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**VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER No 947**

**QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS**

ORIGIN:	Estonia
REFERENCES:	Articles 44, 45, 46, 48 and 58 of the VAT Directive Article 18 of the VAT Implementing Regulation
SUBJECT:	Services provided by an electronic platform connecting for remuneration, by means of a smartphone application, a driver using his own vehicle with persons who wish to make urban journeys The significance of the VAT identification number

1. INTRODUCTION

Estonia has submitted two questions (annexed) concerning the application of the place of supply rules for services.

The first question focuses on the correct VAT treatment of services as referred to in the judgment of the Court of Justice of the European Union (CJEU) in case C-434/15 *Asociación Profesional Elite Taxi*¹. These services consist of providing for the connection, by means of a smartphone application and for remuneration, between drivers using their own vehicle and persons who wish to make urban journeys.

The second question refers to the correct identification of the status of a customer and the role played by the VAT identification number in this process, in particular in relation to the application of Articles 44 and 45 of the VAT Directive².

These questions are relevant, as it seems that there is a divergent application of the rules in question by different Member States.

2. THE SUBJECT MATTER

2.1. The first question

The Estonian delegation asks how to identify correctly, for VAT purposes, services provided for remuneration, which consist of making the connection, by means of a smartphone application, between drivers using their own vehicle and persons who wish to make urban journeys (hereinafter “services in question”). In particular, the question is whether they should be treated as (i) electronically supplied services; (ii) a supply of passenger transport, or (iii) services taxable under the general rules.

In the opinion of the Estonian delegation, the services described in *Asociación Profesional Elite Taxi* should be treated for VAT purposes as electronically supplied services as they fulfil the conditions of the definition included in Article 7 of the VAT Implementing Regulation³.

2.2. The second question

The Estonian delegation with its second question raises doubts linked to the possible lack of a harmonised application of certain rules on the place of supply of services. In particular, the question concerns the situation where the recipient of the services, located in one Member State, does not have a VAT identification number and the supplier of the service, located in another Member State, applies a 0% VAT rate to the supply assuming that he deals with a business customer.

¹ CJEU, judgment of 20 December 2017, *Asociación Profesional Elite Taxi*, C-434/15, EU:C:2017:981.

² Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006).

³ 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 (OJ L 77, 23.3.2011, p. 1).

In this context, it is asked if the supplier has an obligation to obtain the VAT identification number of his customer in order to apply a 0% VAT rate on the relevant supply of a service.

Further, the question is raised whether the principles of the VAT Directive are respected in cases where a 0% VAT rate is applied on a service supplied to a natural person from another Member State based on a presumption that the recipient is a person engaged in business.

In the opinion of the Estonian delegation the decision on whether the recipient of the service is to be treated as a taxable person or not should depend on whether or not that person is VAT registered. The identification of the correct place of supply rules (Article 44 where the customer is a taxable person or Articles 45/58 (for electronically supplied services) where the customer is a non-taxable person) should only follow afterwards.

This stance is supported, in the opinion of the Estonian delegation, by Article 18 of the VAT Implementing Regulation and by Articles 17 and 31 of the VAT Administrative Cooperation Regulation⁴.

Further, the attention is drawn to the VAT Committee guidelines resulting from the 86th meeting⁵ where the question of the identification of the customer is addressed.

The Estonian delegation points out that there is a risk that problems could arise due to varying interpretations of the relevant rules by Member States. It believes that the lack of uniform application of the concerned provisions runs counter to a level playing field in the EU internal market.

3. THE COMMISSION SERVICES' OPINION

3.1. The correct classification of the services in question

The use of new technologies in everyday life is rapidly increasing. One of many questions that are raised in this context is its impact on the relevant economic dimension. In particular, in relation to VAT, there are doubts on how identified economic activities should be categorised and treated from a tax point of view.

This is true for example in relation to activities of electronic platforms, which with the aid of a smartphone application allow users to receive services from providers/persons offering them. Services offered via a smartphone app very often cover transport, accommodation or catering/food delivery. A broader analysis of the general key aspects of sharing economy platforms (which also covers the ones mentioned above) already took

⁴ Council Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax (OJ L 268, 12.10.2010, p. 1).

⁵ https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/key_documents/vat_committee/guidelines-vat-committee-meetings_en.pdf

place in the VAT Committee during its 105th meeting. Working paper No 878 dealing with the subject was followed by VAT Committee guidelines⁶.

The focus of the current analysis is on supplies that fall within the scope of the EU VAT Directive.

3.1.1 The CJEU judgment in Asociación Profesional Elite Taxi

The Estonian delegation asks for a more detailed analysis of services of electronic platforms (below referred to as the “platform”) connecting, by means of a smartphone application and for remuneration, drivers using their own vehicle (below referred to as “the drivers”) with persons who wish to make urban journeys (below referred to as “the users”).

With a view to correctly identifying the activities of this type of platforms, the attention is drawn to the CJEU judgment in *Asociación Profesional Elite Taxi*, which dealt with the activities of a platform (putting in contact drivers and users wanting to order urban transport services).

In the opinion of the Commission services, the judgment itself cannot be applied automatically for VAT purposes. The reason is that its “... main issue is ... whether possible rules on how [the platform] operates are subject to the requirements of EU law ... relating to the freedom to provide services, or whether they fall within the scope of the shared competence of the European Union and the Member States in the field of local transport, a competence which has not yet been exercised at EU level.”⁷.

Nevertheless, the examination provided in this judgment, especially in the Opinion of the Advocate General, can be helpful for the reflections on the possible VAT consequences of the relevant supplies.

The focus of this document is to be seen as not only dealing with the activities covered by the aforementioned judgment, but also with supplies of any other electronic platforms whose main features are comparable to those characterizing the platform referred to in that judgment.

Points 38 to 66 of the Opinion of the Advocate General analyse the activity provided by the platform for remuneration consisting of making the connection, by means of a smartphone application, between drivers using their own vehicle and persons who wish to make urban journeys. It is worth to have a look at the following extracts from this Opinion:

“41. What is [the platform]? Is it a transport undertaking, a taxi business ...? Or is it solely an electronic platform enabling users to locate, book and pay for a transport service provided by someone else?

...

⁶ [Guidelines](#) resulting from the 105th meeting of 26 October 2015 Document B – taxud.c.1(2016)1162824 – 889 (p. 207).

⁷ See the Opinion of the Advocate General in *Asociación Profesional Elite Taxi*, EU:C:2017:364, point 2.

43. ... [the platform] claims that it simply matches supply (the supply of urban transport) to demand. ... [but it] is an unduly narrow view of its role. [The platform] actually does much more than match supply to demand: it created the supply itself. It also lays down rules concerning the essential characteristics of the supply and organises how it works.
44. [the platform] makes it possible for persons wishing to pursue the activity of urban passenger transport to connect to its application and carry out that activity subject to the terms and conditions imposed by [it], which are binding on drivers by means of the contract for use of the application. There are numerous terms and conditions. They cover both the taking up and pursuit of the activity and even the conduct of drivers when providing services.
45. Thus, in order to access the [platform's] application as a driver, you must have a car. The vehicles permitted to drive on behalf of [the platform] must satisfy certain conditions which seem to vary depending on the country and city. As a general rule, however, they must be four- or five-door passenger vehicles subject, at least, to an age limit. The vehicles must have passed a roadworthiness inspection and comply with the provisions on mandatory insurance.
46. Drivers must obviously be in possession of a driving licence (held for a specific period) and have no criminal record. In some countries, a list of traffic offences is also required.
47. Although there are no rules on working time within the framework of the ... platform, so that drivers may pursue that activity alongside others, it is apparent that most trips are carried out by drivers for whom [the platform] is their only or main professional activity. Drivers also receive a financial reward from [the platform] if they accumulate a large number of trips. In addition, [the platform] informs drivers of where and when they can rely on there being a high volume of trips and/or preferential fares. Thus, without exerting any formal constraints over drivers, [the platform] is able to tailor its supply to fluctuations in demand.
48. The [platform] application contains a ratings function, enabling drivers to be rated by passengers and vice versa. An average score falling below a given threshold may result in exclusion from the platform, especially for drivers. [The platform] therefore exerts control, albeit indirect, over the quality of the services provided by drivers.
49. Lastly, it is [the platform] that sets the price of the service provided. That price is calculated based on the distance and duration of the trip, as recorded by the application by means of GPS. An algorithm then adjusts the price to the intensity of the demand, by applying an appropriate multiplier to the basic fare when demand increases as a result of, for instance, an event or simply a change in the weather conditions, such as a storm.
50. Although [the platform's] representatives stated at the hearing that drivers are, in principle, free to ask for a lower fare than that indicated by the application, this does not seem to me to be a genuinely feasible option for drivers. Although drivers

are theoretically given such a discretion, the fee [the platform] charges is the amount resulting from the fare as calculated by the application. Since any reduction in the fare paid by the passenger is to the detriment of the driver, it is unlikely that drivers would exercise that discretion. Consequently, I think it is hard to deny that the fare is set by [the platform].

51. *Thus, [the platform] exerts control over all the relevant aspects of an urban transport service: over the price, obviously, but also over the minimum safety conditions by means of prior requirements concerning drivers and vehicles, over the accessibility of the transport supply by encouraging drivers to work when and where demand is high, over the conduct of drivers by means of the ratings system and, lastly, over possible exclusion from the platform. The other aspects are, in my opinion, of secondary importance from the perspective of an average user of urban transport services and do not influence his economic choices. [The platform] therefore controls the economically significant aspects of the transport service offered through its platform.*
52. *While this control is not exercised in the context of a traditional employer-employee relationship, one should not be fooled by appearances. Indirect control such as that exercised by [the platform], based on financial incentives and decentralised passenger-led ratings, with a scale effect, makes it possible to manage in a way that is just as — if not more — effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders.*
53. *The foregoing leads me to conclude that [the platform]’s activity comprises a single supply of transport in a vehicle located and booked by means of the smartphone application and that this service is provided, from an economic standpoint, by [the platform] or on its behalf. The service is also presented to users, and perceived by them, in that way. When users decide to use [the platform]’s services, they are looking for a transport service offering certain functions and a particular standard of quality. Such functions and transport quality are ensured by [the platform].*
54. *The above finding does not, however, mean that [the platform’s] drivers must necessarily be regarded as its employees. The company may very well provide its services through independent traders who act on its behalf as subcontractors. ...*
55. *The same is true regarding the question of ownership of the vehicles. The fact that [the platform] is not the owner is, in my view, irrelevant, since a trader can very well provide transport services using vehicles belonging to third persons, especially if he has recourse to such third persons for the purpose of those services, notwithstanding the nature of the legal relationship binding the two parties.*
56. *On the other hand, I take the view that the finding made immediately above prevents [the platform] being treated as a mere intermediary between drivers and passengers. Drivers who work on the ... platform do not pursue an independent activity that exists independently of the platform. On the contrary, the activity exists solely because of the platform, without which it would have no sense.*

57. *That is why I think it is wrong to compare [the platform] to intermediation platforms such as those used to make hotel bookings or purchase flights.*
58. *Similarities clearly exist, for instance as regards the mechanisms for booking or purchasing directly on the platform, the payment facilities or even the ratings systems. These are services offered by the platform to its users.*
59. *However, in contrast to the situation of [the platform's] drivers, both hotels and airlines are undertakings, which function completely independently of any intermediary platform and for which such platforms are simply one of a number of ways of marketing their services. Furthermore, it is the hotels and airlines — and not the booking platforms — that determine the conditions under which their services are provided, starting with prices. These undertakings also operate in accordance with the rules specific to their sector of activity, so that booking platforms do not exert any prior control over access to the activity, as [the platform] does with its drivers.*
60. *Lastly, such booking platforms give users a real choice between several providers whose offers differ on a number of important points from the users' perspective, such as flight and accommodation standards, flight times and hotel location. By contrast, with [the platform], these aspects are standardised and determined by the platform, so that, as a general rule, the passenger will accept the service of the most quickly available driver.*
61. *[The platform] is therefore not a mere intermediary between drivers willing to offer transport services occasionally and passengers in search of such services. On the contrary, [the platform] is a genuine organiser and operator of urban transport services in the cities where it has a presence. While it is true, as [the platform] states in its observations in the case, that its concept is innovative, that innovation nonetheless pertains to the field of urban transport.*

...

63. *Under [the platform's] operating system, the connecting of potential passengers and drivers with one another does not, therefore, have any economic value of its own because, as explained above, drivers working for [the platform] do not pursue — at least when they are driving in the context of [the platform]'s services — an independent economic activity. Within the framework of that service, first, [the platform's] drivers are only able to locate passengers through the [platform] application and, secondly, that application allows only drivers working on the platform to be located. One is thus inseparable from the other and together they form a single service. I do not think that the supply of transport in the strict sense can be regarded as being of secondary importance, either.*
64. *It is true that the innovative nature of the ... platform is to a large extent based on the use of new technologies, such as GPS and smartphones, in order to organise urban transport. However, the innovation does not stop there: it also extends to the organisation of the transport itself, without which [the platform] would be a mere taxi booking application. Accordingly, within the context of this service, it is*

undoubtedly the supply of transport which is the main supply and which gives the service economic meaning. Users look for drivers with one aim in mind: to be transported from A to B. Hence the connection stage is merely preparatory in order to enable the main supply to be performed in the best possible conditions.

...

66. *It has been shown that [the platform] uses a number of methods, which have been reported in the press, to prevent the authorities running checks on its drivers, such as temporarily disconnecting the application in some areas. [The platform] also offers legal and financial assistance to drivers who have been penalised for providing transport services without the requisite authorisation. ...”.*

3.1.2 Possible solutions

The situation of the various electronic platforms putting in contact the demand side and the supply side for goods or services varies and can be very complex. The Commission services recognise that different business models are possible and that these may be modified further over time.

The discrepancies may concern different electronic platform providers but it can also be the case that one entity offers varying products.

Therefore, the questions on the nature of the services supplied and on their addressee are pertinent.

The Estonian delegation mentions three possible approaches on how to treat the services provided for remuneration by a platform connecting, by means of a smartphone application, drivers using their own vehicle with persons who wish to make urban journeys:

- (i) electronically supplied services;
- (ii) supply of passenger transport;
- (iii) services taxable under the general rule.

The product offered by these types of platforms is complex, also because it applies innovative solutions not known in the past. Therefore, before taking any position a reflection on each of the possibilities is necessary. There seem to be four solutions that should be looked at: (i) electronically supplied services, (ii) intermediation services, (iii) passenger transport services and (iv) services covered by the general rules in Articles 44 and 45.

The Commission services would like to underline that they see the current paper as a starting point, which should trigger a discussion in the VAT Committee on the services in question. With that in mind, several issues are raised with a view of first identifying and sharing opinions of Member States and only afterwards agreeing on a common position.

The Commission services believe that when tackling the question of the correct identification of the services concerned, several elements must be taken into account.

First, there might be a legal relationship between the platform and the driver, and another legal relationship between the platform and the user.

Where this latter legal relationship gives rise to a supply of services from the platform to the user, that supply is normally to be seen as made in a B2C context if no option is envisaged by the platform that the user may indicate that he is a business customer.

At the same time, where the former legal relationship gives rise to a supply of services from the platform to the driver, it seems correct to assume that normally the services supplied by the platform to the drivers are delivered in a B2B environment. The latter approach was advanced in Working paper No 878: “*...it could be argued that an individual joining a sharing economy platform in order to offer his goods or services acts similarly to a producer, a trader or a person supplying services within the meaning of the second subparagraph of Article 9(1) ... and should be regarded as carrying out an economic activity*”⁸.

Second, apart from any possible legal relationships between the platform and the driver and the platform and the user there might also be a legal relationship between the driver and the user. In such a case, it seems clear that what the driver supplies to the user is a passenger transport service. Here the qualification of that service causes no doubts.

Third, regarding the possible legal relationship between the platform and the driver it has to be answered whether the driver is in fact an independent supplier of a service. Perhaps the features of the relationship between the platform and the driver are such that in fact the employer – employee dependence is in reality present.

Fourth, it must be examined whether the platform should be seen as acting towards the user in its own name and on behalf of the driver. If this would be the case then Article 28 of the VAT Directive should be applicable and the platform would be seen as supplying to the user the services provided by the driver (namely passenger transport services).

Fifth and last, the analysis should take into account the perception of the service received by the user. In the opinion of the Commission services, the user wants to be transported from point A to point B. Further, any additional functions and a particular standard of quality received by the user via the platform should not take precedence over the main reason for the service requested by the user, i.e. the transport.

The aforementioned perception of the service by the user is important regardless of the nature of legal relationships established between the platform, the driver and the user.

The Commission services are of the view that a clear definition of the different legal relationships in place is essential in order to decide which kind of services are supplied, who are their suppliers and who are their recipients. However, at present it is not fully clear what the substance of those legal relationships is.

Question 1

In view of your practical experience with this kind of platforms, what are in your view the legal relationships established between the platform, the driver and the user?

⁸ See page 6 of Working paper No 878.

3.1.2.1 Electronically supplied services

If it is assumed that the transport passenger service is directly supplied by the driver to the user then the question might be raised whether the services supplied by the platform (to the user, to the driver or to both) are to be considered as electronically supplied services.

During previous VAT Committee meetings, substantial work has been carried out with a view to developing detailed indicators helping to draw a dividing line between services that should qualify as electronically supplied ones and those outside the scope of this notion.

Here, as it is the case in respect of intermediation services, there are two different provisions applicable. The particular rule in Article 58 of the VAT Directive covers supplies addressed to final consumers while for business customers the general rule in Article 44 applies.

Article 7(1) of the VAT Implementing Regulation defines “electronically supplied services” as covering services: (i) delivered over the Internet or an electronic network; (2) essentially automated; (3) involving minimal human intervention, and (4) for which it is impossible to ensure their supply in the absence of information technology.

In accordance with guidelines resulting from the 102nd meeting on the *Scope of the notion of electronically supplied services*⁹ further elements providing for more precision were developed:

“1. ... The VAT Committee unanimously agrees that in the assessment of whether a service qualifies as an electronically supplied service all these four elements [of the definition] are equally important.

2. The VAT Committee almost unanimously agrees that for the assessment of the notion of ‘minimal human intervention’ included in the definition of ‘electronically supplied services’, focus shall be on the involvement on the side of the supplier without any regard to the level of human intervention on the side of the customer. In cases where each individual supply requires human intervention on the part of the supplier, the VAT Committee almost unanimously considers that the supply shall be seen as involving more than minimal intervention.

3. The VAT Committee unanimously agrees that the service shall be regarded as requiring only a ‘minimal human intervention’ in situations where the supplier initially sets up a system needed for the supply, regularly maintains the system or repairs it in cases of problems linked with its functioning. ...”

Looking at the way in which the service in question is provided, it could be perceived (assuming that the transport service is supplied directly by the driver to the user) as fulfilling the conditions of the definition of electronically supplied services.

⁹ [Guidelines](#) resulting from the 102nd meeting of 30 March 2015 Document D – taxud.c.1(2015)4128689 – 862 (p. 192).

The platform sets up the system, monitors it, puts requirements, customizes, etc.¹⁰ but does not deal with individual supplies of services, i.e. requests coming from users and responses coming from the drivers. Therefore, it can be seen as staying within the scope of minimal human intervention. The service is also essentially automated, delivered over the Internet and not possible in the absence of information technology. Having that in mind, and provided that there are no additional features of which the Commission services are unaware at the moment, the services provided by the platform (where the transport service is delivered separately by the driver to the user) could be seen as staying within the definition of electronically supplied services.

Question 2

Do you see the services provided by the platform, where the transport service is supplied directly by the driver to the user, as covered by the definition of electronically supplied services or rather as going beyond its scope and therefore requiring a different qualification for the purposes of the application of the rules on the place of supply of services?

Question 3

Do you think that, where the transport is supplied separately by the driver, the platform supplies services both to the driver and to the user? If yes, please explain under which circumstances.

3.1.2.2 Intermediation services

Article 46 of the VAT Directive covers intermediation services, provided to final consumers. When those services are provided to a business customer, they are included in the general rule of Article 44. If it is assumed that the passenger transport service is supplied directly by the driver to the user then the question might be raised whether the services supplied by the platform (to the user, to the driver or to both) are to be considered as intermediation services.

The question here is whether the electronic platform connecting for remuneration, by means of a smartphone application, drivers using their own vehicle with persons who wish to make urban journeys, is to be seen as providing intermediation services.

The Commission services believe that in general intermediation takes place when its purpose is to facilitate contact between distinct persons with a view to finalise a transaction between them consisting of a supply of goods or services.

In this context points 56 to 61 of the Opinion of the Advocate General (cited above) in *Asociación Profesional Elite Taxi* are relevant.

In the Opinion, it is underlined that in relation to the electronic platform in question its function goes well beyond the mere facilitation of contacts between drivers and users. In practice, the activity of drivers is possible because of the innovative business model developed by the electronic platform. The platform provides not only an electronic

¹⁰ See more in the two aforementioned sets of VAT Committee guidelines dealing with electronically supplied services.

interface but also determines the standardised conditions under which the services are provided and exercises prior control over access to the activity of the drivers as well as the users. Therefore, it could be seen as a genuine organiser and operator of urban transport in the cities where it has a presence – a service that goes well beyond intermediation both for the drivers and for the users.

Additionally, the Commission services would like to draw attention to the guidelines resulting from the 107th meeting¹¹. Under point 3, the following is said:

“...

The VAT Committee almost unanimously agrees that to qualify as intermediation and therefore be covered by Article 46 of the VAT Directive, services provided in a digital environment shall require an active involvement of the intermediary which goes beyond the automated supply provided with the use of only minimal human intervention (within the meaning of Article 7(1) of the VAT Implementing Regulation). ...”

Looking at the aforementioned character of the services provided by the platform, the Commission services tend to see them as involving elements excluding the service from the qualification as intermediation covered by Articles 44 and 46 of the VAT Directive.

Question 4

Do you agree that, where the transport service is supplied separately (directly by the driver to the user), the electronic platforms, which apart from facilitating the contacts between the drivers and the users, have a decisive role in respect of the conditions under which the user is transported by the driver from point A to point B, provide services going beyond the scope of intermediation?

3.1.2.3 Transport services

Paragraphs 38 and 39 of the judgment in *Asociación Profesional Elite Taxi* state the following:

- “38 In a situation such as that with which the referring court is concerned, where passengers are transported by non-professional drivers using their own vehicle, the provider of that intermediation service simultaneously offers urban transport services, which it renders accessible, in particular, through software tools such as the application at issue in the main proceedings and whose general operation it organises for the benefit of persons who wish to accept that offer in order to make an urban journey.
- 39 In that regard, it follows from the information before the Court that the intermediation service provided by [the platform] is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, [the platform] exercises decisive

¹¹ [Guidelines](#) resulting from the 107th meeting of 8 July 2016 Document D – taxud.c.1(2017)1402399 – 914 (p. 215).

influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that [the platform] determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.”

When looking at what in essence is supplied to the user in the case at hand one has to recognise that in fact it is urban transport from point A to point B. The service provided contains innovative elements using the achievements of digital technology, but the main supply is received by the user, not in the “virtual” but in the “real world”. It might be therefore that the platform, in view of the role it plays in the whole legal setting, is simply supplying transport services to the user.

In the aforementioned Opinion of the Advocate General it is stressed that the platform’s activity comprises a single supply of transport in a vehicle located and booked by means of the smartphone application and that this service is provided, from an economic standpoint, by [the platform] or on its behalf. The service is also presented to users, and perceived by them, in that way. When users decide to use the platform’s services, they are looking for a transport service offering certain functions and a particular standard of quality. Such functions and transport quality are ensured by the platform.

As already mentioned, in the opinion of the Commission services the user’s perception of who actually is the provider of the service is important. It seems that the users link the service with the platform itself and not with individual drivers.

If it were assumed that the platform is supplying passenger transport services (covered by Article 48 of the VAT Directive) in its own name to the user, then for VAT purposes:

- there would not be any supply of services from the driver to the user;
- there would be a supply of transport services from the driver to the platform, if the driver is a taxable person for VAT purposes (in such a situation the transport service by the platform to the user would be covered by Article 28 of the VAT Directive);
- there would be no supply of services from the driver to anyone, if the driver is bound to the platform through a legal tie of the kind mentioned in Article 10 of the VAT Directive.

Question 5

Do you agree that in the case where the driver is to be seen as an independent supplier, the electronic platform is acting in its own name *vis-à-vis* the user, and therefore should be deemed to receive the transport service from the driver and to supply it further to the user, in accordance with Article 28 of the VAT Directive?

3.1.2.4 Services covered by the general rules

The general rules for the place of supply of services, included in Articles 44 and 45 of the VAT Directive, apply only when none of the particular rules, including those already mentioned, can be used¹².

In the aforementioned Opinion of the Advocate General it is stressed that the platform's activity comprises a single supply of transport in a vehicle located and booked by means of the smartphone application and that this service is provided, from an economic standpoint, by [the platform] or on its behalf. The service is also presented to users, and perceived by them, in that way.

It is also the opinion of the Commission services that the user sees the service as a whole, i.e. the part concerning the transport itself and the part provided thanks to the use of the electronic platform and the application.

In this context, the general rule would only apply where it is concluded that the services supplied by the platform cannot be characterized as transport services, intermediation services or electronically supplied services. This would be possible where:

- the service supplied does not meet the characteristics of any of these services; or
- there is a composite supply by the platform and its main element is none of the aforementioned services; or
- there is a composite supply by the platform and no main element can be ascertained, since all the component elements bear the same importance.

In the opinion of the Commission services, none of these options is rather likely to happen.

Question 6

Do you think that there is scope for the application of the general rules for the place of supply of services included in Articles 44 and 45 of the VAT Directive in the situations referred to in this document?

¹² Guiding principles in this regard are well developed by the CJEU. For example see judgment of 25 January 2001, *Commission v. French Republic*, C-429/97, EU:C:2001:54.

In particular, paragraph 41 states: "... it must be borne in mind that, as regards the relationship between Article 9(1) and Article 9(2) of the Sixth Directive, the Court has already held that Article 9(2) sets out a number of specific instances of places where certain services are deemed to be supplied, whereas Article 9(1) lays down the general rule on the matter. The object of those provisions is to avoid, first, conflicts of jurisdiction, which may result in double taxation, and, second, non-taxation, as Article 9(3) indicates, albeit only as regards specific situations. In every situation, the question which arises is whether it is covered by one of the instances mentioned in Article 9(2); if not, it falls within the scope of Article 9(1)...". Further, paragraph 49 adds: "..., the general rule set forth in Article 9(1) of the Sixth Directive lays down a definite, simple and practical criterion ... that provision is such as to ensure the rational and uniform taxation of the composite supply taken as a whole and to avoid conflicts of jurisdiction between Member States. "

3.2. The significance of the VAT identification number in the light of the correct application of the place of supply rules for services

3.2.1 Relevant legal provisions

For the right application of the place of supply rules for services, the correct identification of the customer (as a taxable or a non-taxable person) is crucial. The two general rules – Articles 44 and 45 of the VAT Directive¹³ – state respectively that when a service is supplied to a taxable person then it takes place where the customer is located, however when it is supplied to a non-taxable person then it takes place at the location of the supplier.

In Article 58 of the VAT Directive – a particular provision discussed among others in this paper – the place of supply of services provided to a non-taxable person is where that person is located (the same as in the case of Article 44).

The VAT Implementing Regulation includes a more detailed explanation of how the customer should be identified – as a taxable or a non-taxable person. In this respect, Articles 17 and 18, included in Subsection 1 of Section 4 of Chapter V, dealing with the status of the customer, have to be analysed¹⁴.

Article 17(1) of the VAT Implementing Regulation states: “*If the place of supply of services depends on whether the customer is a taxable or non-taxable person, the status of the customer shall be determined on the basis of Articles 9 to 13 and Article 43 of Directive 2006/112/EC.*”

The scope of the notion of taxable person in Articles 9 to 13 of the VAT Directive is very wide and it focuses on the material elements of the activities performed by a given person. In essence, a taxable person is any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity¹⁵.

Therefore, it should be underlined that the possession of a VAT identification number is not a requirement needed in order to become a taxable person and that the lack of such a number does not mean automatically that a person is not a taxable person.¹⁶

The Commission services have to emphasise at the same time that for the purposes of providing proof indicating the existence of a taxable person, the possession of the VAT identification number or the lack of it is relevant.

¹³ In this Working paper, focus is on Articles 44, 45 and 58 of the VAT Directive. However, the analysis provided here is relevant also for all other provisions dealing with the place of supply of services where the status of the customer is needed for the correct application of the rules, i.e. Articles 46, 49, 50, 52, 53, 54, 56 and 59.

¹⁴ For the sake of completeness, it should be mentioned that Article 19 of the VAT Implementing Regulation – Subsection 2 of Section 4 of Chapter V – deals with another aspect of the correct identification of the customer, namely the capacity in which the customer acts. This element is however not analysed as the question put by Estonia focuses on the status of the customer itself.

¹⁵ A more extended analysis of the notion of a taxable person as defined in the VAT Directive is provided in Working paper No 878 dealing with the VAT treatment of the sharing economy.

¹⁶ See Working paper No 609 dealing with the identification of a customer as a taxable person acting as such or a non-taxable person.

Article 18¹⁷ of the VAT Implementing Regulation is very important in this respect, as a supplier will often heavily rely on the VAT identification number communicated by his customer in order to identify his status. However, it is still important to remember that any person who independently carries out in any place any economic activity, whatever the purpose or results of that activity, must be regarded as a taxable person. To be a taxable person, registration is not required. In other words, the fact that a taxable person does not have a VAT identification number does not change his status.

Paragraph 1 of Article 18 of the VAT Implementing Regulation tells the supplier when he can regard an EU customer as a taxable person. That is the case when the customer communicates his VAT identification number, or shows that he is in the process of registering for VAT, provided the other conditions in that provision are met.

Where no VAT identification number has been communicated, the first subparagraph of paragraph 2 of Article 18 of the VAT Implementing Regulation explains that the customer can be regarded as a non-taxable person by the supplier but only if there is no information to the contrary.

The application of Article 44 of the VAT Directive, as compared to Article 45, changes substantially the place where services are taxable. Therefore there is an additional requirement on the side of the supplier to verify information provided by the customer and to assess whether the latter can be treated as a taxable person or not.

In relation to telecommunications, broadcasting and electronic services as from 2015 a second subparagraph has been introduced in Article 18(2) of the VAT Implementing Regulation. As the place of supply of services is the same for B2B and B2C supplies for these three services, this provision provides more legal certainty for the supplier by disregarding information other than the VAT identification number. It states that the supplier of these three services may regard any customer established within the EU who does not provide him with a VAT identification number as a non-taxable person.

However, the supplier is not obliged to treat a customer who is a taxable person acting as such as a final consumer: if he wanted to treat him as a taxable person, although his client has not communicated him his VAT identification number, he can do so. The burden of proof will however then be on him and to avoid liability he will need sufficient information to substantiate the status of his customer as a taxable person.

For telecommunications, broadcasting and electronically supplied services, the application of Article 44 (B2B) and of Article 58 (B2C) leads to locating the services at the place of the customer. The only thing that changes is the liability of the supplier when he is not established in the Member State where the tax is due – for B2B supplies, he does not charge VAT and the customer is liable to account for VAT and for B2C supplies it is the supplier who is liable to account for VAT.

The identification of the place of supply of services according to the provisions in question (and as a consequence of the person liable for the payment of VAT) is linked to whether the customer is a taxable person or a non-taxable person. The possession of the

¹⁷ The analysis concerning Article 18 of the VAT Implementing Regulation is developed in the [Explanatory Notes on the place of supply of telecommunication, broadcasting and electronic services](#) published on 3 April 2014.

VAT identification number serves as proof, and is in fact the most important piece of evidence that a supplier could collect in order to identify correctly the status of his customer.

Therefore, it is not obligatory for the supplier to obtain a VAT identification number of the customer in order not to charge VAT on the relevant service covered by Article 44 of the VAT Directive. However, he has to have strong indications that the customer is a taxable person. The indications need to be of a material nature. The pure clause in a contract existing between the supplier and the customer is not sufficient. Where there would be a contradiction between contractual arrangements and the economic reality the latter would prevail. It is up to each taxable person to ensure that he is in possession of appropriate elements of proof indicating correctly the status of his customer.

Finally, Articles 17 and 31 of the VAT Administrative Cooperation Regulation, mentioned by the Estonian delegation, do not regulate whether a person is to be treated as a taxable or a non-taxable person. They refer to the obligation on the side of Member States to store information on VAT identification numbers and provide confirmation of their validity. Therefore, when such an assessment takes place, it is relevant only in the context of the possibility of checking the validity of the number in VIES but not in relation to the validity of the status of a taxable person as such.

3.2.2 The supplier acting in good faith

The VAT Committee has discussed the value of the VAT identification number in the context of the correct application of the place of supply rules for services on several occasions, also before the rules laid down in the VAT Implementing Regulation were adopted. In particular, Working papers Nos 609, 623 and 646 should be mentioned in this respect. The analysis provided there confirms the approach reflected in the implementing provisions.

In particular, the Estonian delegation draws the attention to the guidelines resulting from the 86th VAT Committee meeting (Working paper No 609). The guidelines say *inter alia*¹⁸:

“The VAT Committee almost unanimously agrees that the correct identification of the customer needed in order to apply Articles 44 and 45 of the VAT Directive, in their wording as of 1 January 2010, on the place of supply of services, shall require the supplier to respect several elements.

When it comes to the assessment of the status of the customer, the supplier is assumed to have acted in good faith when he has:

- (a) *established whether the customer is a taxable person via the VAT number communicated to him or through any other proof presented to him to show that the customer is a taxable person or a non-taxable legal person identified for VAT purposes, and*
- (b) *obtained confirmation of the validity of the VAT number of the customer and carried out a reasonable level of verification via existing security procedures.*

¹⁸ [Guidelines](#) resulting from the 86th meeting of 18-19 March 2009 taxud.d.1(2009)357988 – 614 (p. 120).

...”

In the opinion of the Commission services, exactly the same approach should apply to all the situations covered by other provisions in the VAT Directive regulating the place of supply rules.

Therefore, in order to be considered as acting in good faith the supplier should collect evidence from the customer and perform appropriate checks within the range of his possibilities. Where owing to the lack of cooperation of a customer he does not have evidence of the status of the customer it would seem that a supplier in good faith should charge the tax and not leave the liability to fall upon the customer. Any risk of double taxation will fall upon the customer and will be justified in view of his lack of cooperation.

4. DELEGATIONS' OPINION

The delegations are invited to give their opinion on the issues/questions raised in the Working paper. In particular, the delegations are asked whether in their opinion there is a necessity to develop VAT Committee guidelines on the subjects presented and, if so, to what extent.

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ANNEX

Question from Estonia

The Republic of Estonia would like to propose to the Value Added Tax Committee a consultation regarding the application of Articles 44 and 45 of the Council Directive 2006/112/EC on the common system of value added tax (hereinafter *the VAT Directive*) and regarding VAT treatment of the intermediation service described in Court of Justice of the European Union (hereinafter *CJEU*) judgment C-434/15.

Questions from Estonia

Estonia would like to consult the VAT Committee regarding two questions:

- 1) VAT treatment of the intermediation service described in CJEU judgment C-434/15;
- 2) Application of Articles 44 and 45 of the VAT Directive in cases where the recipient of the service does not have a VAT registration number in its Member State.

Question 1

The first question concerns the VAT treatment of the service described in the CJEU judgment C-434/15.

In judgment C-434/15, the court analysed an intermediation service, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys.

The court stated that an intermediation service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver who will carry out the transportation using his or her own vehicle, is classified as a “service in the field of transportation”.

For VAT purposes, should the described intermediation service be treated as (i) an electronically supplied service; (ii) supply of passenger transport; (iii) service taxable under the general rule?

Question 2

The second question concerns the application of Articles 44 and 45 of the VAT Directive in relation to supply of services, especially in cases where the recipient of the service does not have a VAT registration number in its Member State. In order to illustrate, we have used the service described under question 1, as an example.

A company established in one Member State supplies an intermediation service (that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver who will carry out the transportation using his or her own vehicle) to a recipient in another

Member State. The recipient of the service has not provided the supplier its VAT registration number and the supplier is aware of the fact that the recipient is a non-professional driver. Based on a presumption that the recipient of the service is a person engaged in business, the supplier of the service applies a 0% VAT rate on the service supplied. The recipient of the service in the other Member State does not actually have a VAT registration number.

Is it obligatory for the supplier of the service to obtain a VAT number of the recipient in order to apply a 0% VAT rate on the service supplied?

Are the principles of the VAT Directive followed in cases where a 0% VAT rate is applied on the service supplied to a natural person in another Member State based on a presumption that the recipient is a person engaged in business?

Estonia's position

Question 1

Estonia is of the opinion that for VAT purposes the intermediation service described in CJEU judgment C-434/15 is an electronically supplied service pursuant to Article 7 of the Council Implementing Regulation No 282/2011 (EU) as it is a service provided over the internet or other computer network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology.

Question 2

The general rules for the place of supply for services are in Articles 44 and 45 of the VAT Directive. According to Article 44 of the VAT Directive, the place of supply of services to a taxable person acting as such is the place where the customer has established his business. According to Article 45 of the VAT Directive, the place of supply of services to a non-taxable person is where the supplier belongs, irrespective of the location of the recipient. In case of electronically supplied services, according to Article 58 of the VAT Directive, the place of supply to a non-taxable person is where the non-taxable person is established, has his permanent address or usually resides.

In our opinion, application of Article 44 of the VAT directive should be based on whether or not the recipient of the service is registered in its Member State as a taxable person. The supplier of the service can apply a 0% tax rate on the service supplied in case the recipient has provided evidence of being a registered taxable person. In case the recipient is unable to provide a VAT number, the supply should be treated as a transaction covered in Article 45 of the VAT Directive, or as a transaction covered by a specific provision, like Article 58 in case the service mentioned under Question 1 is considered an electronically supplied service.

We believe that this is also supported by Article 18 of the Council Implementing Regulation (EU) No 282/2011 and the Council Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax. According to Article 17 of the Regulation 904/2010, each Member State shall store in an electronic system information on VAT identification numbers; and under Article 31, the competent authorities of each Member State shall ensure that persons involved in the intra-

Community supply are allowed to obtain confirmation by electronic means of the validity of the VAT identification number of any specified person. In case the fact whether the recipient of the service is registered for VAT purposes or not, is not important on supply of service, then it would not be necessary to maintain a register of registered taxable persons or to ensure that undertakings have access to these data. Also, the supply of service to persons from other Member States is declared in the recapitulative statement only if the recipient of the service has a VAT identification number.

In connection with the change in VAT Directive as of 1 January 2010 in the principles governing the place of supply of services to be dependent on the recipient of the services, the VAT Committee (based on Working Paper No 609) has also analysed whether the defining of a recipient of the service should be based on its operating as a VAT taxable person or not, and concluded that the existence of a VAT identification number is relevant for deciding on the status of a client. According to the guidelines resulting from the 86th meeting, the supplier is assumed to have acted in good faith when he has: (a) established whether the customer is a taxable person via the VAT number communicated to him or through any other proof presented to him to show that the customer is a taxable person or a non-taxable legal person identified for VAT purposes, and (b) obtained confirmation of the validity of the VAT number of the customer and carried out a reasonable level of verification via existing security procedures. As stated in the guidelines, the validity of the VAT number is a separate condition and must always be followed separately from the first condition.

Determining the place of supply of services based on the VAT identification number ensures the uniform implementation of Articles 43 and 44 of the VAT Directive and does not pose an administrative burden to the service supplier. We have not managed to find a single clause in legal acts that would give supplier of the service the discretion to decide on the status of the recipient of the service – i.e. whether the recipient of the service is engaged in business or not. We hold the position that the accrual of a tax obligation and the tax rate cannot be dependent on the subjective opinion of the supplier of the service on whether the recipient of the service is engaged in business and whether the engagement in business is permanent under Article 9 of the VAT Directive.

Estonia is of the opinion that in cases the recipient of the service lacks a VAT identification number and the supplier of the service applies a 0% VAT rate on the service supplied, the principles of the VAT Directive are not followed. The described taxation violates the principle of neutrality of VAT, increases VAT fraud and leads to unfair competition.

Discussion by the VAT Committee

As stated above, in order to ensure the correct functioning of the internal market, equal terms of competition and in view of the wish for uniform practice in the Member States, we would like the issue to be considered by the VAT Committee at the earliest possible opportunity, preferably to be discussed at the next meeting of the VAT Committee. Due to its urgent nature, in case the issue could not be discussed at the next meeting of the VAT Committee, Estonia would like the issue to be examined in the written procedure.