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CHALLENGES RELATED TO DETERMINING FOR VAT PURPOSES THE STATUS OF THE GOODS AND SERVICES PROVIDER USING THE PLATFORM ECONOMY

Abstract

Background: The aim of the study was to analyse EU legislation and case law on the VAT status of the provider of goods and services for the platform economy. This issue is becoming increasingly important in the context of a rapidly developing platform economy, using the latest technological developments.

The study conducted a comprehensive legal analysis of the issue, at the same time drawing attention to the doubts that exist particularly due to the lack of CJEU judgments on the concept of a taxable person in the platform economy.

Research purpose: The aim of the study was not only to assess the relevant legislation or its interpretation, but above all to draw attention to the need to fill the legislative gap in the area studied, which has led, and may continue to lead, to non-uniform application of VAT rules in the EU Member States.

Methods: The study was carried out predominantly using the empirical-dogmatic method, backed by a historical method and comparative method.

Conclusions: Our analysis demonstrated that the provisions of the VAT Directive do not simply and clearly regulate whether a platform provider is a taxable person. There is also a lack of CJEU jurisprudence addressing this issue; judgments on the 'traditional' economy do not seem to 'fit' the specifics of the platform economy. In our opinion, legislative changes are needed, especially the VAT Directive, which would take into account the specifics of transactions in the platform economy. We present preliminary proposals that can be taken into account in the legislative work on the European Commission's recently proposed provisions in this area.

Keywords: VAT, platform economy, platform provider, taxable person.

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1. The platform economy – initial remarks

Platform economy is the term used to describe a multi-sided model of transactions, where there are three or more parties involved, with digital platforms playing a leading role through their technological, commercial and legal infrastructures, facilitate trusted transactions among users willing to provide or receive certain services.[1] In these transactions, one of the parties offers access to assets, resources, time and/or skills, goods and/or services to the other party, in return for monetary consideration, explicit barter exchanges, or implicit barter/non-monetary transactions.[2]

There is no single definition of the platform economy, the definition proposed above includes, fully or partially, other related business and transaction models which have recently emerged, namely the sharing economy, collaborative economy and gig economy. The notion of the Platform economy is sometimes used interchangeably with these terms and vice versa since there is no commonly acknowledged definition.[3]

Collaborative platforms enable individuals and other actors such as micro entrepreneurs and (small) businesses to offer services. This creates new employment, flexible working arrangements and new sources of income and helps small businesses reach a wider market and customer base.

The sharing economy is sometimes referred to as the collaborative economy in some jurisdictions, but the sharing economy is an economic system based on granting temporary access (sharing) to underused assets or services, for free or for a fee, directly from individuals.

Their common feature would be the temporary usage, or sharing, of the assets or services provided mainly by private individuals without a change of ownership. This feature distinguishes the sharing and collaborative economy from the platform economy, since, in the latter, goods and services providers can be both private individuals and businesses, and a change of ownership is possible.

Finally, the gig economy implies a high degree of flexibility in engaging in activities provided using platforms, so there will be both contingent work initiatives, i.e. usually part-time, non-permanent and piecework, and full-time work.[4]

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1 **G. Baretta**, *European VAT and the Sharing Economy*, Wolters Kluwer, 2019, p. 27.

2 **G. Luchetta et al.**, *VAT in the digital age, report volume 2*, *The VAT Treatment of the Platform Economy*, European Commission, Directorate-General for Taxation and Customs Union, 2022, Publications Office, p. 87.

3 *Ibidem*, p. 22.

4 *The Impact of the Growth of the Sharing and Gig Economy on VAT/GST Policy and Administration*, OECD, 2021, p. 19.

The success of platform economy, particularly digital platforms, in facilitating the growth of the sharing/gig economy and further stimulating and diversifying this economy has not only resulted in the explosive growth of sectors such as transport, tourism, hospitality, professional services and finance, but has also created challenges in some areas such as the labour market and taxation. In the context of the labour market in particular, employment regulations have become an important issue,[5] from the taxation perspective the advent of the platform economy has caused many activities in the informal economy to come into sight, thus creating a potential for tax administrations to monitor and assess previously unreported tax bases.[6] However, not only have new opportunities opened up for the tax administration in terms of tax collection, but challenges have also arisen, especially in the area of VAT, when transactions from the platform economy are subject to VAT.

These challenges in the area of VAT have led us to address one of the very difficult issues related to this tax in the platform economy, namely when parties participating in the scheme can be considered taxable persons for VAT purposes. It should be noted that according to the article 9 of VAT Directive,[7] the concept of a taxable person is very broad and includes each person 'who independently carries out in any place any economic activity, whatever the purpose or result of that activity'. It follows from the above definition that in order to possess the status of a taxable person, one must carry out economic activity independently. We will analyze, in the context of the platform economy, what is meant by economic activity and the carrying out of this activity independently.

Economic activity includes, inter alia, the activity of persons supplying services on a continuing basis. This means that, in most circumstances, platforms providing services for consideration would qualify as taxable persons and where they supply services for consideration, such services are subject to VAT.[8] The challenges mentioned therefore generally concern not the platforms themselves,

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5 **W.P. De Groen et al.**, *Digital labour platforms in the EU, Mapping and business models*, European Commission, Directorate-General for Employment, Social Affairs and Inclusion, 2021, pp. 10–12.

6 **G. Baretta**, *The New Rules for Reporting by Sharing and Gig Economy Platforms Under the OECD and EU Initiatives*, EC Tax Review 2021/1, pp. 31–32.

7 *Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax*, Official Journal of the European Union, L 347/1, with subsequent amendments, hereinafter 'VAT Directive'.

8 See: *VAT Committee*, Working paper, no 878, VAT treatment of sharing economy, Brussels, 22 September 2015, p. 10, https://circabc.europa.eu/sd/a/878e0591-80c9-4c58-baf3-b9fda1094338/878%20-%20VAT%20treatment%20of%20sharing%20economy.pdf; accessed 16.11.2022.

but rather their providers and consumer.[9] Determining the status of the provider and the consumer is not only important for assessing whether a given transaction should be documented with an invoice, but also for determining the place of supply under the rules of the VAT Directive. In our article, we therefore focus first on the issues involved in determining the taxable status of a provider, we omit the issue of the consumer as this aspect does not, in our view, pose any particular problems in the current situation.

2. The VAT status of the goods and services provider

Determining the status of the goods and services provider is important from the point of view of:

- the provider – it needs to know whether to charge VAT and comply with the obligations related to it;
- the platform – it must know which rules to apply regarding the place of supply, it has to know whether to invoice the provider for its service;
- the tax administration – it must provide services in respect of persons recognized as taxable persons, calculate the costs of these services, profits (revenue to the state budget), and ensure compliance with tax obligations.

We think the status of the provider also matters to their customer because if they are a business customer, they will probably want to get an invoice. If the provider was a person who is not a taxable person, receiving such an invoice would not entitle him to a deduction. This does not appear to be a significant issue either substantively or practically. The customer simply asks the provider whether he will invoice him, and he can easily verify the provider's tax status in some countries.[10]

[9] However, it should be noted that the facilitation services charged by the platforms are regarded in some Member States as electronically supplied services, while in others they are regarded as intermediary services. This divergent approach can lead to different places of supply being applied, which can subsequently lead to double taxation or non-taxation.

[10] In Poland, it is possible to check the provider in the list of VAT taxable persons (see: The list of entities registered for VAT, non-registered and deleted from and reintroduced to the VAT register, https://www.podatki.gov.pl/wykaz-podatnikow-vat-wyszukiwarka; accessed 16.11.2022), and the European Commission also offers a similar, albeit much simpler, tool, but only for taxable persons registered for EU VAT purposes (see: VIES VAT number validation, https://ec.europa.eu/taxation_customs/vies/#/vat-validation; accessed 16.11.2022).

Is the problem of determining the VAT status of the goods and services provider a new one?

The problem of whether a provider is a taxable person is not new, but it does require a new look at activities that have been offered through platform economy by persons who perhaps would not have chosen to engage in them in traditional models.

It is also worth noting that a level playing field should be provided both for the traditional and platform economies.

In the tax field, the concept of economic activity is based on a double criterion, not only a functional criterion relating to activity but also and above all a structural criterion relating to organisation. Such a definition is in accordance with the objective of the common system of VAT, which is to treat, for the purposes of the tax, all active persons established on Community territory equally.[11]

The CJEU has not dealt with the determination of the provider status of goods and services in the platform economy in the context of VAT. However, we would like to analyse the CJEU's judgements with a view to finding rulings that could help us to identify the conditions under which we would consider a platform provider to be carrying out an economic activity within the meaning of the VAT Directive and, consequently, to be a taxable person.

3. Does the goods and services provider carry out any economic activity?

In determining the status of a provider, we must answer the question of whether a person carries out any economic activity within the meaning of Article 9 of the VAT Directive.

Firstly, we would like to recall a case C-230/94 Enkler.

This is an interesting case because it is somehow resembling the sharing economy, and the observations that appeared in the ruling have been referred to in subsequent CJEU judgments.

It should be emphasised that the Court firstly did not decide in this case whether the transactions carried out by Ms Enkler constituted an 'economic activity' within the meaning of the VAT Directive in these particular circumstances. Secondly, the Court examined the case in view of the deductibility of tax. Nevertheless, in our view, the Court has provided helpful 'guidelines' that can be used in examining whether a service provider is engaged in an economic

[11] Opinion of Advocate General in case Banque Bruxelles Lambert SA (BBL) v Belgian State (C-8/03, paragraph 10).

activity within the meaning of the VAT Directive and thus determine whether he/she can be attributed taxable status.

Ms. Enkler had a motor caravan used almost solely for private purposes, since its hire to third parties accounted for only 18 days out of three tax years and less than 15% of the kilometres covered.

The Court stated that the hiring out of tangible property constitutes exploitation of such property which must be classified as an 'economic activity' within the meaning of Article 4(2) of the Sixth Directive[12] if it is done for the purpose of obtaining income therefrom on a continuing basis.[13] The Advocate General, in his opinion to this case, explicitly stated that even if a particular activity has the characteristics of one of the activities specified in Article 4(2) of the Sixth Directive, it cannot be regarded as being an 'economic activity' which is necessarily subject to the common system of VAT, if it is carried out occasionally, that is to say, without some degree of permanence and continuity.[14] This explicitly excludes occasional transactions from the concept of economic activity in the context of this case, unless the Member State concerned has exercised the option in Article 12 of the VAT Directive to consider as a taxable person those who carries out, on an occasional basis, a transaction relating to the activities referred to in the second subparagraph of Article 9(1) of the VAT Directive.

Against the background of this case, the Court found that the fact that property is suitable only for economic exploitation will normally be sufficient to find that its owner is exploiting it for the purposes of his economic activities and, consequently, for the purpose of obtaining income on a continuing basis. On the other hand, if, by reason of its nature, property is capable of being used for both economic and private purposes, all the circumstances in which it is used will have to be examined in order to determine whether it is actually used for the purpose of obtaining income on a regular basis. Comparing the circumstances in which the person concerned actually uses the property with

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[12] Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (77/388/EEC), Official Journal of the European Communities, No L 145/1, with subsequent amendments, hereinafter 'Sixth Directive'. Article 4 (2) of the Sixth Directive corresponds to Article 9 (1) of the VAT Directive.

[13] CJEU judgement of 26 September 1996 in case C-230/94, Renate Enkler and Finanzamt Homburg, paragraph 22.

[14] Opinion of Advocate General of 28 March 1996 in case C-230/94, Renate Enkler and Finanzamt Homburg, paragraph 14.

the circumstances in which the corresponding economic activity is usually carried out may be according to the Court one way of ascertaining whether the activity concerned is carried on for the purpose of obtaining income on a continuing basis. Although criteria based on the results of the activity in question cannot in themselves make it possible to determine whether the activity is carried on for the purpose of obtaining income on a continuing basis, the actual length of the period for which the property is hired, the number of customers and the amount of earnings are also factors which, forming part of the circumstances of the case as a whole, may be taken into account with others when that question is under consideration.[15]

These are important guidelines to consider in a case-by-case study, as suggested by the CJEU, but they do not provide a clear answer on how to apply them in practice. Let's review some other judgments that will perhaps bring more to the interpretation of this complex issue.

Another judgment that may help to determine when we can speak of the carrying out of an economic activity in the context of the platform economy is the judgment in joined cases C-180/10 Jarosław Słaby and C-181/10 Emilian Kuć, Halina Jeziorska-Kuć. Let us just briefly remind the background of the first case.

In 1996 Mr Słaby purchased, as a natural person not carrying out an economic activity, land designated, in accordance with the urban management plan in force at the time, for agricultural purposes. He used that land for the purposes of an agricultural activity between 1996 and 1998, ceasing that activity in 1999.

In 1997, the urban management plan in question was changed, and the land in question was henceforth earmarked for a holiday home development. Following that change, Mr Słaby divided the land into 64 plots which, from 2000, he gradually began to sell to natural persons.

The Decision taken by CJEU was that a natural person who carried out an agricultural activity on land that was reclassified, following a change to urban management plans which occurred for reasons beyond his control, as land designated for development must not be regarded as a taxable person for VAT for the purposes of Articles 9(1) and 12(1) of the VAT Directive when he begins to sell that land if those sales fall within the scope of the management of the private property of that person.

[15] CJEU judgement of 26 September 1996 in case C-230/94, Renate Enkler and Finanzamt Homburg, paragraphs 27–29.

If, on the other hand, that person takes active steps, for the purpose of concluding those sales, to market property by mobilising resources similar to those deployed by a producer, a trader or a person supplying services within the meaning of the second subparagraph of Article 9(1) of the VAT Directive, those initiatives do not normally fall within the scope of the management of personal property, the supply of land designated for development in such a situation cannot be regarded as the mere exercise of the right of ownership by its holder. This means that such a person must be regarded as carrying out an 'economic activity' within the meaning of that article and must, therefore, be regarded as a taxable person for VAT.[16] The Court pointed also out that the number and scale of the sales carried out in that case are not in themselves decisive. In support of this statement, the Court cited the judgment in case C-155/94, where it stated that large share sales may also be carried out by private investors.[17] In our view, here the analogy with joined cases C 180/10 Jarosław Słaby and C 181/10 Emilian Kuć, Halina Jeziorska-Kuć is not justified, as it is difficult to contrast passive financial instruments with real estate transactions.

Another interesting case that could help a little in our journey to investigate when we can conclude that we are dealing with an economic activity within the meaning of the VAT Directive for the purpose of the platform economy is the case C-263/11.

At issue in this case were supplies of timber made by a natural person for the purpose of alleviating the consequences of a case of force majeure. CJEU ruled that such supplies come within the scope of the exploitation of tangible property, which must be regarded as an 'economic activity', within the meaning of that provision, where those supplies are carried out for the purposes of obtaining income therefrom on a continuing basis. However, it is for the national court to carry out an assessment of all the circumstances of the case in order to determine whether the exploitation of tangible property, such as a forest, is carried out for the purposes of obtaining income therefrom on a continuing basis. An interesting issue taken up by the Court in case C-63/11 was whether the applicant in the main proceedings acquired the tangible property in issue to meet his own personal or business needs. The Court stated that whether an individual, in a given case, has acquired property for the needs of his economic

[16] CJEU judgement of 15 September 2011 in joined cases C-180/10 and C-181/10 Jarosław Słaby v Minister Finansów (C-180/10) and Emilian Kuć and Halina Jeziorska-Kuć v Dyrektor Izby Skarbowej w Warszawie, paragraphs 39–41.

[17] CJEU judgement of 20 June 1996 in case C-155/94, Wellcome Trust Ltd and Commissioners of Customs & Excise, paragraph 27.

activities or for his own needs arises when that individual requests the right to deduct the input VAT paid in respect of the acquisition of that property.[18] The concept of a taxable person is linked to the possibility of deducting input VAT, considering that 'where taxable persons incur expenditures which are not business related they are acting as consumers rather than as traders, and as such should bear the VAT costs'.[19]

4. Position of the provider for occasional activities outside the main economic activity

In our analysis, it is important to mention several judgments of the CJEU, in which it addressed the question of whether one can speak of the carrying out of an economic activity in the case of occasional activities that a person carrying out an economic activity performs outside the mainstream of this activity. It is worth noting that the CJEU, in Kostov,[20] indicated that a taxable person acting in a certain field of activity who occasionally carries out a transaction falling within another field of activity is liable to VAT on that transaction, provided that that activity constitutes an activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive. The Court in the Kostov case further stated that as follows from recital 5 in the preamble to the VAT Directive, '[a] VAT system achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible'.[21] From reading this judgment, one might have been under the assumption that any activity carried out 'privately' by a person who carries out an economic activity would also be considered to be carried out in the context of this economic activity. Recognising some imprecision in the wording in the Kostov judgment, in the Paulo Nascimento Consulting case, the Court stated that in Kostov case it was raised the issue of the liability to VAT of transactions carried out on an occasional basis by a taxable person for VAT purposes in respect of his main activity, where that person's secondary activity, while constituting an economic activity having a connection

[18] CJEU judgement of 19 July 2012 in case C-63/11 Ainārs Rēdlihs v Valsts ieņēmumu dienests, paragraph 39.

[19] **R. De la Feria**, *The EU VAT System and the Internal Market*, IBFD Doctoral Series, 2009, p. 144.

[20] Case C-62/12 Kostov, ECLI:EU:C:2013:391, paragraphs 28–31.

[21] *Ibidem*, paragraph 29.

with his main activity, was not the same as that main activity.[22] By this wording, the Court explained, as it were, the lack of examination in the Kostov case of this secondary activity. In the Paulo Nascimento Consulting case, the Court examined whether, in a situation such as that at issue in the main proceedings, the assignor may be considered to have acted in the course of his 'economic activity' within the meaning of the second subparagraph of Article 9(1) of Directive 2006/112, on the ground that PNC's involvement in the debt assignment transaction at issue in the main proceedings was only ad hoc, since the economic activity which it usually carries out is that of a property agency. The Court pointed out, that the assignment at issue in the main proceedings occurred in the context of a dispute relating to the enforcement of a debt stemming from a contract concluded in the course of PNC's taxable economic activity, consisting in the provision of property agency services, and PNC has not denied that it acted, as regards the transaction giving rise to the enforcement procedure, in the course of its economic activity. Consequently, the transaction at issue in the main proceedings is a direct extension of PNC's main activity.[23] It follows, therefore, from the above analysis that even if a person carries an economic activity and the activity carried out by that person using the platform economy is a secondary activity, the nature of that secondary activity must always be examined in terms of whether it can be considered an economic activity. The fundamental difficulty in the area of the platform economy is to determine whether a person using the platform is 'still' acting privately or as a taxable person. The Court has repeatedly emphasised that a taxable person must act 'as such' for a transaction to be subject to VAT, whereby the mere exercise of the right of ownership by its holder cannot, in itself, be regarded as constituting an economic activity.[24]

So far, however, there is no ruling that could be applied to the universe of situations in the platform economy, and the boundaries between activities carried out by taxable persons and private individuals remain, to some extent, uncertain.[25]

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[22] CJEU judgement of 17 October 2019 in case C-692/17 Paulo Nascimento Consulting – Mediação Imobiliária Lda v Autoridade Tributária e Aduaneira, paragraph 24. It should be noted here that the secondary activity (a contract of agency) was not related at all to Kostova's main activity as a taxable person (a private bailiff).

[23] *Ibidem*, paragraphs 26 and 27.

[24] See C-331/14 Petar Kezić s.p. Trgovina Prizma v Republika Slovenija, ECLI:EU:C:2015:456, paragraphs 18–24.

[25] **G. Luchetta et al.**, *VAT in the digital age, report volume 2…*, p. 62.

5. Does the goods and services provider carry out economic activity independently?

The question of whether a person is carrying out an economic activity while being a provider in the platform economy seems to pose far more problems than determining whether such a person is carrying out an economic activity independently. Nevertheless, it is worth examining this problem from the VAT side, especially as it raises challenging issues in the context of employment regulations.[26]

According to the Article 10 of the VAT Directive, the condition that the economic activity must be conducted independently is aimed at excluding from the scope of VAT employed and other persons in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability. Natural person who supplies services to a taxable person pursuant to a contract of employment is in that context not himself a taxable person within the meaning of Article 4(1) of Sixth Council Directive 77/388/EEC because he is not independently carrying out an economic activity. Such services are, on the contrary, excluded from the scope of VAT by virtue of Article 4(4) of the same Directive. In that regard, it is immaterial whether the employer is a legal person of which the employee is also a shareholder and/or director, or even sole shareholder and sole director, provided that the two parties have separate legal personality with the capacity to enter into a contract of employment between them and have in fact entered into such a contract pursuant to which the services are supplied.[27] Thirdly, the Court of Justice has held that with regard to remuneration, there is no relationship of employer and employee where the persons concerned bear the economic risk entailed in their activity,[28] a typical individual provider of goods or services through a sharing economy platform carries out his/her activities independently (typically there is no such relationship of employer and employee binding an individual goods or services provider and the sharing economy platform). However, in specific cases doubts arise about the possible legal relationship between the platform and the

[26] See: **V. Hatzopoulos**, **S. Roma**, *Caring for sharing? Collaborative economy under EU law*, Common Market Law Review, February 2017/54/1, pp. 117–119.

[27] Opinion of Advocate General of 14 June 2007 in case C-355/06, J.A. van der Steen v Inspecteur van de Belastingdienst, paragraph 39.

[28] See: CJEU judgement of 25 July 199 in case C-202/90, Ayuntamiento de Sevilla and Recaudadores de Tributos de las Zonas Primera y Segunda, paragraph 13.

provider, i.e. whether the provider is in fact an independent supplier of a service. Perhaps, the features of the relationship between the platform and the provider are such that in fact the employer-employee dependence is present in reality. Such circumstances should generally be analysed on the basis of agreements between platforms and providers.[29]

6. What arrangements can be proposed so that the rules for determining the status of the goods and services provider in the platform economy take into account the specifics of the platform economy?

Our analysis demonstrated that, in general, the problem with determining the status of a provider lies in determining whether it is carrying out economic activities rather than whether it is carrying out economic activities independently. Thus, in our further consideration, we will focus only on the former issue.

Does merely joining a platform mean that a person is engaged in economic activity?
It can be assumed that, in general, becoming a provider of goods and services via a platform in return for consideration implies some continuity. The activities in question would therefore meet the requirements for inclusion in the concept of 'economic activity' as set out in Article 9(1) of the VAT Directive. Such an approach would, however, be challenging in the context of the Court's previous case law, notably in the Słaby and Others case, where it was made clear that the mere exercise of the right of ownership by its holder cannot, in itself, be regarded as constituting an economic activity. However, some countries have followed this concept and recognise service providers of certain types of platforms as taxable persons.[30] This could be a good way forward in our view, it also does not require in principle an amendment to the VAT Directive (the option in Article 12 of the Directive could be used), but would require a common approach by all Member States to use the option. Consideration could be given to turning the option into an obligation, which would already require an amendment to the VAT Directive but would ensure a uniform approach across the EU.

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[29] **G. Luchetta et al.**, *VAT in the digital age, report volume 2*…, p. 63.
[30] *Ibidem*, p. 61.

Can the number of transactions carried out through a given platform be an indicator of economic activity?
In our view, this option could be considered, especially as the reporting obligations imposed on platforms from 2023 onwards should counteract the possible phenomenon of attempting to evade tax by registering on more than one platform.[31] Of course, this option would have to be adjusted to the different platforms, but one could try to clarify the rules for the most popular market segments e.g. transport, tourism, hospitality.

Assuming that the recognition as an economic activity of providers joining a platform would be adopted in the VAT Directive, the clarification of e.g. the number of transactions for each type of platform could be done in the framework of the implementing regulation. Such clarification seems possible according to a recent opinion of the Advocate General in the Fenix International Limited case.[32]

The problem of exemption for small enterprises
Regardless of which version of the changes would gain acceptance among Member States in the platform economy, whether to expand the concept of an economic activity to include activities hitherto considered private, or to leave the issue unchanged, consideration would have to be given to amending the rules regarding the exemption for small enterprises (Article 283 et. seq. of the VAT Directive). First, consideration should be given to revising the exemption for non-established persons in the country. The problem can especially affect individuals who own properties in different countries that they rent through the platform on a small scale. Are such individuals able to compete effectively with domestic individuals who do not have to pay VAT? We identify at least two types of risks related to using a broad or narrow VAT exemption.

Risks for platforms – allowing wide application of the exemption for platform providers will make it difficult to verify the status of the provider (exempt taxable persons are generally not registered for VAT).

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[31] See: Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation. According to this Directive online platforms need to collect and verify the tax information of EU sellers who use their services and report taxable sales activities each year to local tax authorities, which will then transmit the information to other EU Member States. However, sellers who have less than 30 transactions and for less than EUR 2 000 in total are excluded from the platform's reporting obligations.

[32] Opinion of Advocate General of 15 September 2022 in case C-695/20, Fenix International Limited v Commissioners for Her Majesty's Revenue and Customs, paragraphs 28–99.

Risks for tax administrations – allowing wide registration for VAT for small providers can be costly.

The European Commission's proposal to amend the VAT Directive
In December 2022, The European Commission presented a package of changes in the area of VAT treatment of the platform economy, focusing in particular on the problem of VAT inequality.[33] The problem of inequality results from the fact that private individuals and small businesses can provide their VAT-free services via a platform and with the economies of scale and network effect be in direct competition with traditional VAT registered suppliers.

According to the proposal, this problem should be solved by introducing a deemed supplier model, by which platforms will account for the VAT on the underlying supply where no VAT is charged by the supplier, thereby ensuring equal treatment between the digital and off-line sectors. The proposal only applies to two sectors: short-term accommodation rental and passenger transport. In addition, clarifications will be given on the treatment of the facilitation service to allow for a uniform application of the place of supply rules, and steps will be taken to harmonise the transmission of information from the platform to the Member States.[34]

This proposal generally seeks to address the problems we have highlighted in identifying taxable status in the platform economy, but we cannot assess them positively as proposed. Firstly, they make the assumption that whether or not a service is supplied by a taxable person, and even if it is provided by a taxable person, bear in mind that it may be exempt due to the small undertaking, it will be subject to VAT at the platform level. This approach, which is intended to ensure equal treatment between the digital and off-line sectors, leads to, for example, Uber or Bolt drivers always being subject to VAT, while taxi drivers could still benefit from the exemption. In our opinion, a broader view of the problem would be needed here, as it seems that equal treatment will not be solved in this way. Secondly, the proposal only applies to the short-term accommodation and passenger transport sectors. While these sectors are currently responsible for the vast majority of services in the platform economy sector, there would still be unresolved issues regarding other platform economy services, e.g. professional and household services. Furthermore, we do not know what new types of platform economy services are arising in the near future that may soon become

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

[34] *Ibidem*, pp. 5 and 6.

an important part of the platform economy, which the proposed solutions do not cover. This would probably mean that the provisions of the VAT Directive would need to be amended again to include these services in the new regulations.

7. Conclusions

Our analysis demonstrated that the provisions of the VAT Directive do not simply and clearly regulate whether a platform provider has a taxable status. There is also a lack of CJEU jurisprudence addressing this issue, judgments on the 'traditional' economy do not seem to 'fit' the specifics of the platform economy. It can only be deduced from them that where a person is engaged in an economic activity and undertakes unrelated activities in the platform economy, the assessment of whether these activities constitute an economic activity should be evaluated in the circumstances of the particular case.

In our opinion, the provisions of the VAT Directive need to be adjusted with regard to whether the mere joining of a platform causes a person performing transactions through it to be considered to be carrying out an economic activity. In our opinion, the recognition of such a provider as a taxable person would be justified, however, in order not to bring purely private transactions under VAT, the introduction of a threshold (e.g. number of transactions) should be considered, the exceeding of which would mean that a person is conducting an economic activity. It would also be necessary to amend the rules on the exemption of small enterprises to ensure a level playing field for domestic and foreign providers.

In this context, it should be welcomed that the European Commission has recognised the problems we have highlighted and has presented a relevant legislative proposal at the end of 2022. However, as we have already raised, this proposal should be further elaborated in the course of legislative work in the Council, both in the subject area (it should not be limited only to the short-term accommodation and passenger transport sectors) and in the objective area (issues of equal treatment of providers should be better addressed). Adoption of the provisions as proposed in the draft would imply serious challenges to the equal treatment of the traditional sector and the platform economy sector. It does not seem reasonable that the current shortcomings of the VAT system, sometimes leading to non-taxation of platform economy providers, should be resolved in such a way that all supplies made by platform providers, regardless of whether they are made in the course of a economic or private activity, are to be subject to VAT.

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WYZWANIA ZWIĄZANE Z OKREŚLENIEM DLA CELÓW VAT STATUSU DOSTAWCY TOWARÓW I USŁUG KORZYSTAJĄCEGO Z GOSPODARKI PLATFORMOWEJ (*PLATFORM ECONOMY*)

Abstrakt

Przedmiot badań: Celem opracowania była analiza przepisów i orzecznictwa UE w zakresie statusu VAT dostawcy towarów i usług dla gospodarki platformowej. Zagadnienie to nabiera coraz większego znaczenia w kontekście szybko rozwijającej się gospodarki platformowej, wykorzystującej najnowsze osiągnięcia technologiczne.

W opracowaniu przeprowadzono kompleksową analizę prawną zagadnienia, zwracając jednocześnie uwagę na wątpliwości, które istnieją w szczególności z uwagi na brak orzeczeń TSUE dotyczących pojęcia podatnika w gospodarce platformowej.

Cel badawczy: Celem opracowania była nie tylko ocena odpowiednich przepisów prawa czy ich interpretacji, ale przede wszystkim zwrócenie uwagi na konieczność wypełnienia luki legislacyjnej w badanym obszarze, która doprowadziła i może nadal prowadzić do niejednolitego stosowania przepisów o VAT w państwach członkowskich UE.

Metody badawcze: Badanie zostało przeprowadzone w przeważającej mierze przy użyciu metody empiryczno-dogmatycznej, wspartej metodą historyczną oraz metodą porównawczą.

Wyniki: Nasza analiza wykazała, że przepisy dyrektywy VAT nie regulują w sposób prosty i jednoznaczny, czy dostawca platformy jest podatnikiem. Brakuje również orzecznictwa TSUE odnoszącego się do tej kwestii, wyroki dotyczące gospodarki „tradycyjnej" wydają się nie „pasować" do specyfiki gospodarki platformowej. Naszym zdaniem potrzebne są zmiany legislacyjne, zwłaszcza w dyrektywie VAT, które uwzględniałyby specyfikę transakcji w gospodarce platformowej. Przedstawiamy wstępne propozycje, które mogą zostać uwzględnione w pracach legislacyjnych nad zaproponowanymi niedawno przez Komisję Europejską przepisami w tym zakresie.

Słowa kluczowe: VAT, gospodarka platformowa, dostawca platformy, podatnik.