

ELEONOR KRISTOFFERSSON &
ANNINA H. PERSSON

Intermediary Platforms and Their Users – in the Light of the Swedish Consumer and Tax Regulations

ELEONOR KRISTOFFERSSON Jur. dr. och professor i
rättsvetenskap med inriktning mot skatterätt vid Örebro universitet.
eleonor.kristoffersson@oru.se

ANNINA H. PERSSON Jur. dr. och professor i rättsvetenskap med
inriktning mot civilrätt vid Örebro universitet, redaktions- och styrelse-
ledamot i Insolvensrättslig tidskrift, annina.persson@oru.se

1. INTRODUCTION

The emerging sharing economy allows private individuals to sell or rent their underutilized assets and resources through intermediary platforms, whose function is to link those who offer goods or services with those who request them. A private individual can, for example, pay to borrow someone's tools, to travel together in someone's car or to use someone else's home. In addition, there are platforms that offer childcare, cleaning and computer assistance.¹ It can also be a matter of financial assets, such as when a private individual lends money to another individual.² Finally, it may concern intangible assets, such as when someone performs an assignment on behalf of someone else and hence gives up both time and skills to perform the assignment.

¹ See SOU 2017:26 p. 14.

² See SOU 2018:20 p. 16-25.

There are different types of intermediary platforms.³ First, there are international platforms like Airbnb⁴ that are aimed at users in several countries and where the sharing of resources can be done internationally. Secondly, there are international platforms like Streetbank⁵ that are aimed at users in several countries but where the sharing of resources is done locally. Thirdly, there are national platforms such as RentL,⁶ which are aimed at users in Sweden and where the sharing of resources takes place locally. In addition to this, there are groups on Facebook and other social media or in so-called swap shops⁷ where the sharing of resources takes place locally.

The provider of these services or goods may be a private individual or a company. If the provider is a private individual, working under conditions that are similar to those of a person employed by a company or to someone running a business, it may trigger legislation related to taxes and fees. If the provider is not a well-established business, what can the person using the goods or services (called user below) expect if the quality of the goods or the services fail or something else goes wrong in the transaction?

In this article, the following questions are discussed. Firstly, which regulatory framework is applicable with regard to the transactions between the provider/user and the platform? Secondly, which regulatory framework is applicable with regard to the transactions between the provider and the user? Thirdly, under which circumstances can the user claim responsibility of the provider if the services or the goods are not performed or made according to the agreement? Fourthly, how are payments made between the provider and the user but also to the platform? Fifthly, under which circumstances are the provider, the user and the platform liable to pay taxes and fees?

³ See SOU 2017:26 p. 15 and p. 86.

⁴ Airbnb provides a platform for short-term residential letting services between private individuals.

⁵ Streetbank provides a web-based network through which the public can donate or lend items of all kinds, such as tools, household utensils, clothes. Even labour can be provided.

⁶ RentL provides a platform for renting goods

⁷ See, for example, The Free Shop in Majorna, Gothenburg. The business is conducted at a physical venue where individuals exchange items of different kinds with each other.

In order to answer these questions, we have analysed two different Swedish national platforms. We have firstly analysed RentL, which is a rental service for movable property such as tools, machinery and vehicles but also housing. Secondly, we have analysed TaskRunner, which provides services such as gardening, mobility assistance, craft services, etc. The transactions can be made between private individuals but also between traders and consumers.

2. THE EFFECT OF PRIVATE LAW LEGISLATION ON THE PROVIDER, THE USER AND THE PLATFORM

2.1 Applicable legislation

Referring back to the questions above: Which regulatory framework is applicable regarding the transactions between the provider/user and the platform and secondly, which regulatory framework is applicable as concerns the transactions between the provider and the user?

The platforms of both RentL and TaskRunner constitute a meeting place where providers of rental goods or people offering services are brought together with those interested in renting the items or paying for a service. The service provided by the platform simply constitutes access to a forum that allows the renting out of goods or the provision of services between individuals. The agreement to either rent goods or buy a service is concluded directly between the two private individuals. The platform expressly states that it does not constitute a contractual party. Furthermore, the platform assumes no responsibility beyond providing access to a meeting place.

Both RentL and TaskRunner are limited companies. Therefore, consumer law may be applicable regarding the agreement that the platform reaches with the provider/user if either of them is a consumer. The consumer legislation that is applicable may be determined on a case-by-case basis. In the present case, legislation such as the Electronic Communications and Information Society Services Act (2002:562) and the Internal Market Services Act (2009:1079)

may apply.⁸ It may also be the case that the Consumer Contracts Terms Act (1994:1512), the Price Information Act (2004:347) as well as other market law legislation are relevant.⁹ However, there is nothing in TaskRunner's terms of agreement that allows the platform to be considered as a party to the agreement between the user and the provider. The platform does not determine the price, it does not own the assets and it is not the platform that determines the key contractual terms between the parties. On the other hand, there are certain write-downs in RentL's terms of contract, which indicate that RentL could be perceived as a party to the agreement between the user and the provider. RentL determines for example a lot more than TaskRunner on the key contractual terms between the parties. However, RentL itself implies that the platform shall not under any circumstances be regarded as a contractual party.

In the case of the law applicable between the provider and the user in a rental agreement, it may be noted that there is no specific legislation, except for certain older provisions in Chapter 13 of the Civil Code (*Handelsbalken*). Since specific legislation is lacking and case law is scarce, it is necessary to use analogies from other legislation such as the 1990 Sale of Goods Act.¹⁰ Another possible analogy is to the rules on rent in Chapter 12 of the Land Code but also the Commission Agency Act.¹¹ The model rules in the Draft Common Frame of Reference (DCFR), Book IV, Part B Lease of goods may also be considered. If the provider rents out goods to a user, the agreement is considered to be a consumer agreement. However, no mandatory rules exist, apart from the Consumer Contracts Act (1994:1512) on contractual terms in consumer relations.¹²

As regards the law applicable between the provider and the user in a service agreement, the Consumer Services Act (1985:716) may apply if the provider is a tradesman and the user a consumer. If both the provider and the user are private individuals, there are no legal provi-

⁸ See SOU 2017:26 p. 267.

⁹ See SOU 2017:26 p. 277.

¹⁰ SFS 1990:931.

¹¹ See Hellner, J. & Hager, R. & Persson, A.H., *Speciell avtalsrätt II, Kontraktsrätt*, 6 ed. 2015, 1 Häftet. *Särskilda avtal* p. 211.

¹² Compare law proposal, Ds 2010:24 *Hyra av lös sak*.

sions governing the rights and obligations between the provider and the user. Guidance on legal questions can be obtained from the Sale of Goods Act, which may to a certain extent be applied by analogy to such a service agreement. However, it may be hard to draw any conclusions from the Consumer Services Act on such an agreement. If the Consumer Services Act and the Sale of Goods Act include the same rule, it is safe to assume that it will also apply to contracts for services that fall outside the scope of the Consumer Services Act.¹³

2.2 The form of the agreement

The agreement between the provider and the user does not have to meet any specific requirements. The same applies to service contracts. When determining the obligations of the rental agreement, a distinction can be made between three stages, namely the initial stage when the goods encompassed by the agreement are taken over by the lessee, the rental stage when the goods are held by the lessee and the final stage when the goods are restored to the lessor or the settlement is otherwise terminated. An important issue is to determine the length of the rental period. The time period can be determined using the starting date and the ending date or otherwise. The beginning of the rental period is normally determined by the agreement. According to RentL's contractual terms¹⁴, the start of the rental period and delivery of the rental goods always takes place at 10:00 am on a particular day, unless otherwise agreed between the provider and the user in writing. The provider can choose between two rental options. If the provider chooses so-called direct payment, the provider must indicate on the platform which specific dates the goods can be rented. If the provider chooses a so-called booking request, no specific dates are given. The goods are always available on request.

How the delivery of the rented property shall be made is not reflected in RentL's contractual terms, except for the renting out of

¹³ Hellner, J. & Hager, R., Persson, A.H., *Speciell avtalsrätt II, Kontraktsrätt*, 6 ed., 2015, 1 häftet. Särskilda avtal, p. 93-94.

¹⁴ Section 4.2 of RentL's general contract terms.

accommodation.¹⁵ However, such information can be given in the booking confirmation, which is sent by e-mail to both the provider and the user when the user confirms the rental booking on the platform.¹⁶ If it is not clear in the agreement where the delivery shall be made, the user should retrieve the goods from the site of the provider; compare Section 6 of the Sale of Goods Act.

A service agreement may refer to a single act of service or a multitude of services for a longer period of time. If the assignment refers to a single act of service and it is not explicitly agreed during which period the service shall be carried out, it is often quite obvious when the service should take place due to the circumstances. Otherwise, it may be assumed that the service shall be performed within a reasonable period of time from the conclusion of the agreement, cf. Section 9 of the Sale of Goods Act. Furthermore, the terms of the agreement should be fulfilled at the time agreed and otherwise within a reasonable period of time considering what is normal for a service of the same kind and scope.¹⁷ TaskRunner's contractual terms state that when the user and the provider have entered into an agreement, it is the duty of the provider to perform the service as agreed. It is the duty of the user to appear at the time and place agreed to receive the service from the provider.¹⁸ However, the terms do not stipulate when the service should be completed or when it can be considered completed.

2.3 The provider's responsibility for the quality of the rented goods or the services performed

The provider's responsibility for the quality of the rented property at the beginning of the rental period can often be assessed using the rules on sale of goods as an analogy. Regarding the provider's responsibility for the property, the aforementioned contractual terms from RentL are few. However, it is stipulated that the provider is

¹⁵ See Section 9.6 of RentL's general contract terms which state that the landlord must be present (himself or herself) at the start of the rental period and at the end of it to hand over/receive keys to/from the lessee.

¹⁶ Section 4.1 compared with Section 4.3 of RentL's general contract terms.

¹⁷ Compare 24 § 1 of the Consumer Services Act. See Hellner, J. & Hager, R., Persson, A.H., *Speciell avtalsrätt II, Kontraktsrätt*, 6 ed., 2015, 1 häftet. Särskilda avtal, p. 100-101.

¹⁸ Section 12.3 TaskRunner's general contract terms.

responsible for ensuring that all the information published on the platform's website is accurate. When an advertisement is published on the platform's website, the provider also guarantees that he or she is entitled to rent out the property to the user. In connection with the letting of the property, it is recommended in the contract terms that the provider and the user collectively review important features of the rental property. They should carry out an inspection of the rental property and note any damage in writing. The provider is also responsible for keeping the rented property (including any equipment) insured and the insurance policy must include rental services.¹⁹

Regarding vehicles, the provider is responsible for ensuring that a technical inspection of the rental vehicle is carried out and approved. In respect of housing, it is said that the lessor guarantees that he owns the property or is entitled to let the property. When renting out a house or a flat, the provider is also responsible for ensuring that at the time of access and throughout the rental period the rented property has a standard equivalent to being fully usable as a residence in accordance with Chapter 12 Section 9 of the Swedish Land Code.²⁰ In addition, the provider and the user should jointly carry out an inspection – both at the beginning of the rental period and at the end of it and write an inspection protocol covering the property and any inventory.

If the agreement does not stipulate anything about the quality of the rented goods, it may be argued that these should fit the purpose for which goods of a similar kind are generally used (see Section 17 § 2. p. 1 of the Sale of Goods Act) or be fit for the particular purpose for which the goods are intended to be used provided that the seller, at the time of sale, has realised that particular purpose and the buyer was reasonably entitled to rely on the seller's expert knowledge and judgment (Section 17 § 2 p. 2 of the Sale of Goods Act.). The provider's responsibility for the quality of the goods during the rental period is often referred to as his preservation obligation. The pro-

¹⁹ Section 7.5 of RentL general contract terms.

²⁰ Chapter 12 Section 9 of the Swedish Land Code states that on the possession date, unless better conditions have been agreed, the landlord shall provide the unit in such condition that, according to the general view in the locality, it is fully serviceable for the purpose intended.

vider may not take action that prevents the user from exercising the agreed use. Should the goods be damaged or otherwise defective, it could be argued that the provider may be required to rectify the error, possibly sending replacement goods to be at the disposal of the user without any compensation from the user (see DCFR IV B 3:104 compare 5:104 and 5:105). From a Swedish perspective, however, it is doubtful whether there are sufficient grounds for imposing such a strict obligation on the provider.²¹ In the aforementioned contractual terms from RentL, another alternative is presented, namely if the goods break down during the rental period or for any other reason are not fit for use, and this is not due to the user, the user is entitled to a deduction on the price corresponding to the agreed daily rent for the days the goods are not available.²²

In the event of a service agreement where the Consumer Services Act is applicable, there are several provisions in the Act on how the service is to be performed, see Sections 4-15.²³ As a general requirement, in the absence of a specific agreement on the work performed, Article 4 (1) states that the trader shall perform the service in a professional manner. The rule is compelling to the consumer's benefit. How to define a professional manner must be decided on a case-by-case basis and is often governed by different industry standards. Furthermore, the trader shall safeguard the consumer's interests with due care and consult the consumer to the extent that this is necessary and feasible. If the service is defective, the consumer has the right to withhold payment, demand that the defect be remedied, make a deduction to the price or terminate the contract. The consumer may also claim damages.

If the Consumer Services Act is not applicable to the agreement, the parties may freely agree on the standard of service. In the event

²¹ See Hellner, J. & Hager, R., Persson, A.H., *Speciell avtalsrätt II, Kontraktsrätt*, 6 uppl., 2015, 1 häftet. Särskilda avtal p. 214.

²² See Section 7.9 of RentL's general contract terms.

²³ See Hellner, J. & Hager, R., Persson, A.H., *Speciell avtalsrätt II, Kontraktsrätt*, 6 ed., 2015, 1 häftet. Särskilda avtal p. 102 and the following pages. See also Munukka, J., *Kontraktuell lojalitetsplikt*, 2007, p. 323 and the following pages.

of a dispute between the parties, it may be possible to apply the rules in the Consumer Services Act to a certain extent.²⁴

TaskRunner's terms of agreement state that if the service has caused the user an injury or any damage has been caused by or in connection with the service, the user may immediately contact the provider. It is not possible for the user to turn to the platform in this situation. By accepting TaskRunner's terms of agreement, the user has accepted that the platform has no responsibility for the service. However, the platform provides liability insurance as a service that can be claimed.²⁵ It applies, inter alia, to "certain injuries" caused by the provider while providing the service. The kinds of injuries that are covered or not covered are not specified with a few exceptions. If, for example, the provider causes damage that is in turn caused by water or electricity that is not covered by the liability insurance.

2.4 The user's responsibility for the rented goods or for the services performed

According to RentL's terms of contract, the user is responsible for any damage to the rental goods during the rental period. The user is responsible for all costs incurred during the rental period in connection with damage or loss of property, regardless of whether the user has been negligent or not. Here, the terms of the agreement differ from the general contractual rules regarding the user's duty of care. Normally, if the user fails to fulfil his duty of care and damage occurs, the user becomes liable for damages unless the user can prove that he or she was not negligent.²⁶ However, according to RentL's terms of contract, the user is not obliged to pay the provider for expenses that the provider is reimbursed for through his insurance.

²⁴ See Hellner, J. & Hager, R., Persson, A.H., *Speciell avtalsrätt II, Kontraktsrätt*, 6 ed., 2015, 1 häftet. Särskilda avtal p. 103, 107, 108, 111, 119, 127-128. See also Munukka, J., *Kontraktuell lojalitetsplikt*, 2007, p. 355 and the following pages. See also Supreme Court case NJA 2013 p. 1174. Compare also Björkdahl, E.P., *Lojalitet och kontraktsliknande förhållanden*, 2007, p. 47 and the following pages.

²⁵ See Section 17, especially 17.2 of the Taskrunner's general contract terms.

²⁶ See Hellner, J. & Hager, R., Persson, A.H., *Speciell avtalsrätt II, Kontraktsrätt*, 6 ed., 2015, 1 häftet. Särskilda avtal p. 224.

In TaskRunner's terms of contract, no information is available about the users' obligations regarding the service rendered. If the Consumer Services Act is applicable, the user shall pay the agreed price for the service. If the price has not been determined in the agreement, the user shall, in accordance with Section 36 § 1, pay a price which is reasonable taking into account the nature, extent and performance of the service, current prices or methods of calculating prices for similar services at the time of contract, as well as other circumstances. In addition to that provision, there are a number of other detailed rules concerning pricing.²⁷

If the user delays payment, the trader may demand payment be made with interest, or may terminate the agreement, etc.²⁸ For agreements that fall outside the Consumer Services Act, it may be possible to apply similar rules as those in the Consumer Services Act regarding the price²⁹ and the penalties issued when a consumer fails to pay on time.³⁰

2.5 Terms of payment

As mentioned above, one of the questions we raise is about how payments are made between the provider and the user but also to the platform. A user who wants to buy a service or rent goods is usually obliged to pay the platform before the service or rental period commences. Thus, as the user makes a prepayment, the user refrains from the option of withholding the payment to see whether errors or delays in the service or the delivery of the rented goods occur.³¹ TaskRunner's terms of contract state that the user should pay the platform when the user accepts a tender from the provider. The remuneration is determined by the provider and the user alone.³² TaskRunner charges a fee of 15 per cent of the fee that the user pays the provider

²⁷ See Section 36 § 2 about approximate price, about surcharge 38 § 1, and preliminary examinations in 37 § in Consumer Services Act.

²⁸ See 45 § and 47 § Consumer Services Act and Hellner, J. & Hager, R., Persson, A.H., *Speciell avtalsrätt II, Kontraktsrätt*, 6 ed., 2015, 1 häftet. *Särskilda avtal* s. 131-135.

²⁹ Cf. Section 45 § of the Sale of Goods Act. See NJA 2001 p. 177.

³⁰ See Hellner, J. & Hager, R., Persson, A.H., *Speciell avtalsrätt II, Kontraktsrätt*, 6 ed., 2015, 1 häftet. *Särskilda avtal* p. 135-136.

³¹ See SOU 2017:26 p. 97.

³² See SOU 2017:26 p. 82.

for the provision of the service. However, payments to the provider only occur when the user has approved the service. The transfer of the remuneration to the provider does not mean that the provider enjoys an employment or assignment relationship with the platform.

RentL's terms of contract stipulate that the user will make a payment to the platform when he/she books the rental goods. For the services rendered to the user, RentL charges a service fee. The platform then deposits the paid amount into a client account that belongs to the platform. The amount is transferred on the 15th or the next consecutive banking day the month after the rental period to the provider after RentL has charged the provider a commission fee. In addition, if the user objects stating that the provider has not delivered the rental goods and the user notifies the platform about this delay, the platform will only transfer the payment to the provider if the provider can present a signed agreement within seven days of the platform's request. If the signed rental agreement is not presented within the said time, the rent will be returned to the user after a deduction for the platform's service fee.³³

The above-mentioned contractual terms show that both the user and the provider are less likely to lose their money if something goes wrong. Although the user makes an advance payment, he/she can get part of his/her money back if he/she is not satisfied with the service or if the rented goods have not been delivered. The provider is also protected as the user has to make an advance payment. None of the platforms, however, take responsibility for disputes between the parties or losses.³⁴

³³ See Section 5.3 of RentL's general contract terms.

³⁴ See a case from the National Board of Consumer Disputes, 2016-05631, where a provider (private individual) had rented his car to a user (another private individual) via a platform intended for such rental services. The user returned the car later than what had been stipulated in the agreement. For this reason, the platform claimed on the provider's behalf, that the user should pay contractual fees due to the delay in returning the car. However, the user did not pay. The provider subsequently demanded that the platform pay the fee to the provider, even though the user had not paid it to the platform. The National Board of Consumer Disputes found that according to the agreement between the provider and the platform, the provider was entitled to the fee (but with a deduction for the platform's commission fee), regardless of whether the user had paid it to the platform or not.

3. THE EFFECTS OF TAX LEGISLATION ON THE PROVIDER OF SERVICES

3.1 General

In Sweden, there are no special tax rules concerning the sharing economy and applying the traditional tax system on the sharing economy is not so straightforward. In fact, the sharing economy is said to be rarely reported, rarely controlled by the tax authorities and for obvious reasons even more rarely taxed.³⁵ The European Commission has put forward a proposal on an EU-wide provisional tax on certain income from digital activities.³⁶ The new tax is proposed to be levied as from 1 January 2020 and shall apply to income deriving from digital intermediary activities through which users can come into contact with each other or sell goods and services to each other. It would, hence, apply to the sharing economy intermediary platforms. The tax rate is proposed to be set at 3 per cent of the gross income. The tax should be collected by the Member States where the users are located, and only from companies with annual revenues of at least 750 million euros worldwide and at least 50 million euros within the EU.

As mentioned in the introduction, we analyse under which circumstances the provider, the user and the platform may be subject to liability for taxes and fees. The main tax effects that arise concern income tax, social security contributions and value added tax (VAT). In Sweden, social security contributions are part of the tax system, since they are not directly connected to a *quid pro quo*. The person paying social security contributions does not receive anything sufficiently specific in return to be considered as having paid an actual fee. In other words, if you are simply obliged under law to make a payment to a public authority without receiving something specific in return, you are paying a tax.

³⁵ See Beretta, Giorgio, Taxation of Individuals in the Sharing Economy, Intertax, Volume 45, Issue 1, 2017 pp. 2-11 (p. 3).

³⁶ European Commission, Proposal for a Council Directive on a common system of a digital services tax on revenues resulting from the provision of certain digital services, Brussels 23.3.2018, COM (2018) 148 final.

Income tax and social security contributions are not harmonized within the EU. Hence, the statements in this article regarding income tax and social security contributions apply to Swedish taxes. The tax problems that arise from the use of intermediary platforms within the sharing economy are, however, not specifically Swedish but are relevant also in other jurisdictions.

Value added tax is harmonized within the EU. The main legal act is the VAT Directive from 2006.³⁷ The VAT Directive is applicable in all EU Member States. It is not part of the EEA³⁸ Agreement, which means that it does not apply in Norway, Lichtenstein and Iceland. The VAT Directive is implemented in the Member States' national legislation. In this article, we have a clear EU perspective on VAT issues, which means that most of the conclusions regarding VAT are relevant in all Member States. When we home in on national Swedish legislation, interpretation and application, we make clear statements to that effect.

Section 14 of the TaskRunner terms of contract states that the supply and acquisition of services may entail certain tax effects. It is only the user of the services who is responsible for tax effects that may arise when TaskRunner is used. TaskRunner recommends the user to turn to the Swedish Tax Agency³⁹ for further information. The RentL terms of contract do not include any rules on taxes. In the FAQs, however, it is said that a car owner may charge SEK 60 a day for expenses incurred for congestion charges.⁴⁰

3.2 Income Tax and Social Security Contributions

Both TaskRunner and RentL are run, as mentioned above, as Swedish limited corporations, *Aktiebolag* in Swedish. Swedish limited corporations are subject to unlimited tax liability in Sweden.⁴¹ That means that all their net income is subject to 22 per cent corporate tax.⁴² If

³⁷ The Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the VAT Directive).

³⁸ European Economic Area.

³⁹ SW: *Skatteverket*

⁴⁰ SW: *Trängselskatt*. See <https://www.RentL.se/fragor-och-svar>.

⁴¹ Chapter 6 Section 3 Swedish income tax act (SITA), SW: *Inkomstskattelagen* (1999:1229).

⁴² Chapter 65 Section 10 SITA.

the companies receive income from other countries, the tax liability can be limited due to tax treaties that Sweden has entered into with other countries. Under certain circumstances, the platform companies could be considered as employers and thus liable to pay social security contributions for the users of 31.42 per cent on top of the amount paid to the users.⁴³ It should, however, seldom be the case that the users are dependent on the platform company to such an extent that they are considered to be employed by it.

For the users of services negotiated by the platforms provided by TaskRunner and RentL, different income tax and social security contribution effects may occur. Individuals supplying services or letting out their property may be liable to income tax.

A person who independently supplies services on a regular basis for consideration will for income tax purposes be considered to be a businessperson.⁴⁴ Such a person is subject to income tax for business income as well as liable to pay his or her own social security contributions.⁴⁵ The social security contributions for the self-employed are 28.97 per cent.⁴⁶ The tax is calculated on the net income after costs have been deducted from the income earned.⁴⁷ On income of up to SEK 468 700, the taxpayer only pays municipal tax of around 32 per cent (the level of municipal taxes differs from one municipality to another).⁴⁸ On income above that level but below SEK 675 700 SEK, an additional tax of 20 per cent is levied.⁴⁹ While above SEK 675 700 SEK, an additional tax of 5 per cent is levied.⁵⁰ Thus, the tax may amount to approximately 57 per cent for the top income bracket.

⁴³ SW: *Arbetsgivaravgifter*. Skatteverket, Delningsekonomi. Kartläggning och analys av delningsekonomin påverkan på skattesystemet. Rapport 131 129 651-16/113, 2016-10-31 p. 25.

⁴⁴ Chapter 13 Section 1 SITA. See Beretta 2017 p. 5.

⁴⁵ SW: *Egenavgifter*. Chapter 3 Section 1 the Swedish Social Security Fee Act (SSSFA), SW: *Socialavgiftslagen* (2000:980).

⁴⁶ Chapter 3 Section 13 SSSFA.

⁴⁷ Chapter 14 Section 21 SITA.

⁴⁸ Chapter 65 Section 3 SITA.

⁴⁹ Chapter 65 Section 5 SITA.

⁵⁰ Chapter 65 Section 5 SITA.

Individuals who only supply services on an occasional basis are not deemed to be businesspersons.⁵¹ Their income is classified as income from employment.⁵² The tax rates and the income brackets are, however, the same as for businesspersons. There is no tax-free limit, apart from the general minimum allowance which applies to all people resident in Sweden,⁵³ but the income is taxable from the first money earned. What differs, however, are the social security contributions.

If a customer acquires services for less than SEK 1 000 from one person, no social security contributions need to be paid.⁵⁴ If a person, who is not a businessperson, supplies services for an amount of a maximum of SEK 10 000 to one person that person is liable to pay his or her social security contributions, as if he or she were a businessperson.⁵⁵

If, however, one person supplies services amounting to more than SEK 10 000 to one and the same customer, the customer becomes liable to pay the social security contributions for that person.⁵⁶ The social security contributions are then a matter for the customer. In addition, the customer is in that case, just as any other employer, liable to deduct the income tax for the provider of the services from the income earned, before it is paid to the service provider.⁵⁷ This means, in practice, that if a person has sold a service for SEK 12 000, the employer has to deduct at least 30 per cent tax from this amount which is SEK 3 600, and only pay SEK 8 400. The customer also has to pay social security contributions for this person amounting to $12\,000 \times 31.42$ per cent = SEK 3 770.

In addition, the customer is obliged to hand in a statement of earnings and tax deductions⁵⁸ to the Tax Agency when the services

⁵¹ Beretta 2017 p. 5.

⁵² Chapter 10 Section 1 SITA.

⁵³ SW: *Grundavdraget*. Chapter 63 SITA.

⁵⁴ Chapter 2 Section 12 SSSFA.

⁵⁵ Chapter 2 Section 6 and Chapter 3 Section 5 SSSFA. See also Skatteverket, *Delningsekonomi. Kartläggning och analys av delningsekonomin påverkan på skattesystemet*. Rapport 131 129 651-16/113, 2016-10-31 p. 25.

⁵⁶ Chapter 2 Section 1, 4 and 10 SSSFA.

⁵⁷ Chapter 10 Section 4 the Swedish Tax Procedure Act (STPA) SW: Skatteförfarandelagen (2011:1244).

⁵⁸ SW: *Kontrolluppgift*.

acquired amount to SEK 1 000.⁵⁹ Not doing so may constitute a criminal offence.⁶⁰ A practical issue in this regard is that the customer may not know the real name and personal identity number⁶¹ of the provider. In many cases, the customer only knows the *alias* and e-mail address.⁶² This makes it impossible for the customer to comply with the regulations.

The Swedish Tax Agency has stated that it is not as easy to comply with the tax system in the sharing economy as in the economy at large. Traditionally established roles as employer and employee, lender and borrower, investor and project owner are not clear anymore.⁶³ As the co-founder of Airbnb *Brian Chesky* has put it: “there were laws created for business and there were laws for people. What the sharing economy did was to create a third category: people as businesses.”⁶⁴ You have to be very familiar with the tax and social security contribution rules in order to be able to comply with them. The Swedish Tax Agency has proposed that the government explores the possibilities of imposing a liability to supply information to the platform owners, in order to make it easier for the parties using the platform.⁶⁵

3.3 Value Added Tax

Companies running the intermediary platforms are normally taxable persons for VAT purposes. Under Article 9 of the VAT Directive, “taxable person” shall mean any person who independently carries out in any place any economic activity, whatever the purpose or result of that activity’. There is no doubt that companies such as RentL AB and TaskRunner AB fulfil these requirements.

⁵⁹ Chapter 15 Section 2 and 8 STPA.

⁶⁰ See s. 2 Tax penalty code, SW: *Skattebrottslagen* (1971:68).

⁶¹ SW: *Personnummer*.

⁶² Skatteverket, Delningsekonomi. Kartläggning och analys av delningsekonomins påverkan på skattesystemet. Rapport 131 129 651-16/113, 2016-10-31 p. 27.

⁶³ Skatteverket, Delningsekonomi. Kartläggning och analys av delningsekonomins påverkan på skattesystemet. Rapport 131 129 651-16/113, 2016-10-31 p. 4-5. See Beretta 2017 p. 6.

⁶⁴ See A. Kessler, Brian Chesky: The Sharing Economy and Its Enemies, *World Street Journal* (WSJ) (17 Jan. 2014). See Beretta 2017 p. 5.

⁶⁵ Skatteverket, Delningsekonomi. Kartläggning och analys av delningsekonomins påverkan på skattesystemet. Rapport 131 129 651-16/113, 2016-10-31 p. 5.

People who rent out their property through RentL or provide services through TaskRunner may be taxable persons or not. The crucial requirement is whether they carry out an economic activity or not.⁶⁶ An economic activity is specified in the VAT Directive as any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions.⁶⁷ Any exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.⁶⁸ The persons who supply services or let out property as an economic activity can be separated from those who do not depending on whether the income is obtained on a continuing basis. This is not always an easy operation.

The Swedish Tax Agency has made a statement regarding how to separate active commercial letting out of immovable property from passive non-commercial letting out of immovable property. The letting out of immovable property is commercial when the property is let out for 16 weeks or more and the turnover exceeds SEK 50 000.⁶⁹ One reason for this definition is the increased letting out of private immovable property over intermediary platforms like Airbnb.⁷⁰ There is, however, an important difference between passive letting out of immovable property and active commercial letting out of immovable property. Passive letting out of immovable property may well qualify as an economic activity, but it is tax exempt.⁷¹ Passive, non-commercial letting out of movable property is not tax exempt. This means that if a person lets out movable property for an amount not exceeding SEK 50 000, that person cannot be sure that he or she is not a taxable person for VAT purposes.

In Sweden, there is a limit for when it is compulsory to become a taxable person. If the turnover relating to taxable transactions does not exceed SEK 30 000 a year, there is no obligation to be part of

⁶⁶ Art. 9.1 of the VAT Directive.

⁶⁷ Art. 9.2 of the VAT Directive.

⁶⁸ Art. 9.2 of the VAT Directive.

⁶⁹ Skatteverkets ställningstagande, Skatteplikt vid rumsuthyrning i hotellrumsrörelse, mervärdesskatt, Dnr: 131 675099-15/111, 18 December 2015.

⁷⁰ <https://www.airbnb.se/>.

⁷¹ Art. 135.1 l of the VAT Directive.

the VAT system.⁷² If the requirements for not being a taxable person no longer exist, namely when the turnover exceeds SEK 30 000, the person shall declare output VAT on the exceeding amount.⁷³ The person shall also register for VAT purposes at the Tax Agency.⁷⁴ The transfer from being a non-taxable person to a taxable person is hence soft. The alternative would have been to make the person liable to pay VAT from the first crown, which would have been a harder solution, but this is not the case.

People with a yearly turnover below SEK 30 000 can choose to be part of the VAT system if they carry out a taxable economic activity. This could be advantageous in the building-up phase of a taxable activity. Under EU VAT law, as it has been formed in the case law of the Court of Justice of the European Union (CJEU),⁷⁵ a person who has the intention, confirmed by objective evidence, of commencing independently an economic activity and who incurs the first investment expenditure for this purpose must be regarded as a taxable person. Acting in that capacity, that person has therefore the right to immediately deduct the VAT payable or paid on the investment expenditure incurred for the purposes of the transactions which he intends to carry out and which give rise to the right to deduct, without having to wait for the actual exploitation of his business to begin. The right to deduct VAT paid on transactions carried out with a view to the realization of a planned economic activity still exists even where the tax authorities are aware, from the time of the first tax assessment, that the economic activity envisaged, which was to give rise to taxable transactions, will not be continued.

Also as concerns activities where income is unevenly earned over time and the profit margin is low or non-existent, it might be an advantage to be a taxable person. The *Enkler* case from the CJEU is one such example.⁷⁶ In this case, a motor caravan was let out to the

⁷² Chapter 9 d Section 1 *mervärdesskattelagen* (1994:200), Swedish value added tax act, SVATA.

⁷³ Chapter 9 d Section 5 SVATA.

⁷⁴ Chapter 9 d Section 5 SVATA.

⁷⁵ 268/83 D.A. Rompelman and E.A. Rompelman-Van Deelen v Minister van Financiën, ECLI:EU:C:1985:74 and C-400/98 Finanzamt Goslar v Brigitte Breitsohl, ECLI:EU:C:2000:304.

⁷⁶ C-230/94 Renate Enkler v Finanzamt Homburg, ECLI:EU:C:1996:352.

owner's spouse as well as to third parties. It was, however, mainly used for private purposes. The CJEU did not exclude that the owner was a taxable person. Instead the CJEU stated that in order to determine whether the hiring out of tangible property such as a motor caravan is carried out with a view to obtaining income on a continuing basis it was for the national court to evaluate all the circumstances of the particular case. Consequently, when property is let out or services are provided on a continuing basis with the view of obtaining income, the supplier may be a taxable person, even when the turnover is below SEK 30 000 a year.

For intermediary platforms there is another VAT issue, namely whether the platform company enters into agreements with its customers in their own name or not.⁷⁷ Where a taxable person acting in his own name but on behalf of another person takes part in the supply of services, that person shall be deemed to have received and supplied those services himself.⁷⁸ This means that if the intermediary platform company acts in its own name, the service or the renting out of the property should first be considered as being supplied from the actual supplier to the platform company, and then from the platform company to the customer. In such a case, VAT shall be imposed by the platform company on the entire consideration received from the customer. If, however, the intermediary platform company does not enter into any agreements in its own name, VAT shall only be charged on the negotiation service supplied from the platform company to the person supplying the services or letting out property to the customer.

Where electronically supplied services are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications, a taxable person taking part in that supply of services shall be presumed to be acting in his own name but on behalf of the provider of those services unless that provider is explicitly indicated as the supplier by that taxable person and that

⁷⁷ See Skatteverket, Delningsekonomi. Kartläggning och analys av delningsekonomin påverkan på skattesystemet. Rapport 131 129 651-16/113, 2016-10-31 p. 23.

⁷⁸ Art. 28 of the VAT Directive.

is reflected in the contractual arrangements between the parties.⁷⁹ In order to regard the provider of electronically supplied services as being explicitly indicated as the supplier of those services by the taxable person, the following conditions shall be met:

- the invoice issued or made available by each taxable person taking part in the supply of the electronically supplied services must identify such services and the supplier thereof;
- the bill or receipt issued or made available to the customer must identify the electronically supplied services and the supplier thereof.⁸⁰

The Swedish Tax Agency is of the opinion that the impression of an average customer rather than the contract terms should be decisive for whether the intermediary platform acts in its own name or not.⁸¹

RentL is in its general contract terms clear about the fact that RentL only provides a forum for private individuals to meet and let out private property.⁸² RentL states that there is no case in which RentL can become part of the contract.⁸³ RentL retains 16 per cent as a commission fee, including six per cent for the insurance of the property.⁸⁴ RentL seems, however, to take an active part in the payment procedures. For example, RentL has the right to carry out the payment despite the objection of the lessee.⁸⁵ Furthermore, RentL has the right to change prices and other conditions on the website at any time.⁸⁶ Changes in prices and payment conditions enter into force from the date of publication on the website and are valid for all property let via the website.⁸⁷

⁷⁹ Art. 9a of the Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (the Implementing Regulation) (Art. 6 b of the Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services.

⁸⁰ Art. 9a of the Implementing regulation.

⁸¹ Skatteverket, Delningsekonomi. Kartläggning och analys av delningsekonomin påverkan på skattesystemet. Rapport 131 129 651-16/113, 2016-10-31 p. 23.

⁸² Section 2,2 of RentL's general contract terms.

⁸³ Section 2.2 of RentL's general contract terms.

⁸⁴ Section 5.1 of RentL's general contract terms and <https://www.RentL.se/hyr-ut-dina-prylar>.

⁸⁵ Section 5.5 of RentL's general contract terms.

⁸⁶ Section 5.8 of RentL's general contract terms.

⁸⁷ Section 5.8 of RentL's general contract terms.

TaskRunner is clear about the fact that it only negotiates the services, and that it is not responsible for carrying out the services.⁸⁸ TaskRunner retains 15 per cent of the payment for the services as a commission fee.⁸⁹

The Swedish Tax Agency has mapped out the intermediary platforms which let immovable property in the Swedish market. Most of the platforms handle the VAT as if they are not acting in their own names. According to the Tax Agency, the trend is that the intermediary platforms are taking on more responsibilities, handling more practical issues and providing insurance. There are also platforms which supply supplementary services and offer to take care of all the practical arrangements in connection with the letting out. The Swedish Tax Agency draws the conclusion that the VAT situation is unclear and has to be determined on a case-by-case basis.⁹⁰

4. CONCLUSIONS

The mutual legal status of the provider and the user and their relationship to the platform is determined by factors such as, for example, the terms that apply between the provider/user and the platform. Consumer legislation may in some parts be applicable concerning such agreements but the legal situation is not clear. Here, however, the proposed EU Directive on Certain Aspects concerning Consumer Contracts for the Supply of Digital Content⁹¹ may solve some of the above-mentioned problems.

The agreement between the provider and the user is governed by their individual contractual terms or alternatively by the direct or analogue application of civil law. In the case of a service agreement or the renting out of movable property between individuals, no legislation is applicable. The parties' mutual rights and obligations are left entirely to the parties to decide.

⁸⁸ Section 2.1-2.2 of TaskRunner's general contract terms.

⁸⁹ Section 9.3 of TaskRunner's general contract terms.

⁹⁰ Skatteverket, Delningsekonomi. Kartläggning och analys av delningsekonomin påverkan på skattesystemet. Rapport 131 129 651-16/113, 2016-10-31 p. 23-24.

⁹¹ COM (2015) 634 final.

The provider's responsibility for the quality of the rented property at the beginning of the rental period can often be assessed using the rules on sale of goods as an analogy. If the agreement does not stipulate anything about the quality of the rented goods, it may be argued that these should fit the purpose for which goods of a similar kind are generally used. If the goods break down during the rental period or for any other reason are not fit for use, and this is not due to the user, it can be argued that the user is entitled to a deduction on the price corresponding to the agreed daily rent for the days the goods are not available. The provider may also be required to sending replacement goods to be at the disposal of the user without any compensation from the user.

The provider's responsibility for the quality of the services can be assessed by using the rules in the Consumer Services Act if it is applicable. If the service is defective, the consumer has the right to withhold payment, demand that the defect be remedied, make a deduction to the price or terminate the contract. The consumer may also claim damages. If the Consumer Services Act is not applicable to the agreement, the parties may freely agree on the standard of service, which can lead to disputes if the parties do not agree on the standard and it has not been defined clearly in the agreement.

Regarding payment, it can be noted that both the provider and the user pay the platform for the service rendered by the platform. A user who wants to buy a service or rent goods is for example usually obliged to pay the platform before the service or rental period commences. Thus, as the user makes a prepayment, the user refrains from the option of withholding the payment to see whether errors or delays in the service or the delivery of the rented goods occur. However the analysed contracts terms show that it is possible for the user to get part of his/her money back if he/she is not satisfied with the service or if the rented goods have not been delivered. As the user makes a prepayment it is also less risk for the provider for losing payment for the rented goods or services rendered.

The question regarding the circumstances under which the provider, the user and the platform may be subject to liability for taxes and fees are in theory not so complicated. The general rules concerning income tax, social security contributions and value added tax apply, and the tax situation for each party in the sharing economy has to be decided on a case-by-case basis. The main problem is that tax compliance within the sharing economy is low, sometimes because a person who is liable to pay taxes and fees does not have enough information about the contracting party to comply with the regulations. This is why the European Commission has put forward a proposal on a digital tax. If more and more of the conventional economy shifts to a sharing economy in the future and tax collection does not become more efficient, it is not only the tax revenues that are at risk. When people do not pay taxes on their main income, they do not get the social benefits as people who pay taxes do. They only receive minimum level pension rights, they are not eligible for sickness benefit if they fall ill and the same applies to unemployment benefits. As long as the sharing economy does not give a minimum of protection in such cases, it seems important to find an efficient way to tax the sharing economy just like any other activities are taxed.

TABLE OF CONTENTS

EU Legislation

Art. 9a of the Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (the Implementing Regulation) (Art. 6 b of the Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services.

European Commission, Proposal for a council directive on a common system of a digital services tax on revenues resulting from the provision of certain digital services, Brussels 23.3.2018, COM (2018) 148 final.

The Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the VAT Directive).

Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM (2015) 634 final.

Swedish legislation

Ds 2010:24 Hyra av lös sak.

SOU 2017:26 Delningsekonomi. På användarnas villkor. Delbetänkande av utredningen om användarna i delningsekonomin.

Literature

Beretta, Giorgio, Taxation of Individuals in the Sharing Economy, Intertax, Volume 45, Issue 1, 2017 pp. 2-11 (p. 3).

Björkdahl. E.P., Lojalitet och kontraktliknande förhållanden. En civilrättslig studie av förutsättningarna för ansvar för förhandlingar eller andra kontakter mellan avtalsmässigt obundna parter. Iustus Förlag. 2007.

Principles, Definitions and Model rules of European Private Law. Draft Common Frame of Reference (DCFR) Volume 2. III. – 5:101 to IV.C. – 8:111. (ed.) Christian von Bar and Eric Clive. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) Sellier European Law Publishers, 2009.

Hellner, J. & Hager, R. & Persson, A.H., Speciell avtalsrätt II, Kontraktsrätt, 6 ed. 2015, 1 Häftet. Särskilda avtal. Norstedts juridik.

A. Kessler, Brian Chesky: The Sharing Economy and Its Enemies, World Street Journal (WSJ) (17 Jan. 2014).

Munukka, J., Kontraktuell lojalitetsplikt, Jure Förlag, 2007.

Skatteverket, Delningsekonomi. Kartläggning och analys av delningsekonomins påverkan på skattesystemet. Rapport 131 129 651-16/113, 2016-10-31 p. 25.

Skatteverkets ställningstagande, Skatteplikt vid rumsuthyrning i hotellrumsrörelse, mervärdesskatt, Dnr: 131 675099-15/111, 18 December 2015.

Court cases

Swedish Supreme Court case NJA 2001 p. 177.

Swedish Supreme Court case NJA 2013 p. 1174.

National Board of Consumer Disputes, 2016-05631.

268/83 D.A. Rompelman and E.A. Rompelman-Van Deelen v Minister van Financiën, ECLI:EU:C:1985:74 and C-400/98 Finanzamt Goslar v Brigitte Breitsohl, ECLI:EU:C:2000:304.

C-230/94 Renate Enkler v Finanzamt Homburg, ECLI:EU:C:1996:352

Contract Terms

<https://www.RentL.se>

<https://www.taskrunner.se>

<https://www.airbnb.se/>