. Uber Systems Spain SL*, 2017 EUR-Lex CELEX LEXIS 981.

179. FREEDMAN, *supra* note 116, at 31.

not and cannot negotiate with passengers . . . they are offered and accept trips strictly on Uber's terms."<sup>180</sup> According to the Contract,

Uber may, in Uber's sole discretion, create promotional codes that may be redeemed for Account credit, or other features or benefits related to the Services. [A]ll Charges . . . and payment will be [enabled] . . . by Uber using the preferred payment method . . . [and] Uber reserves the right to establish, remove and/or revise Charges for any or all services or goods obtained through the use of the Services at any time in Uber's sole discretion.<sup>181</sup>

Uber receives the full fare amount before it allocates an amount to the drivers and reserves the right to issue promotional offers and discounts. Uber dictates the fare that the passenger is charged and the amount the driver receives.<sup>182</sup> Drivers carry no voice when it comes to pricing or when surge pricing is activated—Uber maintains sole discretion.

Uber not only enjoys the sole discretion of governing fare prices, but also the hiring and terminating of drivers, and temporarily or permanently disabling drivers' accounts. Uber may disable a driver's account for various reasons, including, but not limited to: failing a background check; receiving an average driver rating lower than 4.6; giving away free rides; frequently cancelling rides; and not completing at least one ride per month.<sup>183</sup> Uber acts as an employer, where temporarily disabling a driver's account qualifies as "probation" and permanently disabling one's account qualifies as "termination." Without access to the app, the driver cannot access passengers and complete the trips.

In conclusion, it remains apparent that the Contract exists as a contract of service and the economic reality proves that Uber is the employer of the drivers, who constitute employees. Uber is therefore a taxable person who carries out, independently, an economic activity.<sup>184</sup>

*iii. Uber Exceeds the Threshold*

Uber is "a taxable person for the purposes of this Act [UK VAT Act]... [and] is required to be, registered under this Act [UK VAT Act]."<sup>185</sup> Uber is the supplier of the services since it is the employer, and the reverse charge is inapplicable. Uber is obliged to register, charge, and

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180. Uber B.V. v. Aslam, Appeal No. UKEAT/0056/17/DA ¶ 28.

181. *Legal: Terms and Conditions (UK)*, *supra* note 61.

182. *Id.*

183. *Id.*; *see also* Hartmans, *supra* note 143.

184. Value Added Tax Committee, *supra* note 105; *see also* VAT Taxable Person Manual, *supra* note 105; Council Directive 2006/112, art. 9(1), 2006 O.J. (L 347) 1, 11 (EU).

185. Value Added Tax Act 1994, c. 23, § 3(1) (UK).

report VAT on its bookings in the UK, as it meets all the requirements to be registered under the UK VAT Act.

The VAT threshold to register is measured by a business's total VAT taxable revenue ("VAT Revenue") of everything it sells or supplies in a 12-month period.<sup>186</sup> If a business's VAT Revenue is £85,000 or more per year, it must charge the 20 percent VAT rate in the UK.<sup>187</sup> Uber is a billion-dollar technology powerhouse with revenue clearly exceeding the threshold; therefore, it must charge the 20 percent VAT rate on each ride.

#### ***D. The Impact on the UK's Economy***

Introducing a new entity into a market naturally increases competition, but regulatory laws, such as tax laws, level the playing field. The EU VAT Directive establishes a blanket tax law and requires all EU countries to enact it. However, Uber asserts that it represents an exception to this law and is not required to charge VAT on each ride. This negatively impacts the UK economy in two ways: (1) it disadvantages businesses that wish to claim the expense of an Uber ride on their VAT returns; and (2) it leads to unfair competition and an uproar in the taxicab industry.

##### *1. Person/Entity's Reclamation of Uber Journey on VAT Return*

Jolyon Maugham QC ("Maugham"), a barrister at Devereux Chambers, paid for an Uber to drive him from his office to meet with a client.<sup>188</sup> Uber did not provide him with a VAT receipt and, thus, he was unable to claim the money back from HMRC.<sup>189</sup>

In retaliation, Maugham chose to pursue a lawsuit through the Good Law Project (the "Project").<sup>190</sup> The Project gained funding to prosecute and issue proceedings against Uber in the High Court of London (the "Court").<sup>191</sup> Maugham argues that Uber is obliged to provide him with a VAT receipt because Uber provided him with a service when Maugham

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186. *Policy Paper VAT: Maintain Thresholds for 2 Years From 1 April 2018*, *supra* note 70.

187. *Id.*

188. Barney Thompson & Vanessa Houlder, *Uber Faces New Pressure from Crowdfunded VAT Case*, *FIN. TIMES* (June 28, 2017), available at <https://www.ft.com/content/19c1afe8-5a8f-11e7-b553-e2df1b0c3220> (last visited Nov. 21, 2018).

189. *Id.*

190. Joel Hills, *Call for Whitehall to Boycott Uber as the Company Is Accused of Tax Avoidance and Sued for Unpaid VAT*, *ITV* (Feb. 20, 2017), available at <http://www.itv.com/news/2017-02-20/call-for-whitehall-to-boycott-uber-as-the-company-is-accused-of-tax-avoidance-and-sued-for-unpaid-vat/> (last visited Nov. 25, 2018).

191. *Uber Case*, GOOD LAW PROJECT, available at <https://goodlawproject.org/uber-case/> (last visited Nov. 21, 2018).

took a ride from his office to meet a client.<sup>192</sup> Maugham demands a VAT receipt of £56.<sup>193</sup> Additionally, Maugham alleges that Uber “gam[es] the [EU] tax system” in a way which “gives it an unfair advantage over its rivals and at a cost to the taxpayer.”<sup>194</sup> Furthermore, Maugham states that “Uber undoubtedly has arranged its business model to minimi[z]e its tax liability, to dodge taxes... and to minimi[z]e the workers’ rights that it has to offer to its drivers.”<sup>195</sup> This case is a part of a larger effort to address complaints and “understand whether HMRC treats these big [U.S.] multinationals[,] including Uber[,] with kid gloves.”<sup>196</sup> If Maugham succeeds in this case, Uber may suffer a hit with a much higher tax bill.<sup>197</sup> The Court may require Uber to pay hundreds of millions in backdated VAT,<sup>198</sup> demolishing the company’s lucrative business model.

## 2. Unfair Competition

In the UK, Uber charges less per ride than its competitors because all of its competitors’ fares include the 20 percent VAT on their booking fees.<sup>199</sup> By classifying itself as a technology platform, misrepresenting its place of supply, and treating each Uber driver as an independent contractor, Uber exploits EU VAT legislation by offering cheaper fares and depriving HMRC of approximately £40 million in VAT per year.<sup>200</sup>

Uber’s business model is labeled an “unfair business practice” that constitutes “unfair competition.”<sup>201</sup> This led to revocation of licenses and a partial or complete ban of Uber in many EU countries.<sup>202</sup> For example,

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192. *Id.*

193. *Id.*

194. Hills, *supra* note 190.

195. *Id.*

196. *Uber Case*, *supra* note 191.

197. See John Stevens, *Does Uber Owe the Taxman Hundreds of Millions in VAT?*, DAILY MAIL (Mar. 27, 2017), available at <https://www.dailymail.co.uk/news/article-4358770/Does-Uber-owe-taxman-hundreds-millions-VAT.html> (last visited Nov. 25, 2018).

198. *Id.*

199. Bergin, *supra* note 90.

200. James Salmon & Katherine Rushton, *Revealed, Uber’s £40m Tax Loophole: Taxi Firm Registers Each of Its Drivers as a Separate Business to Avoid Paying VAT on Booking Fees*, DAILY MAIL (June 7, 2017), available at <http://www.dailymail.co.uk/news/article-4583044/Revealed-Uber-s-40m-tax-loophole-avoid-paying-VAT.html> (last visited Nov. 22, 2018).

201. Anna Rhodes, *Uber: Which Countries Have Banned the Controversial Taxi App*, THE INDEP. (Sept. 22, 2017), available at <http://www.independent.co.uk/travel/news-and-advice/uber-ban-countries-where-world-taxi-app-europe-taxi-us-states-china-asia-legal-a7707436.html> (last visited Nov. 22, 2018).

202. *Id.*

Uber officially launched in London in 2012 and claims to be 23 percent cheaper than Green Tomato Cars, a minicab rival in the city.<sup>203</sup> However, Transport for London (“TfL”) rejected Uber’s application to renew its London license to operate in the city on the basis that it was “not a “fit and proper” private car hire operator” and that “Uber’s approach and conduct demonstrate a lack of corporate responsibility.”<sup>204</sup>

Uber’s unfair business practices prevent funds from re-entering the UK economy, resulting in lack of support for the UK community. By charging less per ride, Uber takes business away from its competitors who pay the VAT. When an individual purchases an Uber ride, the total fare goes directly to Uber; but if an individual buys a taxi ride that does not participate in the sharing economy, 20 percent of the fare will go back into the UK’s economy in the form of VAT. The increased usage of Uber deducts from the UK tax amount needed to support public commodities.

VAT represents the third largest tax in terms of receipts,<sup>205</sup> therefore making it one of the main sources of income for HMRC. Further, VAT consists of one of the major sources of revenue for the EU, as it raised over £1 trillion in 2015, equivalent to seven percent of EU GDP.<sup>206</sup> Conclusively, this will negatively impact the UK because the budget for government expenditures such as education, security, infrastructure, hospitals, and transportation will decrease with less VAT being collected.<sup>207</sup>

### III. ARGUMENT

The EC needs to address this tax scheme in the VAT system, which is exploited by many multi-national companies—such as Google,

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203. Hills, *supra* note 190.

204. Sarah Butler & Gwyn Topham, *Uber Stripped of London Licence Due to Lack of Corporate Responsibility*, THE GUARDIAN (Sept. 22, 2017), available at <https://www.theguardian.com/technology/2017/sep/22/uber-licence-transport-for-london-tfl> (last visited Nov. 25, 2018).

205. Phillip Inman, *Where Does the UK Government Get Its Money, and What Does It Spend It All On?*, THE GUARDIAN (Nov. 22, 2017), available at <https://www.theguardian.com/uk-news/ng-interactive/2017/nov/22/where-does-the-uk-government-get-its-money-and-what-does-it-spend-it-all-on> (last visited Nov. 22, 2018).

206. European Commission Press Release IP/17/4946, *Fair Taxation: Commission Proposes New Tools to Combat VAT Fraud* (Nov. 30, 2017), available at [http://europa.eu/rapid/press-release\\_IP-17-4946\\_en.htm](http://europa.eu/rapid/press-release_IP-17-4946_en.htm) (last visited Nov. 22, 2018).

207. Cormac O’Sullivan, *The Making of ‘Where Does Your Tax Go?’*, PUB. POL’Y IE (Oct. 10, 2013), available at <http://www.publicpolicy.ie/making-tax-go/> (last visited Nov. 22, 2018).

Facebook, and Uber.<sup>208</sup> Permitting these multi-billion-dollar companies to continue this type of tax evasion is both impracticable for business and counter to public interest. Proponents of the sharing economy may applaud Uber's tax scheme and perceive it as a well-constructed tax plan to avoid taxes across borders. However, by refusing to charge VAT in the UK, Uber's tactics go beyond manipulating a tax loophole—it is committing tax evasion. This Section asserts three points: (1) the UK VAT Act applies to Uber; (2) Uber's refusal to charge VAT is tax evasion; and (3) an examination of the UK's implementation of the Digital Single Market shows that it needs an EU task force to prevent tax evasion of VAT.

#### *A. Traditional Law Does Apply*

Uber presumes to have found a “gray area” in the UK VAT Act regulatory framework, but a simple application of the UK VAT Act establishes that Uber is no anomaly. Under the traditional rule of the UK VAT Act, taxable persons or entities who supply goods and services (even electronically) with a place of supply in the UK and have a VAT Revenue of £85,000 or more must charge VAT.<sup>209</sup> As set out in detail above, Uber constitutes a taxable person that supplies a transportation service with a place of supply in the UK, and it has a VAT Revenue of more than £85,000.<sup>210</sup> Therefore, the traditional UK VAT Act applies to the bookings made through the transportation service (Uber app) by passengers in the UK.<sup>211</sup>

Proponents of Uber and the ride-sharing industry might excuse Uber from the current UK VAT Act because it does not strictly state “digital services” or “e-commerce;” but this simply holds no truth. The EC published Working Paper 878 (the “Paper”), which represents the most comprehensive guidance for the application of the existing VAT provisions to the sharing economy.<sup>212</sup> In the Paper, the EC answers questions and applies guidelines concerning the existing VAT provisions to the sharing economy.<sup>213</sup> The Paper reiterates that services provided by sharing

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208. Bergin, *supra* note 90.

209. Value Added Tax Act 1994, c. 23, § 1 (UK); *see also* Policy Paper VAT: Maintain Thresholds for 2 Years From 1 April 2018, *supra* note 70.

210. *See infra*, Section III.

211. *See* Value Added Tax Act 1994, c. 23, § 4(1) (UK); *see also* I. Grlica, *European Union-How the Sharing Economy Is Challenging the EU VAT System*, 28 INT'L VAT MONITOR 124, 126 (Mar. 14, 2017).

212. Value Added Tax Committee, *supra* note 105.

213. *Id.*

economy platforms to their users constitute taxable transactions and are subject to VAT.<sup>214</sup>

The Paper focuses on businesses that supply services through sharing economy platforms via mobile applications/websites, which may include a financial service for consumers to make payments.<sup>215</sup> Under the section titled “Services provided by online sharing economy platforms,” the EC explains that services provided by online sharing economy platforms are subject to VAT where those online platforms supply services for consideration.<sup>216</sup> The Paper recognizes that the relationship between a sharing economy platform and an individual may resemble an employer-employee relationship.<sup>217</sup> The EC states that:

[i]f the actual relationship between the sharing economy platform and an individual goods or services provider resembles that of an employer and employee, the situation must be treated accordingly and the issue as to whether economic activity is conducted independently carefully analysed.<sup>218</sup>

The EC does not provide instruction on how to handle VAT in the situation described above, and leaves the floor open for each Member State to administer its own legislation. UK VAT guidance cites to Article 10 of the EU VAT Directive that states that:

[t]he condition in Article 9(1) that the economic activity be conducted ‘independently’ shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer’s liability.<sup>219</sup>

It is evident that employees acting on behalf of their employers are not taxable persons.<sup>220</sup> This long-standing rule is explicit on how Uber, as the employer, is required to charge VAT.<sup>221</sup> Based on the EU and UK legislation, Uber falls within the scope of VAT and it is obliged to charge

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214. *See generally id.*

215. *Id.* at 11.

216. *Id.* at 10.

217. Value Added Tax Committee, *supra* note 105, at 7.

218. *Id.* (stating in footnote 22 that “in the United States several government bodies ruled that Uber drivers are employees, not independent contractors while others issued rulings that classify Uber drivers as independent contractors.”)

219. Council Directive 2006/112, art. 10, 2006 O.J. (L 347) 1, 11 (EU); *see also VAT Taxable Person Manual*, Gov.UK (Apr. 12, 2016), *available at* <https://www.gov.uk/hmrc-internal-manuals/vat-taxable-person/vtaxper23000> (last visited Nov. 25, 2018).

220. Council Directive 2006/112, art. 10, 2006 O.J. (L 347) 1, 11 (EU).

221. *See generally* Value Added Tax Committee, *supra* note 105.

VAT. The EC states, “VAT treatment of services provided by online sharing economy platforms . . . [is] straightforward.”<sup>222</sup> In the future, a digital platform may exceed the borders of the EU VAT Directive and UK VAT Act, but, currently, Uber is not it.

### ***B. VAT Fraud is Tax Evasion***

Today, Uber heads down a dead-end road as calculations conclude that Uber owes HMRC approximately £40 million in VAT per year.<sup>223</sup> Nearly £20 million in VAT comes from London alone, and this amount only accounts for 2015.<sup>224</sup> Uber’s complex global tax scheme might be regarded as “top-performing,” but this is not just tax avoidance—it is tax evasion.

Tax avoidance is the legitimate minimization of taxes by use of methods in the UK’s Tax Code.<sup>225</sup> Businesses and individuals avoid paying taxes by taking legitimate deductions, such as donating money to an approved charity, and sheltering income through a tax deferral plan, such as an IRA or 401(k) plan.<sup>226</sup> A tax loophole “allows a person or business to avoid the scope of a law or restriction without directly violating the law.”<sup>227</sup> Tax avoidance and taking advantage of a tax loophole are legal.<sup>228</sup> However, tax evasion, also known as tax fraud, is the illegal practice of intentionally avoiding to pay the full amount of tax an individual or entity owes.<sup>229</sup> The European Parliament defines tax evasion as not declaring income consumption or production for taxation, despite the fact that the income is taxable.<sup>230</sup> VAT fraud is a type of tax evasion that occurs when a business does not charge VAT when it should, or charges

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222. *Id.* at 11.

223. Salmon & Rushton, *supra* note 200; *see also* Bergin, *supra* note 90.

224. Shona Ghosh, *Uber Is Being Sued in the UK for at Least £20 Million in VAT*, BUS. INSIDER NORDIC, available at <https://nordic.businessinsider.com/uber-is-being-sued-for-at-least-20-million-in-vat-2017-2/> (last visited Nov. 22, 2018).

225. Jean Murray, *What Is the Difference Between Tax Avoidance and Tax Evasion?*, THE BALANCE (Oct. 28, 2018), available at <https://www.the-balance.com/tax-avoidance-vs-evasion-397671> (last visited Nov. 22, 2018).

226. *Id.*

227. *Loophole*, INVESTOPEDIA, available at <https://www.investopedia.com/terms/l/loophole.asp> (last visited Nov. 22, 2018).

228. Murray, *supra* note 225.

229. *Tax Evasion*, INVESTOPEDIA, available at <https://www.investopedia.com/terms/t/taxevasion.asp> (last visited Nov. 25, 2018).

230. Cécile Remeur, *Tax Policy in the EU, Issues and Challenges*, EPRS (Feb. 2015), available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549001/EPRS\\_IDA%282015%29549001\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549001/EPRS_IDA%282015%29549001_EN.pdf) (last visited Nov. 22, 2018).



VAT to an individual but does not pay it to HMRC.<sup>231</sup> For example, a business commits VAT fraud, and therefore tax evasion, if it fails to register for VAT when it is obliged to under the UK VAT Act.<sup>232</sup>

Precedent, and the in-depth analysis in Section III(C)(2), proves that Uber drivers are workers and not self-employed contractors, and a court will likely find that the drivers fall under the definition of employees for VAT purposes. Uber can no longer manipulate the reverse charge to impose the obligation to register and report VAT onto Uber drivers. Uber's net worth is \$70 billion (over £50 billion),<sup>233</sup> which certainly exceeds the £85,000 threshold. Accordingly, Uber has the duty to register and charge VAT on each and every booking in the UK. Since Uber is not registered for VAT as it should be, Uber is committing VAT fraud, and thus, tax evasion, in the UK. No "gray area" exists here.

At a day-long summit in Estonia, leaders from EU countries argued "that tech giants have used low-tax regimes to cut out billions of euros that they should have paid in the EU."<sup>234</sup> EU leaders acknowledged that these "low-tax regimes" eliminate the VAT that should have been paid to the EU.<sup>235</sup> Furthermore, on November 30, 2017, the European Commissioner for Economic and Financial Affairs, Taxation, and Customs stated at an EC conference in Brussels that information on business and cross-border sales overwhelms the manual processing of information, and this fast-moving criminal activity remains "not currently tracked [or] tackled quickly enough."<sup>236</sup>

The National Audit Office ("NAO") deserted the laissez-faire demeanor of HMRC and conducted an investigation on online sellers who do not charge VAT on their goods and services located in the UK and sold to UK customers.<sup>237</sup> In the NAO's investigation, HMRC estimates

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231. *Report VAT Fraud*, Gov.UK, available at <https://www.gov.uk/report-vat-fraud> (last visited Nov. 22, 2018).

232. *Id.*

233. Avery Hartmans & Rob Price, *The Rise and Fall of Travis Kalanick, Uber's Embattled Billionaire Founder Who Just Resigned as CEO*, BUS. INSIDER (June 21, 2017), available at <http://www.businessinsider.com/uber-ceo-travis-kalanick-life-rise-and-fall-photos-resigned-2017-6> (last visited Nov. 22, 2018).

234. Catherine Stupp, *Tax Fight Draws Divisions at EU Digital Summit*, EURACTIV (Sept. 29, 2017), available at <http://www.euractiv.com/section/economy-jobs/news/tax-fight-draws-divisions-at-eu-digital-summit/> (last visited Nov. 22, 2018).

235. *See id.*

236. European Commission Press Release IP/17/4946, *supra* note 206.

237. *Investigation Into Overseas Sellers Failing to Charge VAT on Online Sales*, NAT'L AUDIT OFF. (Apr. 19, 2017), available at <https://www.nao.org.uk/report/investigation-into-overseas-sellers-failing-to-charge-vat-on-online-sales/> (last

“that [there was] online VAT fraud and error cost between £1 billion and £1.5 billion in lost tax revenue in 2015-16.”<sup>238</sup> This estimate enlarges the EU tax gap and represents tax money not contributed to the EU economy. The Chancellor’s budget for 2018 states that tax money will be used for public transport (creating new rail lines and widening roads), education (building new schools), defense (military budget), housing (increased building), and social protection (housing and disability benefits).<sup>239</sup> The approximately £20 million (in London alone) in VAT that Uber failed to pay in 2015 is part of the £1-1.5 billion in lost tax revenue that impacts the EU’s economy and citizens.<sup>240</sup> Contribution of that money to the Chancellor’s budget would increase growth and the general welfare of the community; instead, Uber profits off tax money that belongs to the citizens of the EU.

### C. Digital Single Market for VAT

The sharing economy is growing at an incredible rate and shaping advanced business structures, agreements, organizations, kinds of exchange, and employment strategies. Evidently, the traditional VAT regulatory framework presents confusion to businesses in the sharing economy. EU legislators should amend the EU VAT Directive to include provisions that make clear that it directly applies to the sharing economy. However, “correcting the tax treatment of sharing economy businesses will not be as easy as announcing a rule change[;] rules for registration and compliance must change too.”<sup>241</sup>

#### 1. EC Proposes the Digital Single Market

In May 2015, the EC, in conjunction with the Organization for Economic Co-operation and Development (“OECD”), proposed legislation on modernizing VAT for cross-border digital trade and to prevent tax evasion concerning VAT in the EU.<sup>242</sup> This package of legislation will

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visited Nov. 22, 2018); see also Madison Marriage & Madhumita Murgia, *Taxman Under Fire for Failing to Probe Uber Stance on VAT*, FIN. TIMES (Oct. 26, 2017), available at <https://www.ft.com/content/7ca2f852-b5b5-11e7-a398-73d59db9e399> (last visited Oct. 12, 2018).

238. Marriage & Murgia, *supra* note 237.

239. Inman, *supra* note 205.

240. Ghosh, *supra* note 224.

241. *Sharing Economy Shows Up Outdated Tax Rules*, FIN. TIMES (Jan. 3, 2017), available at <https://www.google.com/amp/s/amp.ft.com/content/56567f7a-d1cc-11e6-9341-7393bb2e1b51> (last visited Nov. 22, 2018).

242. See Mercedes Samavi & Trevor James, *EU Digital Market VAT Reform*, LEXOLOGY (Apr. 30, 2018), available at <https://www.lexology.com/library/detail.aspx?g=2d582e24-cccc-4ab8-bcdf-9b825e73abe8> (last visited Nov. 25, 2018); see also *Economic and Financial Affairs*, EUR. COUNCIL (May 12, 2017), available

be in full effect in 2021 and outlines the Digital Single Market, introducing the first EU-wide VAT online marketplace for companies operating online.<sup>243</sup> Businesses that sell goods and services online will be able to access the “One Stop Shop” (“OSS”), the digital online portal.<sup>244</sup> The Digital Single Market unifies all EU countries and modernizes the VAT process and clarifies the already-established law that businesses in the sharing economy are not exempt from the traditional VAT legislation.

## 2. *The Digital Single Market Simplifies Registration*

The Digital Single Market strategy has 16 “Key Actions.” Specifically, Key Action 8 targets the application of VAT rules on the trade of digital goods and services.<sup>245</sup> Currently, businesses that sell e-services are able to sell to consumers in other Member States, but must register for VAT in each EU Member State in which they sell.<sup>246</sup> This adds additional complexity, costs, and burdens that will diminish once there is a move to the Digital Single Market.<sup>247</sup> The Digital Single Market extends the already in-use EU-wide portal called OSS to companies that sell goods and services online.<sup>248</sup> The Digital Single Market allows businesses to account for all VAT in a single quarterly return through the online portal hosted by their home tax administration.<sup>249</sup> The VAT Revenue apportioned to the Supplier Business’s home tax administration will then be transferred to the relevant Member State in which the business sold e-services to consumers.<sup>250</sup> Overall, businesses located outside of the UK will generate £2.3 billion in savings.<sup>251</sup>

The new legislation also provides a more straight-forward “place of supply standard.” The VAT rate charged on these e-commerce sales will have a place of supply determined by the Member State where the consumer lives, regardless of the location of the online retailer.<sup>252</sup> This uniform standard will make it easier for businesses participating in cross-

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at <http://www.consilium.europa.eu/en/meetings/ecofin/2017/12/05/> (last visited Nov. 25, 2018).

243. Samavi & James, *supra* note 242.

244. European Commission Press Release MEMO/16/3746, *Modernising VAT for E-Commerce: Question and Answer* (December 5, 2017).

245. Samavi & James, *supra* note 242.

246. European Commission Press Release MEMO/16/3746, *supra* note 244.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. European Commission Press Release 734/17, *VAT on Electronic Commerce: New Rules Adopted* (December 5, 2017).

252. European Commission Press Release MEMO/16/3746, *supra* note 244.

border transactions to identify the VAT rate and determine how much to charge.<sup>253</sup>

### 3. *Strict Compliance*

For the Digital Single Market to be successful, tax authorities must enforce compliance of the Digital Single Market to all domestic and international businesses. Meg Hillier, Labour MP, stated that the “HMRC needs to be much more adept at working out how working practices are changing and . . . has been slow to react to new business models.”<sup>254</sup> Surprisingly, with the litany of legal disputes involving Uber, the UK tax authority never opened a formal investigation into Uber’s approach to VAT until last year (2017).<sup>255</sup> Margaret Hodge, Labour MP, stated that HMRC’s “persistent reluctance to test the questionable financial practices of some companies in the courts . . . was a scandal of the UK tax system.”<sup>256</sup>

HMRC created the Fraud Investigations Service Unit (“FIS”) in 2015, due to political pressure to increase the number of successful tax prosecutions in the UK.<sup>257</sup> FIS conducts civil and criminal investigations to combat tax fraud across all taxes that HMRC is responsible for overseeing.<sup>258</sup> Each Member State controls its own task force to combat VAT fraud, but to investigate multi-national companies operating in multiple Member States, I recommend that the EU establish one organization (“Task Force”) responsible for civil and criminal investigations regarding VAT fraud. The EC is mid-way through implementing the Digital Single Market and it should also establish a Task Force to mirror its goal of uniformity. The Task Force would guarantee strict compliance with the Digital Single Market and is impertinent to its success.

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253. *Id.*

254. Marriage & Murgia, *supra* note 237.

255. *Id.*; see also *Investigation Into Overseas Sellers Failing to Charge VAT on Online Sales*, *supra* note 237.

256. Marriage & Murgia, *supra* note 237.

257. Emanuela Hawker, *HMRC Fraud Investigation Team Collected £5.47bn in Extra Tax Equaling 7% Rise on Last Year*, ACCOUNTANCYAGE (Sept. 11, 2018), available at <https://www.accountancyage.com/hmrc-fsi-team-up-by-7-in-last-year-collecting-5-47-in-extra-tax/> (last visited Nov. 20, 2018).

258. *Who Are the HMRC Fraud Investigations Service Unit and What Do They Do?*, MAZARS, available at <https://www.mazars.co.uk/Home/Services/Tax/Tax-investigations/Who-are-the-HMRC-Fraud-Investigations-Service-Unit> (last visited Nov. 20, 2018).

#### IV. CONCLUSION

The UK VAT Act applies to Uber's business model. Uber argues that the UK VAT Act does not apply to it because it is not a taxable person (entity), as it implements the reverse charge and classifies the drivers as independent contractors, who offers a service with a place of supply in the UK. However, the Uber app constitutes a service with its place of supply in the UK and Uber is a taxable person, as an employer, who exceeds the VAT Revenue threshold of £85,000. By refusing to register and charge VAT under the UK VAT Act, Uber is committing VAT fraud, and thus tax evasion. EU and UK legislation clearly state that services provided by sharing economy platforms to their users shall constitute taxable transactions and are subjected to VAT.<sup>259</sup> The EC clarified the application of the UK VAT Act to businesses in the sharing economy; yet, Uber still refuses to play by the rules.

The EC and OECD proposed legislation to modernize the VAT system. The implementation of the Digital Single Market will create a more fair and uniform method in the EU's business industry between domestic sales and cross-border transactions.<sup>260</sup> It is explicitly stated that all goods and services bought online will be subject to VAT, in line with current EU sales practices.<sup>261</sup> The EC stated that:

evidence of abuse of the existing intra-EU [VAT system] . . . [that] involve[s] sellers taking advantage of differentials in VAT rates between Member States . . . or indeed not charging any VAT at all. These sellers exploit the lack of cooperation between Member States which harms citizens in terms of tax [pounds needed] to fund public services and businesses in terms of their competitiveness.<sup>262</sup>

However, by using the Digital Single Market, VAT compliance will need to be strictly enforced by one Task Force to reduce the kind of VAT fraud utilized by Uber.<sup>263</sup>

Uber's self-proclaimed status as a technology platform, its use of the reverse charge with its drivers as independent contractors, and its belief that its Dutch subsidiary controls the VAT rate shields Uber from not

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259. See generally Value Added Tax Committee, *supra* note 105.

260. See generally European Commission Press Release MEMO/16/3746, *supra* note 244.

261. *Id.*

262. *Id.*

263. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, COM (2015) 192 final (May 6, 2015).

charging VAT. Despite Uber's arguments, under the EU VAT Directive, UK VAT Act, and other precedent Uber's claims are incorrect and, as a result, Uber is committing tax fraud on the international level. Uber will soon be smelling burning rubber as it is left in the smoke to reap the consequences of its illegal tax practices.