European VAT and the Sharing Economy*

Kluwer International Tax Blog
October 31, 2019

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Please refer to this post as: Giorgio Beretta (Editor), 'European VAT and the Sharing Economy', Kluwer International Tax Blog, October 31 2019, http://kluwertaxblog.com/2019/10/31/european-vat-and-the-sharing-economy/*

The past few years have seen the sensational rise of new models of production, distribution, and consumption of goods and services, which have been synthetically captured under the umbrella definition of "sharing economy". The ascent of digital platforms – including renowned companies headquartered in the Silicon Valley like Airbnb and Uber, or the French unicorns HomeExchange and BlaBlaCar – expands dramatically the range of possibilities for businesses and consumers alike to exchange with each other anything, from accommodation to rides.

By allowing instantaneous and smooth interaction among millions of individuals, platforms transform otherwise economically inconvenient activities into fully feasible and profitable services. It is, in fact, the action of the platform, rather than the mere relationship established between its users, what ultimately creates value in those kinds of business models. This also reflects the reality that, through the years, the "digital frontier"[1] has been pushed farther and farther, so as to include within it even services once not capable of direct delivery from a remote location such as accommodation and passenger transport services, undoubtedly the most prominent activities in the sharing economy domain.

Another key feature of the sharing economy relates to its ability to disrupt, in tax law as well as in different areas of the law, foundational dichotomous categories and, thus, to create new legal "hybrids". As a matter of fact, conventional dividing lines between suppliers and customers, business and private spheres, employees and self-employed, are largely no longer viable as organizational legal structures in the sharing economy. In a sense, as vividly explained by US District Court Judge Chhabria in a case involving the US-based sharing economy platform operating a network of taxi, Lyft, applying the existing legal categories to the business models featuring the sharing economy is like trying to fit a "square peg" into "round holes".[2]

The rise of the sharing economy has spawned a great deal of attention in recent times, even in the tax field. With regard to an indirect, consumption-type tax such as European Value Added Tax (EU VAT), the VAT Committee – an advisory body inside the European Commission – has discussed certain issues specifically related to the treatment of sharing economy activities.[3] The OECD Working Party No. 9 on Consumption Taxes (WP9), in close consultation with the business community through the Technical Advisory Group (TAG), is also working actively on the role of digital and sharing economy platforms in relation to the collection of VAT and Goods and Services Tax (GST).[4]

Despite a growing spark of interest, until now no comprehensive analysis, neither from a perspective of EU VAT nor from that of other VAT/GST systems, has been carried out concerning the treatment of the sharing economy. Neither specific policies in relation to the tax treatment of the sharing economy have been discussed at the international level. The existence of such gap in the literature is what has motivated the research of the author in this field. In this connection, the present contribution intends to discuss one of the main issues that the sharing economy poses to the EU VAT system, i.e. the classification of platform services under place of supply rules.[5]

Classification of Platform Services under Place of Supply Rules

Nearly all tax laws, being either direct or indirect taxes, contain rules setting their territorial scope. Under EU VAT, this role is fulfilled by what the VAT Directive (VD) terms as place of supply rules.[6] Place of supply rules fundamentally function as distributive rules, whose aim is to allocate taxing rights between two or more jurisdictions, by determining which Member State shall have jurisdiction to tax a cross-border transaction.

Under EU VAT, place of supply rules for services primarily differ depending on the taxable status of the customer, i.e. whether he is a business or a consumer. In more detail, it is necessary to determine, in the first place, whether a customer is a taxable person or not and, in the former event, further verifying whether he is acting in such capacity or not. Next to the taxable status of the customer, place of supply rules differ depending on certain aspects of the transactions concerned. The determination of the place of supply in fact relies on a series of proxies, which require classifying and subdividing transactions into separate categories based on their own nature and characteristics.

Looking at services commonly provided by sharing economy platforms to their users, it seems that various classifications of those services are possible for place of supply purposes under EU VAT.

A first possibility is that, based on their ultimate function to facilitate the provision of the underlying services among their users, the services in question are regarded as intermediary services to which Article 44 or 46 VD apply, depending on whether the transaction in question is, respectively, B2B or B2C. While, in the first case, the place of supply is where the business customer is established, in the second case, the place of supply is instead where the underlying transaction is supplied. Thus, based on this latter provision, in case a platform like Airbnb or HomeExchange supplies its services to a non-taxable person, the place of supply of those services is where the immovable property used in the provision of accommodation services by the underlying supplier is located. In case of a platform like Uber or BlaBlaCar, the place of supply of those services is instead where the passenger transport service provided by the underlying supplier (a non-taxable person) actually takes place.

A second possibility is that a platform does not act in the name of another person, but instead in its own name. In such event, the services provided by the platform to its users might no longer be regarded as intermediary services, but instead should be characterized as "ordinary" services, i.e. services to which the default rules of Article 44 or 45 VD apply, depending on whether the transaction in question is, respectively, B2B or B2C. Notably, under those rules, the place of supply is, respectively, where the customer or the supplier is established. The same classification might also apply if, based on their own nature and characteristics, eventually platform services cannot be classified in any other manner.

A third possibility is that a platform acts in its own name and, yet, on behalf of another person. In such event, based on the deemed rule contained in Article 28 VD, the platform is no longer considered as an intermediary, but rather as a full-fledged supplier of the underlying services. The intervention of the deemed provision contained in Article 28 VD, in fact, extends the place of supply rule applicable to the underlying transaction also to the supply of the related services provided by the platform to its users. Pursuant to such provision, services provided by the aforementioned platforms would thus fall within the scope of Article 47 or 48 VD, depending on whether the underlying transaction concerns, respectively, accommodation or passenger transport services.

A fourth possibility is that platform services are characterized as electronically supplied services, provided they are essentially automated and involve only a minimal human intervention, pursuant to the definition laid down in Article 7(1) of the VAT Implementing Regulation (IR).[7] Notably, the possibility to qualify platform services as electronically supplied services essentially depends on the actual level of influence and control exerted by a platform over the underlying transaction. Should this qualification occur, then, in case of a B2B transaction, the default rule contained in Article 44 VD applies, whereas, in case of a B2C transaction, the relevant place of supply rule is contained in Article 58 VD. Noteworthy, under both those rules, the place of supply is where the customer is established, has his permanent address, or usually resides.

The existence of several possible classifications of platform services for place of supply purposes under EU VAT might lead to situations of double taxation or non-taxation, should the Member States concerned have divergent views on how to qualify those services or regarding the taxable status of the customer. Indeed, uncertainties surrounding the classification of platform services might also induce platforms to engage in purposive misclassifications of their services or simply to change such classification at their best convenience.[8]

Tentative Solutions to Classification Problems of Platform Services

In order to solve those kinds of classification problems, a single, more straightforward proxy for determining the place of supply of platform services should be laid down. In this connection, the author submits that three alternative solutions might be implemented.

A first alternative solution would be to treat platform services always as intermediary services, i.e. as services provided by a disclosed agent to one or both parties of the underlying transaction. In such event, while, in case of a B2B transaction, the default place of supply rule of Article 44 VD applies, in case of a B2C transaction, the relevant place of supply rule is contained in Article 46 VD. Operatively, this first alternative solution might be implemented by inserting a specific clarification in the text of Article 7(3)(u) IR, pursuant to which, in no event, services having a "tangible" nature, such as those relating to the provision of accommodation and passenger transport, can be regarded as electronically supplied services. This solution has advantages but also drawbacks. The main advantage is that the classification of platform services as intermediary services accords with a broad reading of Article 7(3)(u) IR ("broad reading" in the sense that it is rather unclear whether the provision in question, referring to accommodation and passenger transport services "booked online", also applies to platform services). The main drawback of this solution instead relates to the fact that whether the recipient of the services in question is a taxable or a non-taxable person remains of importance, in so far as distinct place of supply rules are associated with the different taxable status of the customer, a circumstance which is particularly difficult to assess in the context of the sharing economy. While, in case of B2B transactions, the place of supply is in fact where the customer is established, in case of B2C transactions, the place of supply is instead where the underlying transaction is supplied.

A second alternative solution would be to treat platform services always as electronically supplied services, i.e. as services delivered over the Internet or an electronic network, which are essentially automated, involve minimal human intervention, and are impossible to ensure in the absence of information technology, as stipulated by Article 7(1) IR. In such event, while, in case of a B2B transaction, the default place of supply rule of Article 44 VD applies, in case of a B2C transaction, the relevant place of supply rule is contained in Article 58 VD. Operatively, this second alternative solution might be implemented by amending the current definition of electronically supplied services laid down in Article 7(1) IR. Notably, the definition in question could be amended as no longer referring to the conditions of a service being essentially automated and involving minimal human intervention, but instead as only making reference to the circumstance that the service in question, due to its digital nature, can be provided at a distance.[9] This solution displays several advantages. First, it arguably consents to align the treatment, for place of supply purposes, of services provided by sharing economy platforms with those operated by other digital companies, such as Amazon, Apple, Facebook, Google, or Netflix. Second, this solution appears future oriented, in so far as, in the forthcoming years, an increasing number of services are likely to be provided by sharing economy platforms, even at a distance. Third, this solution renders quite unimportant whether the recipient of the services in question is a taxable person or not, as long as both the two relevant place of supply rules, contained, respectively, in Articles 44 and 58 VD, essentially make reference to the place where the customer is established, has a permanent address, or usually resides. The main drawback of this solution instead relates to the fact the underlying supplier and/or the underlying customer, especially if they are non-taxable persons, might hold an incentive, as to avoid paying VAT on their own purchases, to falsely declare that the place of their usual residence is located outside the EU.

A third alternative solution would be to treat platform services always the same as the underlying services to which they relate, i.e., in case of the aforementioned platforms, as services connected with immovable property or concerning passenger transport. In such event, the very same place of supply rules for the underlying services would equally apply to the services provided by the related sharing economy platform. Thus, the application scope of the place of supply for the underlying services is practically extended as to cover also the related platform services. Operatively, this third alternative solution might be implemented by adding a specific reference to services provided by a sharing economy platform to its users in the text of Articles 47 and 48 VD or, in the alternative, by means of specific provisions to be inserted in the IR. The main, obvious advantage of this solution is that exactly the same place of supply rules applicable to the underlying

services operate also with regard to the related supply made by the platform, so that there is no need for a platform to determine whether the supplier and the customer is actually a taxable person or not. The main drawback instead relates to the fact that this solution entails a quite radical departure from the current place of supply rules, which is particularly problematic if the proposed provisions are interpreted narrowly and only applied in the sharing economy domain.

Whatever solution is implemented, the author submits that it should be the result of a mere policy decision, rather than reflecting the – supposedly – "true" nature and characteristics of the services provided by sharing economy platforms, circumstances which are difficult – if feasible at all – to assess. Indeed, in the author's view, the classification of a service under place of supply rules is only a matter of political choice.

From a broader perspective, what is rather clear is that, given the rapid expansion of the sharing economy and taking into account the multi-jurisdictional level at which most sharing economy platforms operate, a discussion at the EU level – if not at the international level in an institution like the OECD – on the tax treatment of the sharing economy needs to be undertaken. Indeed, the 21st century economic and social landscapes are evolving at a fast pace, and the sharing economy – which is part of such ongoing shift – is set to stay. Even tax pundits, then, had better prepare themselves and watch closely this – growing – space.

END NOTES

* The author has recently published a book on "European VAT and the Sharing Economy" which is available in Wolters Kluwer EUCOTAX Series on European Taxation (see: **here**) and builds upon his Ph.D. thesis defended at Università Carlo Cattaneo – LIUC (Milan, Italy) on 17 December 2018.

[1] OECD/G20, *Tax Challenges Arising from Digitalisation – Interim Report 2018* at pp. 15 and 207 (OECD Publishing 2018).

[2] US: Northern California District Court, 11 March 2015, *Patrick Cotter et al. v. LYFT Inc.,* No. 13-cv-04065-VC, 60 F. Supp. 3d 1067 (N.D. Cal. 2015), at para. 7.

[3] VAT Committee, *Working Paper No. 878. VAT Treatment of Sharing Economy* (taxud.c.1(2015)4370160); *Working Paper No. 947. 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* (taxud.c.1(2018)1735106). See also VAT Expert Group, *VAT Treatment of the Sharing Economy* (taxud.c.1(2019)2026442).

[4] OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Sales* (OECD Publishing 2019).

[5] For other issues and tentative solutions in this regard, please see G. Beretta, *European VAT and the Sharing Economy* (Kluwer Law International 2019).

[6] Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax, OJ L 347/1 of 11 December 2006.

[7] 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 77/1 of 23 March 2011.

[8] From discussions at a VAT Committee meeting, in fact, it appears that tax authorities of many Member States have not yet reached a formal position, neither firm views, on how to qualify, for EU VAT purposes, transactions between platforms and their users. Therefore, divergent interpretation and application of place of supply rules by different Member States are very much possible. See VAT Committee, *Minutes 111th Meeting – 30 November 2018*, at p. 8 (taxud.c.1(2019)1709508).

[9] As indeed suggested by M. Lamensch, *European Value Added Tax in the Digital Era* at para. 2.2.3.1.2. (IBFD 2015) and M.M.W.D. Merkx, *VAT and E-Services: When Human Intervention Is Minimal*, 29 International VAT Monitor 1 (2018), Journals IBFD.