The Platform Economy Will Have Its Own VAT Regime in 2025

The European Commission has proposed one of the most revolutionary packages of legislative measures on VAT in recent decades, with the title “VAT in the Digital Age” (or the acronym “ViDA”) that affects (i) the transactions made through digital platforms or platform economy; (ii) what has been called “single VAT registration”; and (iii) the way to carry out VAT reporting in the European Union. In this article, the authors explain the rules proposed by the European Commission with respect to digital platforms and point out some technical shortcomings that they hope will be announced after the consultative period or during the revision of the proposed text by the Council of the European Union for final approval.

1. Main Tenets and Rationale of the Proposal

The part of the proposal related to transactions made through digital platforms or platform economy focuses on short-term housing accommodation and transport of persons platforms. Contrary to what could have been expected, the other sectors (e.g. restaurant services) thus remain unaffected by the rules proposed under this part of the ViDA package.

Under the proposed rules, the concerned platforms and not the providers of the underlying services, would become liable to collect VAT in some situations. In practice, if the proposals made with respect to digital platforms are adopted, companies like Airbnb or Uber would become liable for some of the services available through their platforms.

As noted in the preamble to the text submitted, the so-called “platform economy” has posed certain difficulties for the application of VAT rules, in particular the determination of the status of the service provider and the level playing field between small and medium-sized enterprises (SMEs) and other stakeholders. In the authors’ view, the question whether or not the platforms have distorted the functioning of the market from a VAT perspective or whether the current VAT regulation is inadequate remains open. In the authors’ opinion, it seems that there is an alleged unjustified distortion of competition between services provided through platforms “that evade VAT taxation” and “supplies made in the traditional economy subject to VAT”.

The distortion has been most acute in the two largest sectors of the platform economy, namely the short-term accommodation rental and passenger transport. What is not indicated, however, is that this distortion arises, in some cases, due to the exemption of accommodation services vis-à-vis hotel services, or in other cases by the status of the service provider as an SME that is not obliged to collect (pay) the tax. Both circumstances depend on national legislation. On the one hand, this is an exemption from VAT that can be adjusted by the Member States as is the case with the lease of buildings, for example. On the other hand, the VAT treatment of SMEs fully depend on national political decisions. As for taxi services, whether they are provided by the platform or not, the treatment is identical in most Member States. It is therefore not clear what the European Commission’s point here is. platforms only mediate in the provision of the transport service but they do not do so in their own name and, therefore, the rules applicable to the service depend on the status of the providers, which are not taxable persons in many states because of their low volume of transactions (namely, below the registration threshold for VAT purposes).

In any case, what is certain is that thanks to the platforms, providers of short-term accommodation and transport services reach more people. Moved by a clear desire to increase the collection and to make it easier (at least for the underlying providers), the Member States want to change the rules of the game. The Commission’s estimates are that they could raise up to EUR 6.6 billion per year for at least ten years after the entry into force of the proposed rules.

Under the Commission’s proposal, from 1 January 2025, platforms will be obliged, in some situations, to charge VAT as a deemed supplier, instead of the underlying provider which will be exempted from VAT (see section 2.1.). On the other hand, it appears that Member States currently interpret the place of supply of the facilitation service provided by platforms differently to the underlying service providers who are not taxable persons (see section 2.2.).

Finally, the authors also intend to clarify the issue of whether the exemption of Article 135(2) of the VAT Directive should not apply to short-term accommodation rentals, whether or not the situation applies similarly to those provided by the hotel service since it is not the same.

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to rent a property with no more benefits than to offer it with additional services such as breakfast, cleaning and change of towels daily (see section 2.3.).

2. The Proposal in Further Details

2.1. Deemed supplier provision

The European Commission proposes to introduce a regime similar to that currently in place in the field of electronically supplied services and distance sales of goods so that platforms providing short-term accommodation rental and passenger transport services are classified as “deemed suppliers”. In practice, the concerned digital platforms would become suppliers of the underlying transactions for VAT purposes instead of the actual suppliers of the service (proposed article 28a of the VAT Directive), but only in situations in which VAT would otherwise not be collected. The purpose is that services that might otherwise be out of scope or were in scope but exempt from VAT (either because of the status of the provider or because of the exemption that sometimes applied to that type of services), become subject to VAT. Instead of requesting the VAT from these providers directly (by changing the VAT treatment of C2C transactions or the rules concerning the SME exemption), the European Commission proposes to go after the platforms and thus save collection and auditing efforts by leaving thousands of operators out of the VAT system, and instead only look at a few platforms.

In other words, under this measure, where the underlying supplier does not charge VAT because it is, for example, a natural person or makes use of the special scheme for small businesses, the platform will collect and account for VAT on the underlying supply. The normal VAT registration rules will apply.

This ensures, as the Commission indicates in the preamble of the Text, that there is a “level playing field between platforms offering services and other traditional suppliers qualifying as taxable persons, while not imposing a burden on the underlying suppliers operating through the platform.”

This model is presented as positive because it allows the underlying provider to be freed from tax obligations and these are borne by the platform.

It would be too burdensome for this underlying supplier to collect the VAT (e.g., when the underlying supplier is a natural person or a taxable person using special schemes for small enterprises), or because it is more secure to collect it from this intermediary (when the underlying supplier is not established in the EU).

While the supply of the platform when acting as a deemed supplier will be subject to VAT, by effect of article 28a, the one made by the provider underlying the platform will be exempt from VAT without the right to deduction (proposed article 136 ter). This is because a fiction is created by which the service is divided into two successive services in time.

The exact scope of the deeming provisions is clarified in the proposed article 28a of the VAT Directive, which states that such services shall be deemed to be subject to the deemed supplier rule where the person supplying such services is one of the following:

- a non-established person who is not identified for VAT purposes in a Member State;
- a non-taxable person;
- a taxable person who carries out only supplies of goods or services in respect of which VAT is not deductible;
- a non-taxable legal person;
- a taxable person subject to the special scheme for agriculture, livestock and fisheries; or
- a taxable person subject to the special scheme for small enterprises.

In the authors’ view, category b of the proposed article 28a of the VAT Directive, regarding who qualifies as a non-taxable person, represents a slippery slope. The question who qualifies as a non-taxable person can even vary from Member State to Member State and it is steered into different directions by the following rules:

- reverse charge rules under which the person liable to collect the VAT can become the recipient of the services based on the option offered by article 194 of the VAT Directive;
- small businesses that are exempt from VAT under the special scheme of articles 282 to 292 of the VAT Directive; and
- different interpretations of VAT exemptions. As noted by the ECJ in the case WEG Tevesstraße,4 under article 135.1.l of the VAT Directive, the exemption on leasing or letting of immovable property, contrary to the position of the German tax legislator, does not cover supplies of heat by an association of residential property owners to the property owners belonging to that association. As regards taxable person, this concept is quite wide these days specially after the ECJ decision on the above-mentioned case, WEG Tevesstraße, interpreted strictly article 9.1 of the VAT Directive. According to this Court, “under Article 9(1) of the VAT Directive, a ‘taxable person’ means ‘any person who, independently, carries out in any place any economic activity, whatever the purpose or result of that activity’ (…) The terms used in Article 9(1) of the VAT Directive, in particular the term ‘any person who, give to the notion of ‘taxable person’ a broad definition focused on independence in the pursuit of an economic activity to the effect that all persons – natural or legal, both public and private, even entities devoid of legal personality – which, in an objective manner, satisfy the criteria set out in that provision must be regarded as being taxable persons for the purposes of VAT.” Based on this view, even natural persons who lease immovable property during a few days throughout the year can eventually become taxable persons.

A definition of the term “facilitates” is provided in the proposed amendments to the Implementing Regulation5

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(proposed article 9b) in order to provide a certain degree of legal certainty regarding the scope of the “considered” taxable person regime, as follows:

Where an electronic interface is used to enable a customer and a provider offering short-term accommodation rental or passenger transport services to contact each other through it, the platform shall be deemed to be acting as a taxable person concerned. However, a taxable person shall not be deemed to facilitate a supply of short-term accommodation rental or passenger transport services where all the following conditions are fulfilled:

- the taxable person does not determine, directly or indirectly, any of the conditions under which the supply is effected;
- the taxable person does not participate, directly or indirectly, in authorizing the charge to the customer for payments made; and
- the taxable person does not participate, directly or indirectly, in the supply of those services.

Likewise, the presumption shall not apply to a taxable person in any of these cases:

- the processing of payments in relation to the provision of short-term accommodation rental or passenger transport services;
- the listing or advertising of short-term accommodation rental or passenger transport; or
- the redirecting or transferring of customers to other electronic interfaces where short-term accommodation rental or passenger transport services are offered for sale, without any further intervention in the supply.

For the effective operation of the deemed supplier regime for passenger transport services and short-term accommodation rental, it is necessary to clarify how the platform can identify whether this regime applies, and in this sense another presumption is introduced, that is when the underlying provider does not provide the platform with a VAT number (proposed article 9c of the Implementing Regulation).

In addition, when the underlying supplier holds a VAT identification number but is not obliged to collect VAT (for example, because it is using the special scheme for small businesses in a Member State that provides a VAT identification number for those entities), that supplier should not provide the platform with this VAT identification number.

On the other hand, the platform should not be held liable when the information provided by the underlying supplier is incomplete or erroneous and it is not and could not reasonably have known that that information was erroneous and hence, it was misled to concluding that article 28a of the VAT Directive is not applicable.

To comply with these new VAT obligations, platforms will have to register in all Member States where they have underlying transactions or, alternatively, register in one Member State to apply the one-stop shop arrangement. Through this arrangement, they will be able to declare and pay VAT in a single Member State for all B2C services supplied within the European Union as deemed taxable persons. For the purposes of the one-stop shop arrangement, new paragraphs of article 369a of the VAT Directive will be inserted, with effect from 1 January 2025, to extend the definition of Member State of consumption and to include supplies of goods pursuant to article 36 (supply of goods with installation or assembly), article 37 (supply of goods on board ships, aircraft or trains) and article 39 (supply of gas, electricity, heating and cooling) and domestic supplies of goods.

In order to prevent abuse, it has been clarified that a transaction for which a platform is considered the deemed supplier cannot be included in the special scheme for travel agents (article 306 of the VAT Directive).

The provision of the service by the platform to the final customer should not affect the platform’s right to deduct for its activities (article 172a of the VAT Directive).

### 2.2. Facilitation service

When platforms put suppliers of goods or services in contact with customers, as long as those who render the services are not qualified by the legislator or the courts as employees of the platforms, these services provided by the platforms to vendors or customers or both can be categorized as intermediary services for VAT purposes. At least this has been the view of the authors for quite some time and it was finally addressed by the new proposed article 46a of the VAT Directive, with the objective of introducing a uniform application of the rules on the location of the facilitation service.

In this case, if the intermediary services were provided to the service providers (and the authors understand that they act as entrepreneurs or professionals), they would be taxed where the recipients of these are established. In contrast, if provided to final consumers, the intermediary services would be taxed wherever the underlying transaction is located.

### 2.3. No exemption for the rental of short-term housing

The rental of short-term housing (for a period of less than 45 days) will be considered as a sector of a similar nature to the hotel sector and, therefore, may not be exempt from VAT (proposed article 135.3 of the VAT Directive). This ensures that the service of the platform to the final consumer has a similar VAT treatment as the provision of services from traditional hotels to the final consumer.

Currently, France, Greece, Spain and Italy take the view that when the lessor does not provide any of the services complementary to the hotel industry, such as those of a restaurant, cleaning, washing clothes or similar activities, the services will still be exempted from VAT. Accordingly, it would not be surprising if there was some opposition to this proposal by these Member States. It is important to note that not exempting this type of transactions opens the door to the deduction of input VAT on the purchase of leased property, which can generate serious problems for these Member States when establishing the scope of the right to deduction in each case.
3. Critical Analysis of the Proposals

As the service of the underlying provider to the platform is exempt from VAT without the right to the deduction, it incurs additional costs that force it to raise the price requested for providing the service and with this, it is more than likely that what is alleged as the main reason for changing the VAT regime of this sector is the competitive advantage over traditional sectors, which not only disappears but may be reversed.

Another issue that has not yet been clarified is how to tax complex accommodation services that include parking or breakfast, i.e. whether one or more tax rates apply.

As for cancellations or no-show of customers on the day and time of the reservation, nothing is said about it in the ViDA proposal and it seems very convenient to explain what should be done in these cases, all the more since the ECJ has maintained contradictory positions in this regard. On the one hand, in Société thermale d’Eugénie-les-Bains the ECJ held that deposits paid to hoteliers are to be retained when the customers do not show up on the day of the hotel reservation as these are fixed compensations to cover the loss suffered, thus deposits should remain outside the scope of VAT. In contrast, in Air France-KLM and Hop!-Brit Air SAS the Court stated that when a customer purchases an airline ticket and does not board the plane on the day and time indicated on the ticket, the withholding of the price of the ticket is not seen as a contractual indemnity because the ticket represents the passenger’s right to benefit from the performance of obligations arising from the transport contract.

To conclude, the authors consider that it does not appear that the European Union has been excessively proactive in proposing a VAT regime for the platform economy because it has limited itself to extending what it already introduced for electronically supplied services and distance sales of goods, with slight adjustments. But while on that occasion substantial fraud was alleged by non-EU suppliers, this situation is about unfair treatment compared to the taxation applicable to hotels (not taxis) but without digging into the underlying issue, which is that in some Member States specific exemptions from VAT apply. Instead of eliminating such exemptions and leaving the platforms free of obligations for the operations carried out by the providers that use them to offer their services, it has been decided to challenge them because this eases the life of the tax authorities.

It appears to the authors that this easy way out is not technically an achievement because the rules are the same as those already in place for e-commerce, no matter how much this is repeated over and over in a tantalizing manner. However, it is well known that by repeating certain slogans, in this case that the platform economy is fraudulent and that the deemed supplier rules are the solution, the general public will generally tend to believe it. Definitely, time will tell.