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Tax aspects of digital platforms

Certain tax aspects of digital platforms intervening between suppliers and customers have been analysed by different tax experts and relevant authorities, including EU Commission, VAT Committee, ECJ, OECD, etc. In addition to that, some future changes of the tax legislation related to such platforms are also announced.

Thus, there were some initiatives for determining general conclusion on VAT categorisation of services provided by such platforms, but due to large variety in the way platforms intervene between suppliers and customers, it is not feasible to draw a general conclusion on VAT treatment of services provided by such platforms.

First, **there might be significant differences between number of transactions involved, participants and terms of those transactions.** E.g., there might be a transaction between the platform and supplier offering some supply using the platform or a transaction between the platform and customer acquiring some supply using the platform, or transactions between the platform (on one side) and both the supplier and the customer (on the other side). Also, there might be a transaction between the supplier and the customers. Therefore, for determining VAT aspects, it is important to identify all relevant transactions and their participants, as well as relevant terms of those transactions.

There are some platforms which enable private individuals to offer certain supplies on an occasional basis. In such case it may be especially important to analyse **the supplier's VAT status**, i.e. whether the supplier is (or is not) a taxable person acting as such for VAT purposes. For example, if a private individual uses such platform for selling his old private furniture, this is not an entrepreneurial activity and such an individual should not be regarded as a taxable person. On the other hand, in case an individual is selling certain goods or services under such terms that this can be regarded as independent economic activity (i.e. entrepreneurial activity), this would mean that such supplier uses the platform as a taxable person. Still, this does not mean that a transaction between that person and the platform or between that person and customer is subject to VAT in a particular country (e.g. this will not be a case if the supplier benefits from exemption for small entrepreneurs, if a supply is VAT

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Porezni aspekti digitalnih platformi

Određeni porezni aspekti digitalnih platformi koje dovode u vezu dobavljače i kupce su razmatrani od strane raznih poreznih eksperata i nadležnih tijela, uključujući Europsku komisiju, PDV Odbor, Europski sud, OECD, itd. Uz to, najavljene su i određene buduće promjene poreznih propisa koje se odnose na takve platforme.

Tako, postojale su neke inicijative za donošenje općeg zaključka o PDV kategorizaciji usluga koje pružaju takve platforme, no zbog velike razine raznolikosti u načinu na koji pojedine platforme dovode u vezu dobavljače i kupce, nije moguće doći do općeg zaključka o PDV tretmanu usluga koje pružaju takve platforme.

Kao prvo, **moгу postojati značajne razlike u broju uključenih transakcija, u tome tko su sudionici takvih transakcija i uvjetima pod kojima se takve transakcije provode.** Na primjer, može postojati transakcija između platforme i dobavljača koji nudi neke isporuke koristeći tu platformu ili transakcija između platforme i kupca koji nabavlja određene nabavke koristeći platformu, ili transakcije između platforme (s jedne strane) te i dobavljača i kupca (s druge strane). Također, može postojati i transakcija između dobavljača i kupca. Prema tome, za određenje PDV aspekata, bitno je identificirati sve relevantne transakcije i njihove sudionike, kao i relevantne uvjete pod kojima se te transakcije obavljaju.

Postoje neke platforme koje omogućuju privatnim osobama da ponude određene isporuke na povremenoj osnovi. U takvim slučajevima može posebno biti bitno analizirati **PDV status isporučitelja**, tj. ima li (ili nema) isporučitelj status poreznog obveznika koji djeluje kao takav. Na primjer, ako privatna osoba upotrijebi takvu platformu za prodaju svojeg starog privatnog namještaja, to se ne bi moglo smatrati poduzetničkom aktivnosti i ne bi se trebalo smatrati da takva osoba djeluje kao porezni obveznik. S druge strane, ako osoba prodaje određena dobra ili usluge pod takvim uvjetima da bi se to moglo smatrati njegovom samostalnom gospodarskom djelatnosti (tj. poduzetničkom djelatnosti), to bi značilo da takva osoba koristi platformu kao porezni obveznik. Ipak, to još uvijek neće značiti da je neka transakcija između te osobe i platforme ili između te osobe i kupca oporeziva PDV-om u određenoj državi (npr. to neće biti slučaj ako dobavljač koristi pogodnost oslobođenja za male poduzetnike, ako je isporuka na

exempted by its nature, if a place of supply is in another country, etc.).

For **determination of a place of supply**, it is important to analyse and determine the nature (category) of a supply and in many cases also the taxable status of a customer (i.e. whether the customer acts as a taxable person or not).

When **determining the nature (category) of a supply** undertaken by some digital platform and/or through some digital platform, special attention should be put on differentiation between the following:

- *electronically supplied services,*
- *intermediation services,*
- *underlying supply (e.g. accommodation services in case of platforms offering accommodation services such as Airbnb, Booking, etc., transport services in case of platforms such as Uber platform, etc.).*

It is interesting to note the following:

- In December 2019 ECJ released the judgment¹, in which case the ECJ refers in several paragraphs to the service provided through Airbnb platform as an intermediary service. This judgment was not based on VAT regulations, but it is also interesting to note that in 2020 the EU Commission² questioned whether it is possible to have a general conclusion that the services related to the rental of an immovable property or to the provision of accommodation services rendered by platforms should be taxed as **intermediary service**. However, the conclusion was that no general conclusion could be made, but this always needs to be analysed and determined on a case-by-case basis.
- In 2017 the ECJ brought a decision concerning the question whether certain services related to the transport provided through Uber platform should be considered as **intermediation services** or **information society services** or **services in the field of transportation**³. In this case, the ECJ concluded that the service provided by such platform “*is more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey*” and that the service “*must be regarded as being inherently linked to a transport service and, accordingly, must be classified as ‘a service in the field of transport’ within the meaning of Article 58(1) TFEU.*”⁴. Even though that

temelju svoje prirode oslobođena PDV-a, ako je mjesto obavljanja usluge u drugoj državi, itd.).

Za **određivanje mjesta obavljanja usluge**, bitno je analizirati i odrediti vrstu (kategoriju) isporuke i u mnogim slučajevima je bitno odrediti i status kupca (tj. je li kupac osoba koje djeluje kao porezni obveznik ili nije).

Kada se **određuje vrsta (kategorija) isporuke** koju je obavila neka digitalna platforma i/ili koja je obavljena putem neke digitalne platforme, posebnu pažnju treba posvetiti razlikovanju između sljedećeg:

- *elektronički obavljene usluge,*
- *usluge posredovanja,*
- *osnovne isporuke (npr. usluga smještaja u slučaju onih platformi koje nude usluge smještaja kao što su Airbnb, Booking, itd., usluga u prometu / usluga prijevoza u slučaju onih platformi poput Uber platforme, itd.).*

Interesantno je spomenuti i sljedeće:

- U prosincu 2019. godine Europski sud je objavio presudu¹, u kojoj presudi Europski sud u nekoliko točaka usluge obavljene preko Airbnb platforme navodi kao usluge posredovanja. Ova presuda nije utemeljena na PDV propisima, pa je također interesantno uočiti da je u 2020. godini Europska komisija² propitala je li moguće zauzeti opći zaključak prema kojem bi usluge vezane za iznajmljivanje nekretnina ili pružanje usluga smještaja a koje pružaju platforme mogle biti oporezivane kao **usluge posredovanja**. Međutim, zaključeno je da takav opći zaključak nije moguć, već da je to uvijek potrebno analizirati i odrediti za svaki pojedinačni slučaj zasebno.
- U 2017. godini Europski sud je donio odluku vezanu za pitanje treba li određene usluge vezane za transport koje se pružaju preko Uber platforme tretirati kao **usluge posredovanja** ili **usluge informacijskog društva** ili **usluge u području prometa**³. U ovom predmetu je Europski sud zaključio da se usluga koju obavlja takva platforma: „*ne sastoji samo od usluge posredovanja koju čini povezivanje putem aplikacije za pametni telefon vozača koji se prijevozom ne bavi profesionalno i koji se koristi svojim vlastitim vozilom i osobe koja traži gradski prijevoz*” te da predmetnu uslugu „*treba smatrati neodvojivo povezanom s uslugom prijevoza i stoga obuhvaćenom kvalifikacijom „usluga u području prometa” u smislu članka 58. stavka 1. UFEU-a*”⁴. Iako niti ova presuda

1 Case C-390/18, Airbnb Ireland v AHTTOP

2 Working paper No 990 dated 18 February 2020 (“Question concerning the application of EU VAT provisions”; subject: services supplied by digital platforms intervening in short-term leasing or renting of immovable property)

3 Case C-434/15

4 Case C-434/15

judgment as well is not based on VAT regulations, in 2020 the EU Commission concluded that the ECJ's conclusions in that judgment leads to three important outcomes, that might be relevant for the application of VAT rules as well⁵, including as follows:

- (i) the services provided by a platform with the same features as those of the Uber platform qualify as transportation rather than intermediation;
- (ii) the platform in such a case exercises decisive influence on the users which goes beyond a mere intermediary activity;
- (iii) the service provided by the platform and the transport service should be seen as a whole under non-VAT legislation.

Therefore, the mentioned two ECJ's judgments (in cases related to Airbnb and Uber) were not issued based on VAT regulations, but certain conclusions should be taken into account when considering VAT aspects. Because of that, **it is interesting to note that the conclusion of the ECJ in the case of Airbnb platform is opposite to that in the case of Uber platform.** The most important difference, which has resulted in different conclusion concerning categorisation of services provided by the mentioned two digital platforms, is the level of control and influence over the condition under which underlying supplies are provided through those platforms. While in the case of Uber platform the ECJ concluded that the platform exercised decisive influence, in the case of Airbnb platform the ECJ determined different facts (e.g. that the hosts, who are accommodation service providers, were not influenced by any condition on that platform).

Obviously, there is no general conclusion on VAT categorisation of services provided by digital platforms that connect suppliers and customers, but it is important to analyse each case separately, especially taking into account the following:

- For determination if it should be deemed that the platform performs underlying supplies being offered through the platform, it is especially important **to consider what level of control and influence the platform has over the conditions for providing the underlying supplies.** If there is no control and influence, a conclusion goes into the direction of pure intermediation.
- However, it is also important to differentiate between traditional intermediation (on one side) and digitalised activities which should be regarded, for VAT purposes, as electronically supplied services (on the other side). In this context, it is especially important **to consider: whether platform participation is active or passive, whether this requires "minimal human intervention" or beyond of that, whether the platform participation**

nije utemeljena na PDV propisima, u 2020. godini je Europska komisiji zaključila kako zaključci Europskog suda navedeni upravo u ovoj presudi dovode do tri bitna zaključka, koja mogu biti bitna također i za primjenu PDV pravila⁵, i koja uključuju sljedeće:

- (i) usluge koje obavlja platforma istih karakteristika kao Uber platforma smatra se uslugom iz područja prometa a ne uslugom posredovanja;
- (ii) u takvom slučaju platforma ima odlučan utjecaj na korisnika platforme koji prelazi okvire posredničkih aktivnosti;
- (iii) usluga koju obavlja platforma i usluga iz područja prometa trebaju se smatrati jednom cjelinom prema ne-PDV propisima.

Prema tome, spomenute dvije presude Europskog suda (u predmetima koji se odnose na Airbnb i Uber) nisu donesene na temelju PDV propisa, ali određeni zaključci iz tih presuda se trebaju uzeti u obzir kada se razmatraju PDV aspekti. Zbog toga, **interesantno je uočiti da je zaključak Europskog suda u slučaju Airbnb platforme suprotan zaključku u slučaju Uber platforme.** Najbitnija razlika, koja je dovela do različitog zaključka vezanog za kategorizaciju usluga koje pružaju ove dvije spomenute digitalne platforme, jest razina kontrole i utjecaja nad uvjetima pod kojima se osnovne isporuke pružaju preko tih platformi. Dok je u slučaju Uber platforme Europski sud zaključio da platforma ima odlučan utjecaj, u slučaju Airbnb platforme je Europski sud utvrdio drugačije činjenice (npr. da domaćini, koji pružaju usluga smještaja, nisu pod utjecajem bilo kojeg uvjeta na predmetnoj platformi).

Očito je da nema općeg zaključka o PDV kategorizaciji usluga pruženih od strane digitalnih platformi koje dovode u vezu dobavljače i kupce, već da je bitno analizirati svaki slučaj zasebno, uzimajući u obzir posebno sljedeće:

- Da bi se odredilo treba li smatrati da platforma pruža osnovnu isporuku koja se nudi preko te platforme, posebno je bitno **razmotriti kakvu razinu kontrole i utjecaja platforma ima nad uvjetima za pružanje osnovnih usluga.** Ako takva kontrola i utjecaj uopće ne postoje, zaključak ide u smjeru čistog posredovanja.
- Međutim, također je bitno razlikovati između tradicionalnog posredovanja (s jedne strane) i digitaliziranih aktivnosti koje bi trebalo smatrati, za PDV potrebe, elektronički obavljenim uslugama (s druge strane). U tom kontekstu, posebno je bitno **razmotriti: je li sudjelovanje platforme aktivno ili pasivno, zahtijeva li samo „minimalno ljudsko sudjelovanje“ ili više od toga, je li sudjelovanje**

⁵ Working document of „VAT Expert Group“, 26th meeting – 11 May 2020, taxud.c.1[2020]2365654 – EN, VEG No 090, VAT treatment of the platform economy

is essentially automated and general in nature or adapted to the specific need of each client, etc. Generally, traditional intermediation would require an active participation by the intermediary that goes beyond an automatic provision of services using only minimal human intervention.

When considering Internet platforms, it should be mentioned that in 2020 Croatia amended the Croatian Act on Rendering Services in Tourism, by introducing an obligation of Internet platforms offering for a consideration on-line services, which have an aim of connecting suppliers of services which are within the scope of that Act and special Act on hospitality business and the users of such services, **to indicate tax number, that is VAT ID number of the supplier providing services in the territory of the Republic of Croatia.**

Currently there are some ongoing processes related to taxation or tax reporting of digital platforms (electronic interfaces) at the level of the EU and the OECD, including as follows:

- In February 2020, the Council Directive (EU) 2020/284 amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers⁶ was published. As stated in the preamble of that Directive, the growth of e-commerce facilitates the cross-border sale of goods and services to final consumers in the Member States, but fraudulent businesses exploit e-commerce opportunities in order to gain unfair market advantages by evading their VAT obligations. According to that Directive, **Member States shall require payment service providers to keep sufficiently detailed records of payees and of payments in relation to the payment services** they provide to enable the competent authorities to carry out controls in order to combat VAT fraud. Member States should adopt that Directive by 31 Dec 2023.
- In July 2020, the OECD published “**Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy**”⁷. Inter alia, the Model Rules are designed to help taxpayers in being compliant with their tax obligations, and they also have the ambition to impact on reporting regimes.
- In July 2020, the EU Commission published a directive proposal (the “DAC7 Proposal”⁸), which should amend Directive 2011/16/EU on administrative cooperation (the “DAC”) in the field of taxation. This Proposal

platforme u bitnome automatizirano i općenito u svojoj prirodi ili se prilagođava specifičnim potrebama svakog klijenta, itd. Općenito, tradicionalno posredovanje bi zahtijevalo aktivno sudjelovanje posrednika koje prelazi automatsko obavljanje usluga uz minimalno ljudsko sudjelovanje.

Kada se razmatraju Internetske platforme, treba spomenuti da je u 2020. Hrvatska izmijenila hrvatski Zakon o pružanju usluga u turizmu, tako da je uvela obvezu Internetskih platformi koje na daljinu pružaju uz naknadu usluge, kojima je svrha povezivanje s jedne strane pružatelja usluga uređenih ovim Zakonom i posebnim zakonom kojim se uređuje ugostiteljska djelatnost i s druge strane korisnika tih usluga, **da istaknu porezni broj, odnosno PDV identifikacijski broj pružatelja usluge koji pruža usluge na području Republike Hrvatske.**

Trenutno su u tijeku određeni procesi vezani za oporezivanje i porezno izvješćivanje digitalnih platformi (elektroničkih sučelja) na razini EU i OECD-a što uključuje:

- U veljači 2020., objavljena je Direktiva Vijeća (EU) 2020/284 koja mijenja Direktivu 2006/112/EZ u pogledu uvođenja određenih zahtjeva za pružatelje platnih usluga⁶. Kako je navedeno u preambuli ove Direktive, zahvaljujući razvoju e-trgovine olakšava se prekogranična prodaja robe i usluga krajnjim potrošačima u državama članicama, ali važno je suzbiti prekogranične prijevare u vezi s PDV-om prouzročene nepoštenim postupcima nekih poduzeća u području prekogranične e-trgovine. Prema toj Direktivi, **države članice će zahtijevati od pružatelja platnih usluga da vode dovoljno detaljnu evidenciju primatelja plaćanja i plaćanja u vezi s platnim uslugama** kako bi se nadležnim tijelima država članica omogućilo provođenje kontrola nad isporukama robe i usluga radi suzbijanja prijevara u vezi s PDV-om. Države članice su obvezne ovu Direktivu implementirati u svoja nacionalna zakonodavstva do 31. prosinca 2023.
- U srpnju 2020., OECD je objavio „**Model pravila za izvješćivanje od strane operatera platformi vezano za prodavatelje u ekonomiji dijeljenja i privremenih poslova**”⁷. Između ostalog, ovaj Model pravila je dizajniran da bi pomogao poreznim obveznicima da budu usklađeni s njihovim poreznim obvezama, ali i s namjerom da utječe na izvještajne režime.
- U srpnju 2020. godine, Europska komisija je objavila prijedlog direktive („DAC7”⁸ prijedlog), koja bi trebala

⁶ Working document of „VAT Expert Group”, 26th meeting – 11 May 2020, taxud.c.1(2020)2365654 – EN, VEG No 090, VAT treatment of the platform economy

⁷ <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.htm>

⁸ https://ec.europa.eu/taxation_customs/sites/taxation/files/2020_tax_package_dac7_en.pdf

aims to **extend the scope of automatic exchange of information to digital platforms** by placing an obligation on them to report on the income earned by sellers of goods and services who make use of the relevant platforms.

izmijeniti Direktivu 2011/16/EU o administrativnog suradnji („DAC“) u području oporezivanja. Ovaj prijedlog direktive za cilj ima **proširiti obuhvat automatske razmjene informacija na digitalne platforme** na način da im nametne obvezu izvještavanja o prihodu onih prodavatelja dobara i usluga koji koriste relevantne platforme.

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