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VAT treatment of the platform economy

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1. INTRODUCTION

The VAT Expert Group (VEG) had a first discussion on the VAT treatment of the sharing economy at its meeting of 1 April 2019 (see Working Document VEG 081 and the minutes of the meeting VEG 083).

In general, the members concurred with the Commission services that the topic should be explored further.

As pointed out in Working Document VEG 081, what exactly is covered by term “sharing economy” has not yet been defined for tax purposes. According to the 2016 Commission’s Communication ‘A European Agenda for the collaborative economy’¹, collaborative economy ‘refers to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals.’

Obviously, the above description does not include the supply of goods facilitated by platforms. The Commission services are of the opinion that such supplies, to the extent that they are not already covered by the current VAT provisions related to E-commerce, should also be included in the further reflection. The term “Platform economy” would therefore be a more precise description of the scope of this reflection than “Sharing economy”.

Taking into account the observations made at the previous meeting, the present working document:

- provides information on relevant jurisprudence of the Court of Justice of the European Union (CJEU);
- sets out a number of options for a future VAT treatment of the platform economy that could be further explored and indicates the potential advantages and disadvantages of those options;
- looks into the role the platforms could play as a provider of information and/or in the collection of the tax.

For the discussion, thought will be given to the following three categories of actors, who are involved: 1) a platform (an electronic interface (EI)) connecting 2) the provider of goods or services (who shares assets, resources, time and/or skills) with 3) a user.

Since the concept of EI is a broad concept, which is already used in the VAT legislation², it will be used in this document to refer to platforms. The EI could encompass a website, portal, gateway, marketplace, application program interface (API), etc. It should be understood as a device or programme which allows two independent systems or the system and the end user to communicate.

¹ Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European agenda for the collaborative economy ([COM\(2016\) 356](#) of 2 June 2016).

² Council Implementing Regulation (EU) 2019/2026 of 21 November 2019 amending Implementing Regulation (EU) No 282/2011 as regards supplies of goods or services facilitated by electronic interfaces and the special schemes for taxable persons supplying services to non-taxable persons, making distance sales of goods and certain domestic supplies of goods.

For the purpose of this Working Document, when reference is made to an EI, depending on the context, it can mean the EI as defined above or a taxable person operating an EI.

2. JURISPRUDENCE OF THE CJEU

This section refers on the one hand to a number of CJEU cases related to the platform economy on matters other than VAT, which might nevertheless be relevant for this reflection and on the other hand to CJEU cases on VAT matters, relevant for this discussion although not directly related to the platform economy.

Relevant case law on EU legislation other than VAT

The CJEU has already been questioned a number of times on certain platform business models related to sharing and gig economy. Only certain characteristics related to such platforms have been the object of interpretation, without providing a general notion of sharing economy models.

The first question put forward led the CJEU³ to decide if certain intermediation services related to the transport (e.g. Uber) provided through a platform, should be considered “an information society service”⁴ or “a service in the field of transport”⁵. The CJEU ruled that the service provided by such platform “*is more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey*”⁶. Therefore, this service has to be considered a transportation service according to EU law⁷. In that context, the crucial aspect is that the platform exercises decisive influence over the conditions under which transport services are provided by non-professional drivers using the application made available to them by that company⁸. The service provided by the platform has to be considered inherently linked to the offer by that company of a transport service made through an application without which drivers and passengers would not have been able to get in touch. The CJEU noted also that the intermediation service at issue provided by means of a smartphone application had to be regarded as forming an integral part of an overall service the main component of which was a transport service⁹.

The conclusion of this judgment leads to three important outcomes that might be relevant also for the application of VAT rules:

³ CJEU, judgment of 20 December 2017, C-434/15, *Asociación Profesional Élite Taxi Uber Systems Spain SL*, EU:C:2017:981

⁴ Within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers

⁵ Within the meaning of Article 2(2)(d) of Directive 2006/123.

⁶ CJEU, judgment of 20 December 2017, C-434/15, *Asociación Profesional Élite Taxi Uber Systems Spain SL*, EU:C:2017:981, paragraph 37.

⁷ This observation has its ground in Article 58(1) TFEU as stated in CJEU, judgment of 20 December 2017, C-434/15, *Asociación Profesional Élite Taxi Uber Systems Spain SL*, EU:C:2017:981, paragraph 41: “That classification is indeed confirmed by the case-law of the Court, according to which the concept of ‘services in the field of transport’ includes not only transport services in themselves but also any service inherently linked to any physical act of moving persons or goods from one place to another by means of transport”.

⁸ Such influence consists of putting, by means of a smartphone application, non-professional drivers using their own vehicles in contact with persons who wish to make an urban journey

⁹ CJEU, judgment of 10 April 2018, C-320/16, *Uber France*, EU:C:2018:221, paragraph 27.

- (i) services provided by a platform with the same features as those of Uber qualify as transportation rather than intermediation;
- (ii) the platform in such a case exercises decisive influence on the users which goes beyond a mere intermediation activity;
- (iii) the service provided by the platform and the transport service should be seen as a whole under non-VAT legislation.

The CJEU intervened in another case¹⁰ where a platform (Airbnb) was intended to connect via electronic means, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation services, while also providing a certain number of other services. The main question was again about the qualification of such a service provided through a digital platform.

The outcome of the judgment in the field of accommodation services is opposite to that in the field of transportation services. In other words, the rules for the functioning of an intermediation service such as the one provided by Airbnb are not comparable to those governing the services provided by Uber. The reason lies in the level of control as between the provider and the platform. According to the CJEU, the conditions under which the service is provided in the field of accommodation are not influenced by the platform itself, and therefore the accommodation and the related intermediation service have to be considered as an ‘information society service’ under Directive 2000/31¹¹.

VAT and the taxation field are excluded from the scope of that Directive, which aims at creating a legal framework to ensure the free movement of information society services between Member States.

However, there are some elements pointed out in the case-law in question that might be taken into account for the application of VAT rules. The first element, useful for VAT purposes, noted by the CJEU was that the service “*is provided for remuneration, even though the remuneration received by Airbnb Payments UK is only collected from the guest and not also from the host. The service in question is provided at the individual request of the recipients of the service, since it involves both the placing online of an advertisement by the host and an individual request from the guest who is interested in that advertisement*”¹².

The CJEU also held that a service has to be seen in strict relation with the property transaction itself for it to qualify as intermediation. Therefore, the service provided by the platform goes beyond the immediate accommodation service itself as it connects, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation, while also providing a certain number of services ancillary to that intermediation¹³.

Such a strict relation has been explained by recalling per analogy the VAT case-law about ancillary supplies, even if the question was not related to taxation. The CJEU held that: “*such services are ancillary in nature, given that, for the hosts, they do not constitute an end in*

¹⁰ CJEU, judgment of 19 December 2019, C-390/18, *Airbnb Ireland*, EU:C:2019:1112.

¹¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) (OJ L 178, 17.7.2000, p. 1).

¹² CJEU, judgment of 19 December 2019, C-390/18, *Airbnb Ireland*, EU:C:2019:1112, paragraph 46.

¹³ CJEU, judgment of 19 December 2019, C-390/18, *Airbnb Ireland*, EU:C:2019:1112, paragraph 53.

themselves, but rather a means of benefiting from the intermediation service provided by Airbnb Ireland or of offering accommodation services in the best conditions”¹⁴.

In conclusion, what we can uphold from that decision is that:

- as accommodation services are provided in connection with other ancillary services, they should be considered together with the intermediation service provided by the digital platform;
- remuneration of the intermediation service includes all the intermediary service as it flows from the guest/consumer to the platform;
- a decisive element was the fact that the hosts, who are service providers, are not influenced by any condition imposed by the platform.

VAT case law relevant for the platform economy

VAT case law of particular interest for the discussions concern on the one hand the status of taxable person and on the other hand, the nature of the service supplied in order to determine the place of supply of these services.

The most pertinent cases for determining whether a person providing goods or services via an electronic interface shall be considered to be a taxable person are cases *Fuchs*¹⁵ and *Rehdli*¹⁶. Each of those cases in fact dealt with individuals providing supplies of goods or services relevant for VAT purposes and which for that reason were qualified as taxable persons.

The qualification of services provided through an EI as an electronically supplied service or a traditional service is preliminary to determining the place of the supply of that service. Following that logic, it is useful to take into account first the interpretation related to the rules on the qualification of the transactions. In that context, cases *Geelen*¹⁷ or *RPO*¹⁸ are helpful to understand where to draw the line between an electronically supplied service and a common supply of service.

3. KEY ISSUES AT STAKE

The previous discussion confirmed that the key issues at stake are the following:

- As regards the transactions between the provider and the user, the key issue is the provider’s status: is the provider a taxable person for VAT purposes or not;
- As regards the transactions between the EI and the provider and between the EI and the user, the key issue is the nature of the service supplied by the EI to the provider and/or user;

¹⁴ CJEU, judgment of 19 December 2019, C-390/18, *Airbnb Ireland*, EU:C:2019:1112, paragraph 58 and judgments of 21 February 2008, C 425/06, *Part Service*, EU:C:2008:108, paragraph 52; of 10 November 2016, C 432/15, *Baštová*, EU:C:2016:855, paragraph 71; and of 4 September 2019, C 71/18, *KPC Hering*, EU:C:2019:660, paragraph 38.

¹⁵ CJEU, judgement of 20 June 2013, C-219/12, *Thomas Fuchs*, EU:C:2013:413.

¹⁶ CJEU, judgment of 19 July 2012, C-263/11, *Ainārs Rēdlihs*, EU:C:2012:497.

¹⁷ CJEU, judgment of 8 May 2019, C-568/17, *Geelen*, EU:C:2019:388.

¹⁸ CJEU, judgment of 7 March 2017, C-390/15, *Rzecznik Praw Obywatelskich (RPO)*, EU:C:2017:174.

- The role of the EI in securing collection of the VAT due (see section 5).

3.1. Transactions between the provider and the user: the provider's status

A specific feature of the platform economy is that providers often are private individuals offering goods or services on an occasional peer-to-peer basis. At the same time, increasingly micro entrepreneurs and small businesses are using EIs.

Establishing whether the provider is a taxable person acting as such or not is therefore a recurring question in this domain.

In case the response is negative, the supply carried out by the provider falls out of the scope of VAT.

In case the response is positive, this does not automatically mean that the provider will have to charge VAT to the user. In particular, the provider should not charge VAT when the supply is exempt from VAT (that may be the case for instance with renting of immovable property), when the place of the supply is outside the EU (if provision of accommodation takes place in a non-EU country) or when the provider is able to benefit from the exemption scheme for small enterprises.

As indicated in Working paper VEG081, previous discussions in the VAT Committee have not led to any operational guidance on this question.

3.2. Transactions between the EI and the provider and between the EI and the user: the nature of the service provided by the EI

As regards the transactions between the EI and the provider and the EI and the user, the first issue is to determine whether the EI provides a service against consideration and to whom.

The EI might indeed receive a consideration for its services from the provider, from the user or from both.

When the relation between the EI and the provider or the relation between the EI and the user is without consideration, that relation falls out of the scope of VAT. When the service is provided against consideration, the main issue is then to establish the nature of that service, primarily in order to determine the place of supply of that service.

The VAT Committee already discussed on several occasions the nature of the service carried out by the EI¹⁹. The discussions in particular dealt with the issue of whether these services consist in electronically supplied services (Article 58) or in intermediary services (Article 46). The level of human intervention required by the EI for carrying out its services is key for making that distinction.

These discussions have shown the difficulty in finding a common approach when it comes to applying the current provisions to this new type of economic activity. Indeed, EIs act in very different ways, even when intervening in the same sector, which implies that the assessment of the level of human intervention will ultimately depend on the business model of each individual EI.

¹⁹ [VAT Committee Working paper No 906](#) and [VAT Committee Working paper No 947](#)

Obviously, having to resort to such a case-by-case assessment of the activity of EIs is not likely to be a satisfactory outcome for the tax authorities, nor for the EIs themselves.

Moreover, the criterion of “minimal human intervention” is dynamic likely to evolve quickly as a result of technological developments and at a different speed amongst the various EIs.

4. OPTIONS FOR THE FUTURE VAT TREATMENT OF THE PLATFORM ECONOMY

The absence of common and simple rules that are suited for the platform economy, combined with the fact that providers making use of EIs often are private individuals who are not familiar with possible VAT consequences triggered by the activity they carry out on a non-professional basis, makes compliance difficult for users and EIs alike.

With that in mind, the Commission services have listed hereafter a number of options that would need an amendment of the current rules and indicated some pros and cons of each option. It is to be noted that some options could even be combined with a view to achieve a better result.

The overall aim should be to put into place a steady legal framework that is easy to comply with by EIs and by the providers and that is easy to monitor by the tax authorities.

4.1. Clarifying the application of Article 2(1)(a) and Article 9(1) of the VAT Directive

As indicated in Working Document VEG081, the question whether the transaction between the provider and the user is subject to VAT depends of the following:

- Is the provider carrying out an economic activity in the sense of Article (9)(1) of the VAT Directive or not;
- Is the provider carrying out this economic activity independently or not, according to Articles 9(1) and 10 of the VAT Directive;
- Is the provider a taxable person acting as such according to article 2(1)(a) of the VAT Directive;
- Is there a direct link between the transaction carried out by the provider and the remuneration received from the user.

A clarification on the application of these concepts to the specificities of the platform economy, based on the existing jurisprudence, could be a possible way forward. Such clarification could be achieved by adding provisions to the Implementing Regulation, by unanimously agreed guidelines or by explanatory notes.

<u>Advantages of this approach:</u>	<u>Challenges to this approach:</u>
<ul style="list-style-type: none"> • Awareness of providers assuming simple and clear guidance can be achieved; • The principles governing the notion of taxable person are not changed. 	<ul style="list-style-type: none"> • Previous discussions in the VAT Committee have demonstrated the difficulty to arrive at a common approach • Are the current provisions sufficiently tailored for handling this new phenomenon? • The complexity of the rules would remain, and therefore it would be difficult to apply for small operators and to enforce for tax administrations.

4.2. Rebuttable presumption whereby the provider becomes a taxable person upon exceeding a set threshold

Another option would be to include a rebuttable presumption whereby any person providing goods or services via an EI is considered to become a taxable person once a threshold expressed in number of transactions and/or in yearly turnover is exceeded.

Such a threshold could serve to make the distinction between a provider carrying out (an) occasional transaction(s) and therefore remaining out of the scope of VAT and a provider carrying out economic activities in the sense of Article 9(1) of the VAT Directive.

This would obviously be different from the threshold for the exemption of small enterprises, since the latter threshold is only applicable to those that undoubtedly have the status of taxable person.

In other words, a provider would be presumed to be a taxable person once a threshold is exceeded. The exemption for supplies of goods and services by small enterprises could in that case apply within the conditions of Title XII, Chapter 1, Section 2 of the VAT Directive.

<u>Advantages of this approach:</u>	<u>Challenges to this approach:</u>
<ul style="list-style-type: none"> • Awareness of providers that they will fall within the scope of VAT, and therefore might have VAT obligations, once they exceed a number of transactions and/or turnover; • The principles governing the notion of taxable person are not changed; they are only complemented by a rebuttable presumption. 	<ul style="list-style-type: none"> • Does not resolve the issue as regards the nature of the services provided by EIs to providers and to users; • Difficulties to control the threshold particularly in case the provider is active on a number of platforms.

4.3. A fiction for the place-of-supply rules whereby, for the supplies made by the EI to the provider, the latter is deemed to be a taxable person

A possible way forward could be including, possibly in Article 43 of the VAT Directive²⁰, a fiction that, solely for the purposes of determining the place of supply of the service carried by EIs, any person providing goods or services via an EI is considered to be a taxable person.

Consequently, the service provided by the EI to the provider would in all circumstances be excluded from the scope of Articles 46 and 58 of the VAT Directive since these provisions solely cover supplies made to non-taxable persons. Only supplies from platforms to users could still fall within the scope of these provisions.

The place of supply of the service supplied by the EI to the provider would then be determined in accordance with the general rule of Article 44 of the VAT Directive, unless it falls under one of the particular rules.

In case the EI would not be established in the Member State in which VAT is to be paid, a practical rule could be to make the liability dependent upon whether the provider communicates a valid VAT identification number to the EI or not. In particular, the person liable for the payment of the VAT due would be:

- the provider to whom the EI supplies its service when the provider communicates a valid VAT identification number;
- the EI in absence of communication of a valid VAT identification number by the provider to that EI.

As stated above, the fiction that the provider is deemed to be taxable person would only cover the transaction between the EI and the provider. It would not cover the relation between the provider and the user. If the provider here is not considered to be a taxable person, the supply is not taxed and the provider would obviously not have a VAT identification number.

<u>Advantages of this approach:</u>	<u>Challenges to this approach:</u>
<ul style="list-style-type: none">• Clarifies rules to be applied for transactions between the EI and the provider and therefore simplifies compliance for the EIs.	<ul style="list-style-type: none">• Does not resolve the issue of the nature of the service provided by the EI to the user;• The fiction only applies for determining the place of the supply from the EI to the provider and does not resolve the issue whether the provider is a taxable person acting as such or not as regards the transaction between the provider and the user.

²⁰ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006).

4.4. Clarifying the application of the place of supply rules by changes to the VAT Implementing Regulation

Article 7(2) of the VAT Implementing Regulation enumerates certain types of supplies that are covered by the definition of electronically supplied services provided for in Article 7(1) of that Regulation.

Article 7(2) could be complemented with a provision, comparable to the one under point (d) of that provision, clarifying that the services provided by EIs to users are covered by Article 7(1).

<u>Advantages of this approach:</u>	<u>Challenges to this approach:</u>
<ul style="list-style-type: none">• It would provide clarity and enhance legal certainty for EIs as regards the place of supply of the service provided to users of the EI.	<ul style="list-style-type: none">• It does not resolve the issue as regards the nature of the service provided by EIs to providers;• It does not resolve the issue whether the provider is a taxable person or not.

4.5. Uniform rule for the service of the platform

Another way forward could consist in adopting a specific place-of-supply rule for the services rendered by EIs which would cover B2B and B2C supplies. Such rule could be based on the place of establishment of the recipient of the service (provider and/or user) with, if necessary, an alternative rule for clearly defined transactions.

Who is the person liable for the payment of VAT would however still depend on the status of the customer. When the EI is not established in the Member State in which the VAT is due and the recipient of the service is a taxable person, then that recipient would be liable to pay the VAT.

When the supplier is not established in the Member State in which the VAT is due and the recipient of the service is a non-taxable person, the EI would be liable to pay the VAT due. The EI can make use of either the EU or the non-EU MOSS scheme for declaring and paying the VAT.

The EI would make the distinction between customers to be regarded as a taxable person or as a non-taxable person according to the provisions of Articles 17 to 19 of the VAT Implementing Regulation. Within the EU, the communication by the customer of its VAT identification number would be key for making that decision.

<u>Advantages of this approach:</u>	<u>Challenges to this approach:</u>
<ul style="list-style-type: none">• No risk of divergent application of the place-of-supply rules amongst Member States;• The place of taxation for B2B and B2C services would be identical, only the person liable to pay the VAT due could differ;• No changes as regards the notion of taxable person;• It would facilitate compliance for EIs.	<ul style="list-style-type: none">• Need to stipulate a specific rule able to cover precisely the activities carried out by EIs;• Absence of clear rules for providers as regards their VAT status.

5. ONGOING WORK ON THE ROLE OF EIS AT OECD AND AT EU LEVEL

5.1. Work of the OECD

The OECD is currently carrying out work in the area of the sharing/gig economy and VAT. More in particular Working Party No.9 on Consumption Taxes (WP9) is reflecting on the growth of the sharing/gig economy and its implications for VAT/GST with a view to prepare a report²¹. Tax administrations worldwide clearly expressed a need, which was confirmed by the business community, for OECD to work on this topic.

It is to be noted that the work of the OECD is currently focused on the possible role(s) of sharing/gig economy platforms and VAT/GST for what concerns the activities facilitated by the platforms but not directly performed by them. Thus, it is different from the questions covered in sections 3 and 4 above. Furthermore, the current work of the OECD is limited to two sectors, namely the accommodation and transportation. The work does not encompass pure sharing/gig economy activities performed for non-monetary consideration. It is not excluded that the scope of the OECD work will be extended at a later stage.

A task team (sub-group) was created within the WP9 to assist the secretariat in carrying out the research and analysis. The findings of the task team should result in a report to WP9.

More in particular, based on the preliminary findings, a broad spectrum of platforms' roles is looked at in the analysis. These are:

- i) the platform's full liability for the VAT/GST on the activity facilitated by the platform
- ii) making the platform jointly and severally liable together with the provider for the VAT/GST on the activities which go through the platform
- iii) the platform is collecting/withholding the tax without being liable for it

²¹ The aim is to present the report at the WP9 meeting of May.

- iv) the platform's obligation to provide the tax authority with information relevant for VAT/GST purposes and finally
- v) involvement of platforms in educating/informing providers and users about their tax obligations.

Also the OECD Working Party No.10 on exchange of information (WP10) is pursuing the work in the area of sharing/gig economy, more concretely on the development of a model framework intended to impose reporting obligations on digital platforms²². The model could be adopted by interested jurisdictions on a uniform basis to collect information on transactions and income realised by platform sellers. For the moment, this framework would only encompass certain services facilitated by platforms. In order not to multiply different obligations being imposed on platforms, it is considered important by the OECD members that this model rules could also be used for indirect tax purposes.

5.2. Ongoing work at EU level

The Commission intends to present in June 2020 a proposal for a Council Directive amending Directive 2011/16/EU as regards measures to strengthen the exchange of information framework in the field of taxation (also called "DAC7").

The proposal intends to introduce a common EU system for ensuring that tax relevant information flows from digital platforms to tax authorities²³. The objectives of that proposal are to enable tax administrations to obtain information to control that taxpayers pay their fair share, in particular taxpayers who earn money via the digital platform economy, as well as to provide for better cooperation across tax administrations and keep business compliance costs to a minimum by providing a common EU reporting standard.

Directive 2011/16/EU concerns direct taxes. The aim is however to ensure that the information exchanged under the amended Directive can also be used for indirect tax purposes. To be noted that the type of information that digital platforms would need to transmit to the tax authorities under the envisaged DAC7 has some similarities with the information that EIs will as of 1 January 2021 need to keep in their records according to Article 242a of the VAT Directive.

5.3. Role of the EIs in the collection of VAT

The implementation of DAC7 should ensure that tax authorities obtain on a regular basis information about providers making supplies of goods and/or services to users facilitated by EIs. This information should primarily allow tax authorities to detect users carrying out an economic activity on a regular basis that have complied with their VAT obligations (Identification, submission of VAT returns and payment).

The question arises whether the role of EIs should, for VAT purposes, go beyond that and whether they should have a different role and should be involved in some way in the collection of VAT due on the underlying transaction they facilitate.

²² The aim is to present the model rules by mid-2020.

²³ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12157-Strengthen-the-exchange-of-information-framework-in-the-field-of-taxation->

To be noted that the pros and cons of such approach will be included in the report that then task team will submit to WP9 at the OECD (see section 5.1 above).

Nevertheless, the Commission would be interested in having your views on this issue at this stage.

6. QUESTIONS TO THE MEMBERS

The members are invited to:

- express their views on each of the options described above;
- express their views on the potential role of EIs in the exchange of information and/or collection of VAT;
- suggest other options they might have considered.

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