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The meaning of Platform under DAC7: more clarity needed

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DAC7

The Seventh EU Directive on Administrative Cooperation in the field of taxation ("DAC7")[1] introduced new reporting obligations for Platform Operators. Although these reporting obligations entered into force as of 1 January 2023 already and the first reporting deadline is 31 January 2024, the concept of Platform is not always clear. Thus, determining whether software is a Platform and whether its operator has reporting obligations under DAC7 can be difficult at times.

The purpose of this contribution is to analyze the concept of Platform under DAC7 and highlight some of the difficulties found in practice when applying DAC7 to software. For this purpose, the materials available at the moment are considered. These include the OECD Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy (the "OECD Model Rules"),[2] the International Exchange Framework and Optional Module for Sale of Goods (the "Optional Module"),[3] and the OECD Model Reporting Rules for Digital Platforms: Frequently Asked Questions published in January 2023.[4] As DAC7 originates from the OECD Model Rules and the Optional Module expands the scope of application of the OECD Model Rules to coincide with the scope of DAC7, these materials can serve as interpretative aids.[5] These materials also include some of the guidance produced by EU Member States for the domestic implementation of DAC7, such as Germany and the Netherlands. Finally, these materials include the object and purpose of DAC7 as expressed in its preamble.

According to its Preamble, DAC7 has been adopted to eliminate the risk that Sellers carrying out Relevant Activities via digital Platforms do not declare or under declare income in their tax returns, which is at the moment possible due to the difficulties for tax authorities to verify the tax obligations of these Sellers.[6] For this reason, Platform Operators are required to collect, verify and report on an annual basis to the competent authority of an EU Member State the information of Sellers registered on their digital Platforms, provided the Sellers are domiciled in the EU or rent out immovable property located in the EU. Subsequently, that EU Member State is obliged to automatically exchange this information with the tax authority of the EU Member State of which the Seller is a resident or, if the Seller rents out immovable property, to the competent authority of the EU Member State where the immovable property is located.

Platform

Under DAC7, a Platform is defined as "*any software, including a website or a part thereof and applications, including mobile applications, accessible by users and allowing Sellers to be*

connected to other users for the purpose of carrying out a Relevant Activity [for Consideration]*, directly or indirectly, to such users. It also includes any arrangement for the collection and payment of a Consideration in respect of Relevant Activity.*" Three conditions must be met for software to qualify as a Platform. Firstly, it must be accessible by users and must allow Sellers to be connected to those users. Secondly, it must facilitate (directly or indirectly) carrying out Relevant Activities to the users. And, thirdly, the Relevant Activities must be carried out for Consideration, the amount of which must be known or reasonably knowable by the Platform Operator.[7]

The definition of Platform is thus interlinked to several other terms also defined in DAC7. These are Seller, Relevant Activity, Platform Operator and Consideration. In the following, these terms will be introduced while discussing some cases that show the difficulties associated with determining when software qualifies as a Platform.

Related entities

A Seller is defined in DAC7 as "*a Platform user … that is registered at any moment during the Reportable Period on the Platform and carries out a Relevant Activity*". In addition, a Relevant Activity is "*an activity carried out for Consideration and being any of the following: (a) the rental of immovable property (…); (b) a Personal Service; (c) the sale of* (tangible) *Goods; (d) the rental of any mode of transport.*"

Although the definition of Seller does not refer to related entities, the definition of Relevant Activity excludes those activities "*… carried out by a Seller acting as an employee of the Platform Operator or a related Entity of the Platform Operator*". This wording has been interpreted by some as excluding all the activities of related entities from the definition of Relevant Activity and thus from the scope of the reporting obligations set out in DAC7. A review of the definition of Relevant Activity in languages different from English, such as Dutch, German, and Spanish, shows however that the wording of DAC7 only excludes from the definition of Relevant Activity (i) an activity carried out by a Seller acting as an employee of the Platform Operator, or (ii) an activity carried out by a Seller acting as an employee of a related entity of the Platform Operator. This has been clarified by the German Federal Ministry of Finance in the following terms: "*Only employees of the Platform Operator or employees of a legal entity associated with the Platform Operator are covered by the regulation of § 5 paragraph 1 sentence 2 PStTG. Activities performed by a related entity of the Platform Operator may constitute Relevant Activity.*" [8]

Hence, as also recognized by the OECD, related entities can be Sellers under DAC7.[9] Nonetheless, the analysis does not end there. The definition of Platform Operator is that of "*an Entity that contracts with Sellers to make available all or part of a Platform to such Sellers*". Additionally, as indicated above, the definition of Seller requires registration on the Platform to complete Relevant Activities.

Now, if a business carries out activities in its own name directly via its own software, it does not seem possible to regard it as a Seller because it does not need to register on the website or application for the purpose of being connected to users. Note that the term business in this context is to be broadly understood including all related entities within a group. Consequently, if group entities carry out Relevant Activities via a Platform of another group entity without registration, they apparently do not meet the conditions for being considered Sellers under DAC7. Nor should the related party operating software be considered a Platform Operator, since it does not contract

with Sellers. It follows that if software is exclusively used by the business (i.e., by related entities), this software should not qualify as a Platform under DAC7 because it is not used to connect Sellers to other users to carry out Relevant Activities. At least the above seems to be the view of the Dutch State Secretary of Finance[10] and the OECD, [11] both of which recently clarified that reporting obligations do not apply to related entities that sell their own products via a website of another group company.

Rental of immovable property

If one thinks on Platforms used by Sellers to be connected to other users for the rental of immovable property, one immediately thinks about Platforms such as Airbnb and Booking.com. Via both Platforms, Sellers offer their real estate properties or part of it for short term rentals. The nature of the transaction offers opportunities for Sellers to underreport income and makes it hard for tax authorities to control the amount of income earned in their jurisdictions. The difficulties for the tax authorities to verify the information are worsened if the Seller is not a resident of the same country where the immovable property is located. Therefore, based on the preamble of the Directive, these Platforms seem to be specifically targeted by DAC7. If Platforms Operators such as Airbnb and Booking.com collect, verify and report the information of their Sellers, they will help tax administrations of EU Member States to obtain sufficient information in order to assess and control the income earned in their jurisdictions via their Platforms.

However, if hotel rooms are booked via Booking.com or a hotel group Platform, these Relevant Activities may not need to be reported. The reason is that DAC7 excludes certain categories of Sellers from the Platform Operator's reporting obligations, such as entities for which the Platform Operator facilitated more than 2,000 Relevant Activities by means of the rental of immovable property in respect of a Property Listing during the Reportable Period. According to DAC7's preamble, this exclusion has been implemented to reduce "*unnecessary compliance costs for Sellers that engage in real estate renting, such as hotel chains and tour operators*."[12]

Nonetheless, it is not easy to determine if the referred threshold has been met. The threshold does not indicate whether 2,000 rentals should be counted based on the number of bookings or the number of nights rooms were rented. The threshold also does not take into account that a hotel may start operating during the year making difficult to reach the 2,000 threshold in less than 12 months. Also, the threshold does not clarify whether the 2,000 rentals should be completed via the Platform only or whether rentals completed through other means (such as, via a travel agency or telephone) can also be considered.

At the moment, it is only possible to find guidance from the OECD concerning the first issue raised above. According to the OECD, the number of days each hotel room was rented should be aggregated to determine the number of days each Property Listing was rented during a Reportable Period. This aggregation rule also applies to determine whether a Platform Operator facilitated more than 2,000 Relevant Activities for the rental of immovable property in respect of a Property Listing during the Reportable Period.[13] Thus, it seems like the nights each hotel room was rented can be aggregated for calculating the 2,000 Relevant Activities threshold.

Obtaining certainty on the other issues raised is, however, of importance. Even if in these cases software would most probably qualify as a Platform, if the Platform Operators facilitate the rental of immovable property only to Sellers that reach the threshold, they can qualify as Excluded Platform Operators. Under DAC7, Excluded Platform Operators are exempted from the reporting

obligations, provided that they can show upfront that their entire business model is such that they do not have Reportable Sellers (i.e., they can show to the tax authority that their Platform is available to Excluded Sellers only).

Personal Service

Personal Service is defined in DAC7 as "*a service involving time- or task-based work performed by one or more individuals, acting either independently or on behalf of an Entity, and which is carried out at the request of a user, either online or physically offline after having been facilitated via a Platform.*" Personal Services can thus include a wide range of services. Personal Services that can be carried out online and being delivered to other users anywhere in the world include tutoring, IT services, data entry, copywriting and translations. On the other hand, Personal Services that can be carried out physically offline after being facilitated via a Platform include cleaning, gardening, handyman work, transportation and delivery. Irrespective of whether provided online or physically offline, the most important feature for qualifying as a Personal Service under DAC7 is that the service needs to be adapted or modified to some extent based on a specific request from a user.[14]

According to the Dutch Secretary of Finance, to assess whether a Personal Service exists, it is relevant that a user has the opportunity to exert influence. This is not the case, for example, with pre-recorded digital content (such as online courses, videos or music) or public-accessible transportation services operated in accordance with a predetermined timetable (such as coach, train and airplane services).[15] In these cases, the user cannot make a request for adaptation or modification while the service is provided. These activities are therefore not classified as Personal Services.

But, what is the meaning of adaptation or modification in this context? Take the example of a business that sales goods in its own name directly via its own website or application and in addition connects users with independent insurance brokers – the goods to be insured could be anything from eyewear to electrical cars. Can the insurance services qualify as Personal Services?

Insurance contracts tend to be pretty standardized. However, the insured person can take certain decisions, e.g., concerning the scope of the insurance and sometimes also the value of the good to be insured. Is this enough to consider that the insured person has exerted influence in the provision of the services? The answer to this question is very important to determine whether the website or application in the described case is a Platform under DAC7. Since the goods are sold by the business in its own name, in principle, as explained above, its software would not qualify as a Platform under DAC7. However, if the insurance services do qualify as Personal Services, this software would then qualify as a Platform and its operator would have reporting obligations in respect of the insurance brokers therein registered.

Consideration

DAC7 defines Consideration as "*compensation in any form, net of any fees, commissions or taxes withheld or charged by the Reporting Platform Operator, that is paid or credited to a Seller in connection with the Relevant Activity, the amount of which is known or reasonably knowable by the Platform Operator.*"

According to the OECD, circumstances where amounts paid or credited to a Seller in connection with Relevant Activities are reasonably knowable by a Platform Operator include those (i) where the Platform Operator withholds or receives a fee, commission, or tax set in reference to the

amounts paid by users in respect of Relevant Activities; (ii) where the Platform Operator assumes contractual obligations in respect of the provision of the Relevant Activity giving rise to the Consideration vis-à-vis a particular user (e.g., where the Platform Operator commits to providing a refund or other forms of buyer protection); and, (iii) where the Platform provides a functionality which declares or communicates to the user and Seller the terms of the agreement in respect of the Relevant Activities, including the amount of the underlying Consideration.[16] In each case, the test to be applied is whether the business model of the Platform is such that it provides visibility over the Consideration to the Platform Operator. At the same time, there is no expectation that the Platform Operator puts in place additional procedures to gain access to information on the Consideration where it is not otherwise known or reasonably knowable.

Consider the case of software that facilitates the digital (re)order of goods sold by well-established wholesalers to retailers. Its operator has knowledge of the number of items ordered and their regular prices. However, she does not have knowledge related to the fulfilment of the orders, the issuing of invoices and the relevant payments. As such, she does not know, e.g., whether the number of items ordered were effectively sold or whether discounts to the regular prices were applied. Can it be considered in this case that the operator has visibility over the Consideration paid to the Sellers and as such that she is in the position to know or reasonably know the actual amount of Consideration paid to Sellers? After all, in this case, she does not withhold or receives any fee, commission or tax because payments are directly made to the wholesalers; she does not assume contractual obligations in respect of the sales of goods to the retailers because the goods are sold and sent by the wholesalers directly to the retailers; and, she does not communicate the final terms of the agreements to the retailers or wholesalers. She only communicates the terms of the digital order, while wholesalers and retailers agree directly on the final terms. If the answer to this question was negative, this software would not qualify as a Platform under DAC7.

Conversely, if the answer to the above question was affirmative, in principle, this software would qualify as a Platform. However, would the qualification of such software as a Platform be in line with the object and purpose of DAC7? As indicated above, DAC7's object and purpose is eliminating the risk that Sellers carrying out Relevant Activities via digital Platforms do not declare or under declare income in their tax returns by requesting Platform Operators to report information concerning these Sellers and their Relevant Activities. In the case of well-established wholesalers that conclude the final terms of the sales agreement offline, can we say that there is a high risk of tax avoidance? Or, is it more likely that the wholesalers already fulfill their tax obligations by declaring and paying their taxes? Would reporting obligations in such a case assist tax authorities of EU Member States to increase their tax revenues? Or, would they rather result in unnecessary compliance costs for the Platform Operator? Are not well-established wholesalers comparable to hotel chains and tour operators excluded from the Platform Operators reporting obligations?

Conclusion

DAC7 creates reporting obligations for Platform Operators as of 1 January 2023. Although the rules are already in force and the deadline for the first report is only in a few months, it is not always clear when software can be considered a Platform. The diversity and complexity of businesses operated online raises multiple questions that both operators of software and tax authorities of EU Member States will need to carefully analyze to determine whether software is a Platform under DAC7. Only a few cases were discussed in this contribution to show that more clarity is needed. In lack of more clarity, it is highly probable that controversies will rise very soon

on the application of DAC7.

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[1] Council Directive (EU) 2021/514 of 22 March 2021 amending the Directive 2011/16/EU on administrative cooperation in the field of taxation, OJ L 104, 25 March 2021.

[2] OECD (2020), Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy, available at https://www.oecd.org/tax/exchange-of-tax-information/model-rules-for-reporting-by-platform-operators-with-respect-to-sellers-in-the-sharing-and-gig-economy.pdf (consulted on 12 June 2023).

[3] OECD (2021), Model Reporting Rules for Digital Platforms: International Exchange Framework and Optional Module for Sale of Goods, available at https://www.oecd.org/tax/exchange-of-tax-information/model-reporting-rules-for-digital-platforms-international-exchange-framework-and-optional-module-for-sale-of-goods.pdf (consulted on 12 June 2023).

[4] OECD (2023), Model Reporting Rules for Digital Platforms: Frequently Asked Questions updated in January 2023, available at https://www.oecd.org/tax/exchange-of-tax-information/model-reporting-rules-for-digital-platforms-faqs.pdf (consulted on 12 June 2023).

[5] Recital 16 DAC7.

[6] Recital 6 DAC7.

[7] OECD (2023), Model Reporting Rules for Digital Platforms: Frequently Asked Questions updated in January 2023, sec. I, q. 3.

[8] Gesetz er die Meldepflicht und den automatischen Austausch von Informationen meldender Plattformbetreiber in Steuersachen (Plattformen-Steuertransparenzgesetz – PStTG); Anwendungsfragen zum Plattformen-Steuertransparenzgesetz, sec. 3.1.3., q. 1.6.

[9] OECD (2023), Model Reporting Rules for Digital Platforms: Frequently Asked Questions (January 2023), sec. I, question 1.

[10] Wijziging van de Wet op de internationale bijstandsverlening bij de heffing van belastingen in verband met de implementatie van

Richtlijn (EU) 2021/514 van de Raad van 22 maart 2021 tot wijziging van Richtlijn 2011/16/EU betreffende de administratieve samenwerking op het gebied van de belastingen (PbEU 2021, L 104), Nota Naar Aanleiding van het Verslag 2 Dec 2022, sec. 3, p. 2.

[11] Optional Module, p. 18. Also, OECD (2023), Model Reporting Rules for Digital Platforms: Frequently Asked Questions updated in January 2023, sec. I, q. 2.

[12] Recital 19 DAC7.

[13] OECD (2023), Model Reporting Rules for Digital Platforms: Frequently Asked Questions updated in January 2023, sec. III, q. 2.

[14] OECD (2023), Model Reporting Rules for Digital Platforms: Frequently Asked Questions updated in January 2023, sec. I, q. 11.

[15] Wijziging van de Wet op de internationale bijstandsverlening bij de heffing van belastingen in verband met de implementatie van

Richtlijn (EU) 2021/514 van de Raad van 22 maart 2021 tot wijziging van Richtlijn 2011/16/EU betreffende de administratieve samenwerking op het gebied van de belastingen (PbEU 2021, L 104), Nota Naar Aanleiding van het Verslag 2 Dec 2022, sec. 5, page 3.

[16] OECD (2023), Model Reporting Rules for Digital Platforms: Frequently Asked Questions (January 2023), sec. I, question 8.

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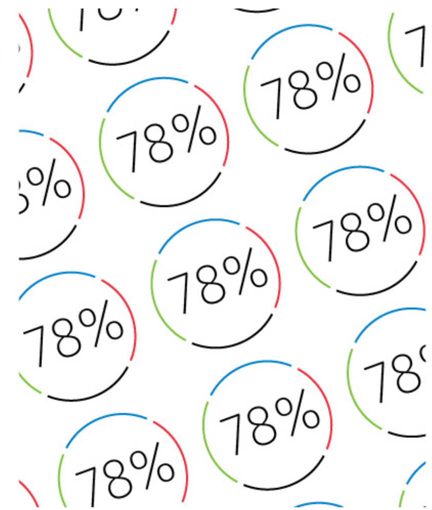

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