Kluwer International Tax Blog

DAC7 and Digital Content Creators: Opaque transparency for influencers, streamers and other content creators?

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It has been over three years and a half since the release of the OECD Model Rules for Digital Platforms[3] and a few days since the expiration of the first reporting deadline under the European variant of such reporting framework: Directive 2021/514[4] (commonly known as 'DAC7'). Despite different guidelines published at the level of the OECD and several EU Member States, many digital platforms are still unsure about their status under DAC7 (herein after referred to as 'the reporting framework'). One of the main reasons of this uncertainty stems not only from the lack of EU guidance on DAC7, but also from the broad (and sometimes vague) definitions of certain concepts included in the Directive.

This short blog contribution aims to illustrate that certain definitions in the European reporting framework might lead to inconsistent reporting within a specific, yet prevalent, aspect of the platform economy: *digital content creators* (often described as '*influencers', 'streamers' or just 'content creators'*).

Our analysis first demonstrates that certain activities of digital content creators would be captured by the EU reporting framework, while others would remain out of scope as a result of their specific features. Second, it argues that the non-application of DAC7 to certain activities of digital content creators may lead to an inconsistent reporting landscape when considering the situation of such economic actors and the need to achieve a level playing field (which is one of the central objectives of DAC7).

Given the broad and diverse nature of digital content creators' activities, it is not the aim of this blog post to conduct an exhaustive analysis of them, but rather to highlight current challenges and outstanding questions in this field, which have become more evident with the recent publication of the updated version of the OECD's FAQs to its Model Rules[5] in October 2023.

1. Background on DAC7

Before addressing the challenges raised by the activities of digital content creators in relation to DAC7, it is necessary to first provide a short overview of this reporting framework.

DAC7 introduces EU standardized due diligence and reporting obligations for *digital platform operators* (POs) in relation to certain activities of their sellers. Both EU and non-EU POs fall under the scope of DAC7 when they make available software (e.g., websites or mobile applications), that facilitates and/or allows the conclusion of agreements with respect to certain activities (and executed for consideration) between registered sellers and buyers (users).

The activities covered by DAC7 (named 'Relevant Activities') include both cross-border and purely domestic transactions with an EU nexus (i.e., EU seller or immovable property located in the EU) and relate to the sale of (tangible) goods, personal services, the rental of immovable property and any mode of transportation.[6] The underlying rationale for including these four relevant activities under DAC7's scope is the understanding that they represent a higher risk of tax evasion by sellers.

Before moving forward, three important clarifications need to be made regarding DAC7 scope and, in particular, with respect to the terms "Platform", "Personal Service" and "Consideration". Regarding the term Platform, it should be highlighted that in order for software to qualify as a Platform three tests must be met: (i) it must be accessible by users and allow Sellers to be connected to other users; (ii) it must facilitate the provision of Relevant Services/Activities and (iii) the amount of Consideration for such Relevant Services/Activities must be known or reasonably knowable by the PO. This implies, amongst others, that in order to qualify as a platform under DAC7, it is not necessary that agreements and/or payments between sellers and users are actually concluded or settled via the interface, as long the software "allocates opportunities for Sellers to provide Relevant Activities to users" and the amount of consideration for such activities is "known or reasonably knowable" by the POs.

In relation to the Personal Service concept, it is important to highlight that it is also defined broadly 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*".***[7]*** According to the commentary to the OECD Model Rules, this definition requires that the service is carried out at the request of a user, which implies that the service is, at least to some extent, adapted to the specific requirements of such user (i.e. customizable).[8]

Concerning the term Consideration (without which there is no relevant activity nor platform), DAC7 defines it as a 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 PO.

POs falling under the scope of DAC7 must collect and verify information from sellers registered on the platform (i.e., *seller due diligence*).[9] POs must report this information to the tax administration of their Member State of residence on a yearly basis,[10] unless they are not based in the EU and cannot benefit from the "switch off" mechanism foreseen by DAC7. In the latter case, non-EU POs must register and report to the tax administration of a Member State of their choice. The data to be reported concerns both information regarding the identification of the sellers and their activities on the platform during the reportable period (calendar year). Competent authorities of EU Member States will subsequently automatically exchange (AEoI) the reported information with the Member State that have substantive jurisdiction to tax sellers' activities (i.e., where the sellers are fiscal residents or where the immovable property is located). This AEoI aims to overcome the territorial limitations faced by sovereign States and to increase transparency

regarding the activities of sellers active on foreign digital platforms. Tax authorities receiving the reported information can use it both to perform audits and to pre-fill sellers' tax returns. In turn, sellers' knowledge that governments have this information is expected to create a deterrent effect and increase voluntary tax compliance.

2. The broad scope of DAC7 and its application to digital content creators

The tax information reporting framework for digital platforms introduced by DAC7 has a broad scope. It does not only cover the usual digital platforms facilitating the rental of accommodation (e.g., Booking.com, Airbnb, etc.), means of transportation (e.g., SnappCar, Bolt scooters, etc.), the provision of personal services (e.g., Uber or Bolt ride-hailing, TaskRabbit, Guru, etc.) or the sale of tangible goods (e.g., Amazon, eBay, Etsy, etc.), but also other less apparent businesses facilitating the connection between two other parties (sellers and users) through a website or mobile application (e.g., mobile applications from Banks offering various side-services related to their core financial and insurance activities). The broad scope of DAC7 results from the comprehensive definitions of certain key concepts contained in the Directive, which include those of "Platform"[11], and its constituent notions of "Relevant Activity",[12] "Consideration",[13] "Personal Service"[14] and others (e.g., sellers, users, etc.). Because of DAC7 broad scope, the question of whether this framework also covers the activities of digital content creators arose without much delay.

Digital content creators (hereinafter referred as "DCC") can be described as individuals who produce and share online materials, such as videos, photos, articles, or graphics, often on social media platforms or websites, to engage and entertain audiences. DCC include not only the so-called influencers, streamers or gamers, but also dancers, writers, designers, craftspeople and comedians that create and share their content online. For the purpose of this contribution, the focus is placed on DCC that earn income by reaching their audiences via social media platforms (instead of their own websites). This category of platforms are web-based services or applications that enable individuals to create and share content and interact with other users to foster communications and connections. It concerns, not only platforms like *Facebook*, *Instagram*, *TikTok or X (former Twitter), but also* video-sharing platforms, such as *YouTube* and *Twitch*, whereby the focus is primarily placed on video- and livestreaming content (e.g., within the context of online gaming).

It should be noted that the activities of DCC, the audiences they appeal to, and their income generation models are very diverse and constantly evolving. For example, DCC can monetize their audiences and generate income in various ways ranging from brand partnerships and sponsored content to affiliate marketing, ad revenue, merchandise sales, subscription fees, pay-per-view arrangements, gratuities/tips, etc. Moreover, similar to gig workers, DCC can earn income on the side of their full-time employment and, in some instances, as a consequence of making this "content creation" their main economic activity.

Obviously, the rapid growth of the so-called "creator economy" (which is estimated to make up to 50 million people[15]) and the generation of (potentially) taxable income by DCC (which is estimated at 250 billion USD[16]) via digital platforms automatically raise a question of tax transparency or, in other words, of whether the income received by DCC is visible to tax administrations. In particular, the question that arises is whether (some of) the activities performed by DCC are (or should be) covered by DAC7.

2.1. Preliminary clarifications about DCC's income generation models

Before assessing DAC7's application to the activities of DDC, it is first necessary to make some important clarifications regarding two different types of income generation models commonly used by DCC offering their contents via social media platforms. These models, which are not the only ones used by DCC and can also be combined, are the following:

A. Content creation and advertisement remunerated by third-parties merchants: In this case, DCC make available their content to users of social media platforms at no cost (for free) and their remuneration comes from paid advertising and/or partnership agreements entered into with third-party merchants (e.g., clothing brands or wellness centers). These merchants pay DCC for the creation of content which directly or indirectly promotes their products and/or services. In these cases, there is no financial exchange and/or transaction between DCC and the users, but only between the former and third-party merchants.

B. Content creation remunerated by users: Differently to the situation described above, DCC can also be remunerated by users of the platform. This remuneration can arise as a consequence of, inter alia, general subscription fees charged by the platform to users for accessing the DCC's content (which is credited to the DCC after the withholding of a commission by the platform), pay-per-view arrangements to access a specific content, or gratuities/tips voluntary paid by users to DCC. Evidently, in these cases, there are economic exchanges and/or transactions between users and DCC.

2.2 Application of DAC7 to content creation and advertisement activities remunerated by third-parties merchants

When considering content creation activities remunerated by third-parties merchants (case described in 2.1.A. above), the application of DAC7 does not seem to be problematic. In this case, there is an economic transaction between DCC and third-parties merchants, which entails advertising services. Since those services seem to qualify as "personal services" under DAC7,[17] they would be covered by the reporting framework.

Evidently, the application of DAC7 in this case would also depend on whether: (i) the transaction was facilitated by a Platform (which in the case could be either, the same social media interface in which the content is posted, or a different business which connects DCCs with third-party merchants for the purpose of offering their content on specific social media platforms); and (ii) the payment received by the DCC from the third party qualifies as "Consideration" which is known or reasonably knowable by the PO.

Evidently, when the posting of content is made available by DDC for free and there is no sponsorship by third-party vendors, it is clear that we are dealing with non-remunerated activities which are not covered by DAC7 and irrelevant for tax administrations.

2.3 Application of DAC7 to content creation activities remunerated by users

When considering content creation activities remunerated by users (case described in 2.1.B. above), the application of DAC7 becomes more problematic. In these cases, the main concern is whether the economic transactions between the users, platforms and DCC (which, in this case, entail digital content creation and not advertising services) could fall under the scope of DAC7. In this regard, the authors identify certain challenges related to the application of DAC7 to

standardized pre-recorded content and livestreams, on the one hand, and on customized pre-recorder content and livestreams, on the other.

2.3.1 Standardized pre-recorded content and livestream activities

When assessing whether DAC7 applies to content creation activities of DCC which are remunerated by users via platforms, it is first necessary to clarify that most of these activities and (important) revenue streams would usually remain out of scope of the reporting framework.

Take, for example, DDC who upload photos or videos on a social media platform, or, the so-called "*influencers*" offering investment (*"finfluencers"),* fitness, professional or fashion advice to their followers.

Although it could be argued that – in the latter case – DCC provide directly remunerated services to their followers (i.e., access to photos/videos or provision of advice or insights) which are facilitated by a social media platform, DAC7 would not cover this type of transactions. This is mainly because, as explained in section 1 above, the Directive does not cover *all* services but only those that qualify as *"personal"*. It is exactly this personal element that is missing in both situations described above.

Pre-recorded digital content, such as photos or videos posted by digital content creators on social media platforms, does not meet the customization requirements of the "personal service" definition and, hence, fall outside the scope of the reporting framework. The same goes for pre-recorded content with general investment, financial or fitness advice, not suited to the specific needs and characteristic of an individual. The exclusion of pre-recorded content from the definition of 'personal services' has been confirmed by the FAQs to the OECD Model Rules.[18].

A similar conclusion can be reached in relation to the application of DAC7 to livestreaming activities made available to users of the platform after the payment of a subscription fee that is credited to the DCC. In this context, DCC enable their users to consume digital content live (e.g., by watching videogames being played and livestreamed on *Twitch*). Although this is not pre-recorded digital content, but live offered content, it also lacks the personal element required to qualify as a "personal service". Therefore, non-customized livestream activities of DCC will also remain outside the scope of DAC7.

Whether the exclusion of non-personal services from DAC7's scope is consistent with the underlying policy rationale of the measure is questionable. Evidently, the exclusion of pre-recorded content and standardized livestream activities of DCC from the DAC7's definition of personal service implies that these activities will not be reported and will remain out of sight of tax administrations. Evidently, this outcome does not seem to raise tax transparency issues when the content offered by DCC via platforms is made available to users at no cost (for free) and/or the former do not receive any form of compensation for those services. In such cases, there would be no financial exchange between users, platforms and DCC, no direct income earned by the latter in connection to the content creation activity and, therefore, no potentially taxable revenues that should be visible to tax administrations. However, in cases where the DCC receive a remuneration either via subscriptions, pay-per-views arrangements, gratuity or *tips*, the situation is different as this potentially taxable income is relevant for tax administrations.

Given the importance and popularity of social media channels, the volumes of users (and thus income) received by DCC involved in these types of transactions can be significant. This raises the

question of whether the income earned by DCC in connection with the provision of standardized pre-recorded content and/or livestream activities should be included under the scope of DAC7 in future amendments to the Directive.

While this is obviously a policy decision, one can nevertheless question whether the reporting and AEoI regarding these activities would not be useful for tax administrations. This question arises in particular given the observation that the challenges related to DCC are similar to those that led to the introduction of the reporting framework at the OECD and EU level (i.e., lack of visibility and enforcement on taxable income by sellers within the platform economy). Indeed, the activities of DCC share common elements with other relevant activities covered by DAC7, which have been deemed to be difficult for tax administration to track and locate. Moreover, on the part of DCC, there might also be uncertainties about the tax obligations incumbent upon them, which facilitates non-compliance.

2.3.2 Application of DAC7 to customized pre-recorded content and livestream activities

Although some content creation activities of DCC remunerated by users remain outside the scope of DAC7, it is important to highlight that there are others which seem to be covered by this reporting framework.

The potential application of DAC7 to content creation activities of DCC specifically arises in the context of certain user remunerated activities that allow direct interaction between the DCC and platform users. In recent years, the practice whereby users on social media platforms are able to *influence* and/or customize the content provided by DCC has gained tremendous popularity. This trend can be observed with respect to both types of activities illustrated above: pre-recorded content and livestream activities.

Recently, for example, users have increasingly been offered the opportunity to request specific, customized content from content creators. These include, for example, photos taken specifically for the user or recorded videos, which are made available for a fee, and only to those users. In addition, *influencers* increasingly provide their followers with the opportunity to request one-to-one advice (and even entire courses) in a wide array of fields including finance, professional development, fitness training, gaming, etc. Moreover, in the context of a livestream, it is increasingly possible to influence the content and course of the stream in exchange for a fee (e.g. a follower can pay a sum of money to have the content creator perform a certain side quest in a video game, which is then credited to the DCC by the platform). Because of the personal nature of these services, which are performed at the specific request of users, it can be argued here that such services do constitute “personal services” under DAC7.

Evidently, in addition to complying with the “personal” element, one of the requirements to qualify as a relevant activity under DAC7 is that relevant activities are carried out for Consideration, which also demands that “a compensation is paid or credited to a DCC in connection with the Relevant Activity” and that its amount is “known or reasonably knowable” by the PO.

Regarding the existence of “consideration” in the cases discussed in the previous paragraph, it is worth noting that, when a DCC receives income that relates both to non-customized services (i.e., the provision of pre-recorded digital content or livestreams) and reportable personal services, in principle, only partial reporting will be required in relation to the latter. However, the question that arises is whether it is possible for POs (i.e., social media platform) to distinguish between the

consideration received in relation to the personal service component of the transaction, and that received in relation to out-of-scope services. The mixed nature of the activities carried out by DCC and the lack of discrimination between the specific consideration received in connection to each of them (e.g., all the income may come together in one single "wallet" of the DCC within the platform) may cause that the amount attributable to the reportable activities (personal services customizable by the user) cannot be correctly identified because it is commingled with non-reportable fees (standardized services).

In this respect, two opposing arguments could be made. First, it could be argued that DAC7 is not applicable for the transactions as a whole. This is because, DAC7 requires POs to have knowledge or reasonable knowledge of the amount of consideration.[19]. On such basis, POs could argue that because of the mixed nature of the transaction and consideration received, it is not possible for them to identify (know) the amounts of consideration related or connected to reportable personal services. As a result, POs could argue that there is no relevant activity, and consequently, that there is no platform under DAC7. In such case, the information related to all the aforementioned activities of DCC would not be subject to reporting. If such lack of reasonable knowledge is demonstrated, the aforementioned outcome would make sense since, after all, third party POs cannot report on information that they do not have: *ad impossibilia nemo tenetur.*

However, a second argument is also possible in this regard, which raises the question of whether the interpretation provided in the previous paragraph can be sustained. Indeed, the most recent version of the FAQs to the OECD Model Rules (which also have authoritative value for the purposes of DAC7), explicitly addresses the situation of "mixed activities". The FAQs clearly provide that, when a service contains elements of a personal service and other services, and such elements cannot be split or identified, the entire service should be subject to reporting. Only in situations whereby the personal service component is purely ancillary to the non-reportable element of the service, the reporting framework will not be applicable. This interpretation is in line with the already available commentaries to the OECD Model Rules.[20] Whereas in the context of the initial version of the OECD Model Rules this discussion mainly concerned the situations where a service (possibly under the scope) was combined with the supply of goods (not applicable in the initial Model Rules), it now comes more explicitly to the forefront when combining different services. What it still not entirely clear is whether the rationale of the guidance provided by the OECD regarding "mixed activities" also applies to "mixed consideration" and how this latter case interacts with the requirement of this having a "connection with the Relevant Activity" and being "known or reasonably knowable" by POs.

In addition, when applying the available OECD guidance, it is difficult to infer when a service is "purely ancillary" in relation to another service. The observation that this is likely to constitute a factual assessment (which moreover must be made by the POs) only complicates the situation. After all, a wrong assessment could lead to an unjustified non-application of DAC7 and the imposition of financial penalties. Should POs consider the "ancillary" nature of a service from a quantitative perspective? In any case, to determine the application of DAC7 to the activities of DCCs POs are faced with the difficult task of making an upfront assessment of the DCC's activities and income breakdown and of the "merely ancillary" nature of their services. In practice, this could lead to situations of overreporting, where even with certain doubts, POs could end up reporting to avoid potential penalties. However, the question arises as to whether the adage "when in doubt, just report" is the correct approach, partly in view of GDPR requirements (e.g., legal basis, data minimization principle, etc.) and the compliance costs faced by POs (specially SMEs).

Approaching the issue from a qualitative angle also does not seem to provide clear criteria for making the distinction between primary and ancillary activities of DCC. Can revenue earned by livestreamers in connection to on-demand actions during a livestream *ipso facto* be considered "purely ancillary"? The same difficult question can be asked in relation to the ancillary nature of photos or videos provided at the request of users for a fee *vis a vis* more widely standardized content offered via the platform.

Despite these unclarities, in the context of DCC, the existence of "personal" elements next to the provision of remunerated standardized digital content (both pre-recorded and livestream) can lead to *all* revenue streams related to such supply to be subject to reporting under DAC7. Evidently, DCC who do not provide any option for personalized content nor receive a compensation in connection with it will evidently remain out of scope of DAC7.

3. Towards specific guidance or a new relevant activity for digital content creators?

This brief exploration into the activities of DCC has illustrated that DAC7 rules for digital platforms and, more specifically, the definition of relevant activities, consideration and personal services, are not easy to apply in this sector. As explained in this short blog, the activities and revenue generation models of DCC are varied and constantly evolving. When applying DAC7 to some of these activities and models there are cases in which the application of the rules seems straightforward (e.g., content creation and advertisement activities remunerated by third-parties merchants) whereas, in other cases, their application becomes more challenging. This is especially because of the mixed nature of these content creation activities (i.e., personal and non-personal services) and their remuneration.

While introducing additional criteria for determining when a service is "merely incidental" to another service could be an option, it is possible that this will only make the reporting environment for digital platforms more complex. Therefore, the authors are not convinced of such course of action. Indeed, practice shows that the existing components peculiar to the concept of a personal service already give rise to many interpretation problems and challenges for digital platforms. Given the (monetary) importance of this facet of the digital economy, a viable alternative option to solve this issue could be the development of further guidance specifically addressing the case of DCC.

Considering the growing relevance of the creator economy, the authors have also raised the question of whether the income earned by DCC in connection with the provision of standardized pre-recorded content and/or livestream activities should be included under the scope of DAC7 in future amendments to the Directive. This could be achieved by extending the relevant activities to "services" without requiring a "personal" element (i.e., customization). Indeed, from the perspective of DCC and the rationale of DAC7, the inclusion of some activities and the exclusion of others merely as a result of the presence or absence of a "personal" element may come across as unreasonable. Indeed, it seems questionable whether the mere inclusion of a "personal" or "customizable" element into a service can create a higher risk of tax evasion. The same reasoning applies to services supplied within other sectors (e.g., tourism).

Policymakers should therefore assess how the architecture of the reporting framework should be adapted to commensurate the shift of its application from the *sharing and gig economy* to the broader *digital platform economy* (which already resonates in the different naming of the EU and

OECD frameworks). However, since DAC7 already has a broad scope, the introduction of broader or new categories of relevant activities under such Directive should be carefully assessed by policymakers in order to avoid unintended effects, arbitrary discriminations within different sectors and further mismatches with the OECD Model Rules. In any case, the authors consider that the definition of DAC7's scope should always be coherent with the central objective of the reporting framework: reporting of income earned by sellers active on digital platforms on activities that represent a heightened risk of tax evasion.

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[3] OECD, *Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy* (2020), 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

[4] Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, OJ L 25 March 2021, available at: eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021L0514.

[5] OECD, *Model Reporting Rules for Digital Platforms: Frequently Asked Questions. Update October 2023*, available at: https://web-archive.oecd.org/2023-10-23/648633-model-reporting-rules-for-digital-platforms-faqs.pdf.

[6] DAC7, Annex V, Sec. I., A., 8.

[7] DAC7, Annex V, Sec. I., A., 11.

[8] OECD Model Rules (2020), p. 14, No. 16 *et seq.*

[9] DAC7, Annex V, Sec. II.

[10] DAC7, Annex V, Sec. III.

[11] DAC7, Annex V, Sec. I., A., 1.

[12] DAC7, Annex V, Sec. I., A., 8.

[13] DAC7, Annex V, Sec. I., A., 10.

[14] DAC7, Annex V, Sec. I., A., 11.

[15] https://www.forbes.com/sites/mattklein/2020/09/23/50m-join-the-creator-economy-as-new-platforms-emerge-to-help-anyone-produce-content–money/.

[16] https://www.goldmansachs.com/intelligence/pages/the-creator-economy-could-approach-half-a-trillion-dollars-by-2027.html.

[17] This is because, the promotional service rendered by DCCs would consist of a customizable task-based work performed by an individual which is carried out at the request of a user (i.e., the merchant).

[18] OECD Model Rules FAQs (2023) p. 4, No. 11.

[19] DAC7, Annex V, Sec. I., A., 10.

[20] OECD Model Rules, p. 15, No. 28-30.

This entry was posted on Tuesday, February 6th, 2024 at 2:11 pm and is filed under DAC 7, Digital economy, Digital platforms, EU
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