Kluwer International Tax Blog

Newly proposed VAT rules for sharing economy platforms – some fine-tuning needed?

Nevia ?i?in-Šain (Vienna University of Economics and Business) · Wednesday, March 22nd, 2023

The focus of this contribution are the newly proposed rules for the sharing platform economy under the VAT in the Digital Age (ViDA) reform package, published on 8 December 2022 by the European Commission. The proposed rules[1] envisage the introduction of a new Article 28a into the VAT Directive stipulating: "*Notwithstanding Article 28, a taxable person who facilitates, through the use of an electronic interface such as a platform, portal, or similar means, the supply of short-term accommodation rental, as referred to in Article 135(3), or passenger transport, shall be deemed to have received and supplied those services themselves…*". The facilitating platforms will become deemed suppliers only if the underlying provider is: a) a non-established person not identified for EU VAT, or is b) a non-taxable person (e.g. consumer) or is c) a member of the Group of 4. The latter includes: 1) a taxable person carrying out only supplies of goods or services in respect of which VAT is not deductible (e.g. financial institution); 2) a non-taxable legal person (e.g. holding, public body); 3) a taxable person subject to the common flat-rate scheme for farmers; or 4) a SME.

Scope of the rules

Visibly, the new deemed supplier rules are targeting only two sectors – the short-term accommodation rental and passenger transport sector. In keeping with the principle of proportionality, the Commission proposed deemed supplier rules only in sectors where disruption of competition with the traditional sector is most flagrant and where the loss of VAT revenue is the highest.[2]

Concerning the first sector, the regulation starts by introducing a new definition of short-term accommodation rentals. A new Article 135(3) VATD would explicitly equate accommodation rentals lasting up to 45 days, regardless of whether any ancillary services are being provided or not, to hotel services that cannot benefit from the exemption provided for letting of immovable property in Article 135(1)(l) VATD. This is a welcomed improvement since Member States are currently treating such rentals differently, oftentimes depending on the type of provided ancillary services.[3]

The second sector raises some issues. The Commission's proposal refers to the general term "passenger transport". This evidently leaves out food and beverage delivery services (typical sharing economy activities frequently provided over platforms by non-taxable persons or exempt SMEs, e.g. bike riders), because these constitute transport of goods, not passengers. In addition, the

use of the term “passenger transport” can also cause a, presumably inadvertent, inclusion of platforms operating outside sharing economy sectors. It can cover platforms facilitating the supply of international airplane (or maritime) passenger transport, because these services can be provided by non-resident suppliers (e.g. airlines) who need not be VAT registered in the EU. Namely, many EU Member States do not require non-resident suppliers of exempt international passenger transport[4] to register for VAT.[5] Based on the proposed rule, if a platform facilitates a supply of passenger transport made by a non-established, non-registered person it will become a deemed supplier. In such cases the deemed supply made by the platform should also be exempt (with right to deduct or 0% rated). Nevertheless this could still create administrative costs for the platform without any added revenue for the Member States.

A platform could also become a deemed supplier in case it facilitates domestic passenger transport provided by e.g. a SME bus company. Such transports are not necessarily exempt, but may profit from a reduced rate.[6] Moreover, from 2025 onwards EU SMEs can make use of their national exemptions in other EU Member States. Therefore, even international passenger transports provided by e.g. SME bus companies could also trigger the application of the deemed supplier rules if facilitated by a platform. Until the place of supply rule for passenger transport changes,[7] the facilitating platform would have to know the exact route of the trip in order to apply the correct VAT to the deemed supply (Article 48 VATD), which might be information that the platform does not have. On a side note, the platform faces the same problem when determining the VAT on the facilitation fee it provides to a non-taxable person, because such service should be treated as an intermediation service, taxable where the underlying supply is taxed. Namely, a new Article 46a VATD would clarify that the B2C facilitation service provided by a platform should be regarded as an intermediary service. This should allow for a uniform application of the place of supply rules because currently some Member States treat such services as electronically supplied services.[8]

In general, it seems that limiting the scope of application of the deemed supplier rule in the transport sector to “passenger transport” services is somewhat misaligned with the options proposed by the underlying study[9] and even the ViDA Impact Assessment.[10]

In comparison, the newly proposed deemed supplier rules for sharing economy in New Zealand define “transportation services” as ride-sharing and beverage and food delivery services.[11]

Even though the EU Commission made a conscientious choice of not including beverage and food delivery services due to no distortion of competition in that sector, a potential fine-tuning of the scope of covered passenger transport services might be needed in order to better target passenger transport sectors where sharing economy models are prevalent and to ensure that other passenger transport platforms are not “caught in the net”.

Prohibition to communicate the VAT number to the platform – in contradiction with other legislation?

The deemed supplier rule should apply when the underlying supplier is not charging VAT to the supply. This is broadly speaking when the underlying suppliers are non-residents not registered for VAT in the EU, consumers or members of the Group of 4. In order to make the deemed supplier rules feasible in practice, the platform needs to apply the deeming provisions when it does not receive a valid VAT number from the underlying supplier, according to the proposed Article 9c first sentence of the VAT Implementing Regulation (IR).

However, since members of the Group of 4 can be in possession of a VAT number (e.g. in Member States where SMEs are identified for VAT purposes, or if they obtained it for intra-EU acquisitions or even for domestic reverse charge), the second sentence of the proposed Article 9c IR stipulates that the members of the Group of 4 are prohibited from communicating their VAT numbers to the platform.

This prohibition seems to be in contradiction with the obligation to communicate the VAT number to the platform imposed by other rules. The current Article 55 IR requires taxable persons and non-taxable legal persons that are liable to account for VAT on the basis of Article 196 VATD (reverse charge) with respect to services received to communicate their VAT number to their service provider.[12] Hence based on this rule, a SME purchasing cross-border facilitation services from the facilitating platform *would have to communicate* its VAT number to the platform. In addition, DAC 7 also requires Reporting Platform Operators to collect VAT numbers from their Reportable Sellers when they provide, *inter alia*, rental of immovable property or rental of any mode of transport (i.e. sectors also covered by the proposed ViDA rules).

An alternative approach to solving the issue of applicability of the deeming provisions by the platforms in practice considered in the underlying study, consisted in accompanying the provision of a VAT number by the underlying supplier with a follow-up question posed by the platform whether the person is a member of the Group of 4.[13] Whether relying on the truthfulness of such responses would be a reliable method remains questionable.

In New Zealand, the proposed deemed supplier rules for sharing economy are not faced with the same issue since the rules should apply also when the underlying provider is a GST registered business. Large enterprises like hotels may however enter into written agreements with the marketplaces that they will remain responsible for collecting and returning GST on the provided accommodation.[14]

Limitation of responsibility of the platform and secondary responsibility of the underlying supplier?

Platforms are not the actual suppliers of the concerned services. They are merely deemed to have supplied them to the customer for VAT purposes. This means that they have to rely on information obtained from the underlying suppliers. In order to limit their responsibility, the ViDA rules propose a new Article 9d IR according to which a platform would not be held liable for the payment of the VAT due should it be subsequently found that they should have acted as deemed suppliers if: (a) the platform is solely dependent on information provided by the supplier of the services; and (b) the information so provided is erroneous and (c) the taxable person can prove that he or she did not and could not reasonably have known that the information was erroneous.

If an underlying supplier communicates a valid VAT number to the facilitating platform, the latter would not apply the deemed supplier rules (*argumentum a contrario* of the proposed Article 9c, first sentence IR). A consumer or a non-registered foreign person could not be in possession of a valid VAT number, therefore they could only communicate a false VAT number. Such a number would qualify as “erroneous” information. Presumably, the platform would have to verify such a VAT number so it would have to know that such information is erroneous.

However, members of the Group of 4 can indeed be in possession of a valid VAT number and they may communicate it to the platform by mistake, intent or because the current legislation obliges

them to do so.[15] It seems as though the platform could not rely on Article 9d IR to shield itself from liability in such cases, since a valid VAT number is not "erroneous" information, which is one of the three requirements that need to be fulfilled cumulatively for the safe harbor rule to apply. The following question that can be posed is whether the deemed supplier rules would be applicable in the first place in such cases, because according to the first sentence of Article 9c IR, the deemed supplier rule in Article 28a VATD would apply if the platform *does not* receive a valid VAT number.[16]

In case the deemed supplier rules have not been applied because a valid VAT number has been communicated by a member of the Group of 4 (despite the prohibition imposed on them to do so), it appears that the tax administration could not turn against the underlying supplier if, for instance, the underlying supplier is still "covered" by the SME exemption. Namely, such a taxable person is normally exempt from applying VAT on its services until they reach a threshold or opt for taxation. As a result, no VAT would be collected even though the provision of short-term accommodation rental or the passenger transport was facilitated over a platform.

In New Zealand, the proposed rules state that an underlying supplier of listed services operating on an electronic marketplace must notify the operator of the electronic marketplace of (a) their name and tax file number and (b) their GST registration status. If the GST registration status of an underlying supplier changes, the underlying supplier must notify the operator of the electronic marketplace as soon as practicable. Once notified, the operator may rely on the information provided by the underlying supplier, and a deficiency in an amount of tax allocated to a taxable period that arises as a consequence of relying on the information provided is treated as a reduction in the total output tax allocated to the taxable period.[17] In contrast to the proposed EU rules, the wording does not mention only "erroneous" information.

Conclusion

The issues mentioned above are some of the identified legal questions that the proposed rules raise. Perhaps in the course of the debate that will ensue during the adoption period, some of the proposed provisions will be fine-tuned and redefined in a different manner. Foreign legislation may serve as a source of inspiration for those purposes.

[1] Proposal for a Council Directive amending Directive 2006/112/EC as regards VAT rules for the digital age, COM/2022/701 final, 8. Dec. 2022.

[2] Economisti Associati et al., *VAT in the Digital Age, Vol. 2, The VAT Treatment of the Platform Economy* p. 96 (2021).

[3] *Id.*, at pp. 59, 60.

[4] All EU Member States zero-rate (or exempt with a right to deduct) international passenger transport by maritime shipping and air, while other modes are frequently subject to positive rates. CASE, IHS, Transport and Mobility Leuven, CPB, *Study on the Economic Effects of the Current VAT Rules for Passenger Transport Final Report, Volume 1*, TAXUD/2012/DE/334 (2014), p. 16.).

[5] CASE, IHS, Transport and Mobility Leuven, CPB, *Study on the Economic Effects of the*

Current VAT Rules for Passenger Transport Final Report, Volume 2, TAXUD/2012/DE/334 (2014).

[6] CASE, IHS, Transport and Mobility Leuven, CPB, *Study on the Economic Effects of the Current VAT Rules for Passenger Transport Final Report, Volume 1*, TAXUD/2012/DE/334 (2014), p. 68 et seq.

[7] DG Taxud, European Commission, *Review of the VAT Rules Applicable to Travel and Tourism Sector – Meeting with Stakeholders – Background Document*, taxud.c.1(2022)8070018 (26 Oct. 2022).

[8] Economisti Associati et al., *supra* n. 3, at p. 58 et seq.

[9] None of the options suggest „only" passenger transport. Economisti Associati et al., *supra* n. 3, at p. 115.

[10] None of the analyzed options suggest to contain the rules to „passenger transport". Commission Staff Working Document SWD(2022) 393 final of 08 Dec. 2022, Impact Assessment Report, pp. 72, 73.

[11] Proposed Section 8C (Supplies of listed services). NZ: Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Bill (No 2), 164—1.

[12] Under Article 214(1)d of the VAT Directive, Member States shall take the measures necessary to ensure that the following persons are identified by means of an individual number… every taxable person who within their respective territory receives services for which he is liable to pay VAT pursuant to Article 196.

[13] Economisti Associati et al., *supra* n. 3, at p. 93.

[14] Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Bill (No 2) s. 60C amended.

[15] See the mentioned contradiction with Article 55 IR.

[16] It is noteworthy that the higher-ranking Article 28a VATD does not make the application of the deemed supplier rules contained therein contingent on the non-communication of the VAT number of the listed underlying suppliers. Therefore, it is also possible to interpret that the non-communication of VAT number is not a substantive condition for the application of the deemed supplier rules and that the rules should apply even if a valid VAT number has been communicated by one of the listed underlying suppliers. However, this makes the application of the deemed supplier rules in practice almost impossible for the platforms.

[17] Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Bill (No 2) s. 60H amended.

To make sure you do not miss out on regular updates from the Kluwer International Tax Blog, please subscribe here.

Kluwer International Tax Law

The **2022 Future Ready Lawyer survey** showed that 78% of lawyers think that the emphasis for 2023 needs to be on improved efficiency and productivity. Kluwer International Tax Law is an intuitive research platform for Tax Professionals leveraging Wolters Kluwer's top international content and practical tools to provide answers. You can easily access the tool from every preferred location. Are you, as a Tax professional, ready for the future?

Learn how **Kluwer International Tax Law** can support you.

This entry was posted on Wednesday, March 22nd, 2023 at 1:04 pm and is filed under Digital platforms, EU VAT, Sharing economy, VAT
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.