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**VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 990**

**QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS**

ORIGIN: Spain

REFERENCES: Article 58 of the VAT Directive
Article 7 of the VAT Implementing Regulation

SUBJECT: Services supplied by digital platforms intervening in short-term leasing or renting of immovable property

1. INTRODUCTION

Spain has asked the opinion of the VAT Committee about the nature of the services supplied by digital platforms intervening between hosts and guests for the short-term leasing or renting of immovable property.

The question raised by Spain is annexed to this Working paper.

2. SUBJECT MATTER

In the situation described above, there are in principle three transactions to assess from a VAT point of view:

- 1) one between the platform and the host offering the short-term leasing or renting of immovable property;
- 2) one between the platform and the guest using the platform for taking a short-term leasing or renting of immovable property;
- 3) one between the host and the guest.

Spain indicated, however, that their request concerns only transactions 1) and 2). Transaction 3) (that between the host and the guest) is thus not included in the questions to be addressed.

In particular, the question concerns the nature of the services supplied by the digital platform in view of determining the place of supply of these services. The core issue at stake is whether the services supplied by platforms involved in such activities constitute electronically supplied services covered in Article 58 of the VAT Directive¹ or not.

If the conclusion would be that the digital platform does not provide electronically supplied services, then its services would rather qualify as intermediary services.

In that case, the place of supply rules applicable to the supply carried out by the platform would, as indicated in the document submitted by Spain, depend on whether or not the service supplied by the host qualifies as the provision of accommodation in the hotel sector or in sectors having a similar function. This issue is, however, also out of the scope of the question raised by the Spanish authorities.

3. THE COMMISSION SERVICES' OPINION

3.1. Previous discussions in the Group on the Future of VAT and the VAT Committee

The difficulty of determining the place of supply of the services provided by platforms intervening in the accommodation sector was precisely pointed out by the Commission

¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

services in the Working Document on the VAT treatment of the sharing economy² that was discussed in the Group on the Future of VAT (GFV) meeting of 5 April 2019.

The Commission referred in particular to previous discussions in the VAT Committee on this issue during which Member States did not reach full consensus.

Based on Working paper No 906³, the VAT Committee discussed the interaction between electronically supplied services and intermediation services supplied in a digital environment.

The guidelines⁴ resulting from that discussion indicate that the key issue for distinguishing between the abovementioned services is the question whether supplying the service requires only minimal human intervention or more than minimal human intervention within the meaning of Article 7(1) of the VAT Implementing Regulation⁵. Specifically, the guidelines state the following:

“3. The VAT Committee almost unanimously agrees that to qualify as intermediation and therefore be covered by Article 46 of the VAT Directive, services provided in a digital environment shall require an active involvement of the intermediary which goes beyond the automated supply provided with the use of only minimal human intervention (within the meaning of Article 7(1) of the VAT Implementing Regulation).

In particular, where an individual supply requires non automated, human, distinct reactions on the side of the supplier, the VAT Committee almost unanimously agrees that the services shall be seen as requiring active involvement of the intermediary in the transaction.

4. The VAT Committee almost unanimously considers that the services of online platforms such as a marketplace, providing only passive automated services, requiring not more than minimal human intervention (within the meaning of Article 7(1) of the VAT Implementing Regulation), and allowing two parties to enter into contact with a view of obtaining separate goods or services, do not fulfil the conditions to be regarded as intermediation services and therefore shall not be covered by Article 46 of the VAT Directive.

For example, where a service consists of a supply automatically generated from a computer via the Internet or another electronic network, in response to specific data input by the recipient, the VAT Committee almost unanimously confirms that it shall be seen as a passive automated service.”

The VAT Committee also on several other occasions discussed the notion of "minimal human intervention", constituting a part of the definition of electronically supplied services provided for under Article 7(1) of the VAT Implementing Regulation.

² [GFV N°86](#)

³ [VAT Committee Working paper No 906.](#)

⁴ [Guidelines resulting from the 107th Meeting of 8 July 2016 Document D – taxud.c.1\(2017\)1402399 – 914](#), Guidelines resulting from meetings of the VAT Committee, page 217.

⁵ Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ L 77, 23.3.2011, p. 1).

The guidelines⁶ resulting from these discussions notably state the following:

“2. The VAT Committee unanimously agrees that where the human activity on the side of the supplier focuses on generic, non-specific adjustments to the system environment and not on individual requests made by customers, such activity shall be seen as not trespassing the ‘minimal human intervention’ requirement included in the definition of electronically supplied services.

[...]

6. The VAT Committee unanimously agrees that services shall qualify as electronically supplied where:

- (i) such services are as a rule fully automated, and*
- (ii) at the same time within the system, via which these services are supplied, there is the possibility, in exceptional individual cases involving particular, more complex problems, for the programmes running that system to direct the customer to a staff member for resolution of those problems.*

In essence, the VAT Committee almost unanimously considers that such exceptional interventions must be seen as activities assuring the smooth running of the system as such, and therefore not exceeding the ‘minimal human intervention’ requirement included in the definition of electronically supplied services.”

Obviously, an essential element for determining whether a supply requires more than minimal human intervention or not is whether the service supplied includes an element of active involvement of the supplier (the platform in this case) that is specifically adapted to the needs of the customer (the provider and/or the host).

To be noted that the advancement of new technologies (smart contracts, artificial intelligence) implies that the criterion of “minimal human intervention” is a dynamic one that is likely to evolve rapidly. Moreover, already today some platforms may well be more advanced in using these new technologies compared to others.

3.2. The analysis carried out by the Spanish authorities

Spain considers in its analysis that the services provided by the platforms intervening in short-term leasing or renting of immovable property mostly include a number of functionalities implying that the services provided do not qualify as electronically supplied services according to Article 7(1) of the VAT Implementing Regulation.

The following functionalities are quoted as an example:

- The possibility for hosts and guests to write a review on each other;
- Customer support in case there is a problem with the bookings;

⁶ [Guidelines resulting from the 108th Meeting of 27-28 March 2017 Document C – taxud.c.1\(2018\)2397450 – 930](#), Guidelines resulting from meetings of the VAT Committee, page 220.

- The fact that the price for the service provided by the platform depends on certain factors;
- The fact that a host protection insurance might be offered;
- The fact that additional online services are on offer. Some of them require the host to meet certain standards, which are established by the platform itself. In order to assess the fulfilment of those standards, some physical in-site visits to the buildings and specific checks might be performed on behalf of the platform.

The Commission services would in this respect like to make a comparison with the services provided by platforms intervening in another type of transactions.

Article 7(2) of the VAT Implementing Regulation enumerates certain types of supplies already covered by the definition of electronically supplied services provided for in Article 7(1).

Point (d) of Article (7)(2) covers the transfer for consideration of the right to put goods and services up to sale on an Internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated from a computer.

It is to be noted that these online markets often have a customer support service by which the platform offers to launch a mediation procedure in case of non-delivery by the seller or non-payment by the purchaser. Often there is also a section with reviews of the seller. Finally, the price to be paid to the platform can be variable; certain platforms offer different options in order to make the announcement of the goods or services more visible on the platform.

Despite the fact that these functionalities might be part of the services supplied by an online market, Article 7(2)(d) of the VAT Implementing Regulation stipulates that these services are covered by Article 7(1) of that Regulation, which means it is incontestable that carrying out those services involves only minimal human intervention despite such functionalities also being offered.

3.3. Nature of the services provided by digital platforms intervening in short-term leasing or renting of immovable property

There is of course some variety in the way digital platforms intervene in short-term leasing or renting of immovable property. For instance:

- platforms may charge their services to the host, to the guest or to both. In case the platform does not charge any fee to the guest for its intervention, no supply for consideration takes place between the platform and the guest;
- some platforms may provide on behalf of the host the confirmation of the renting or leasing of the accommodation to the guest while others will inform the host of the request for a reservation made by the potential guest with further handling done by the host who will confirm the reservation;
- platforms may or may not collect the payments on behalf of the host;

- the services provided by the platforms may include some or all of the functionalities mentioned in the document submitted by the Spanish authorities.

In case the platform provides two services against consideration, one to the host and one to the guest, the nature of each of these services provided by the platform is to be assessed separately. The outcome for both services could be identical but this does not necessarily need to be the case. It could be that for the platform providing its service to the host might need more than a minimal human intervention whilst providing its service to the guest does not require more than minimal human intervention or *vice versa*.

Moreover, the services offered by digital platforms to their customers (the hosts and/or guests) might not always be identical. It could therefore be that a platform provides services to some of its customers with minimal human intervention whilst for its other customers these services comprise more than minimal human intervention.

Because of the large variety in the way platforms intervene in short-term leasing or renting of immovable property, the Commission services are of the opinion that it is not feasible to draw a general conclusion whether providing these services *de facto* requires more than minimal human intervention or not.

The assessment of the level of human intervention, and in particular to which extent this human intervention is adapted to the specific needs of the customer, in the supply made by the platform to the host as well as in the supply made to the guest will ultimately depend on the business model of a platform.

4. DELEGATIONS' OPINION

Delegations are invited to express their views on the matters presented by the Commission services.

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QUESTION FROM SPAIN

SUBJECT: SHARING PLATFORMS IN THE SHORT TIME RENTAL OF IMMOVABLE PROPERTY (ARTICLES 9° (1), 28°, 44°, 46°, 47°, 58° DIRECTIVE 2006/112/EC)

Based on Article 398° of the Council Directive 2006/112/EC (hereinafter: the VAT Directive), the Spanish VAT authorities would be grateful if the Commission and delegations of the VAT Committee would share their views on the following questions on the application of the VAT rules to the services provided by the sharing economy platforms to both guests and hosts in the leasing or letting of an immovable property for a short time.

ISSUE

A sharing economy platform established in a Member State supplies services to business and private customers in other Member States.

RELEVANT EU-LEGISLATION

Articles 9 (1), 28°, 44°, 46°, 47°, 58° VAT Directive

Articles 7(1), 11, 31 of COUNCIL IMPLEMENTING REGULATION (EU) No 282/2011.

LEGAL ANALYSIS

1. QUESTION APPROACH.

In this business model, there is a legal relationship between the electronic platform operator (platform) and the host, and another legal relationship between the platform and the guest.

In addition to the legal relationships between the platform and the host and between the platform and the guest, there is also a third legal relationship between the hosting service provider and the guest. Regarding the latter, there is no difficulty in qualifying the nature of the service in question, as it appears obvious that the host provides the guest with accommodation services.

We propose the VAT Committee to determine whether those services have to be qualified as electronic services, as defined in article 58 of the Vat Directive and corresponding Annexes of the Directive and the Implementing Regulation, or as intermediary services related to the rental of an immovable property or to the provision of accommodation services.

As jurisprudential precedents of the ECJ, although they are not VAT cases, not even related to taxes; the cases C- 434/15, of 11 May 2017, Asociación Profesional Elite Taxi vs. Uber System Spain and C-320/16, of 4 July 2017, Uber France SAS, stand out.

These cases concern a “transport service”, insofar as it applies to an intermediary service provided by means of an application for smartphones and which forms an integral part of an complex service whose main element is the transport service, constituting a service excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31.

On the 19th of December 2019, the Grand Chamber of the ECJ released the Case C-390/18, AIRBNB Ireland v AHTOP judgement. In this case the ECJ addresses whether the services provided by this platform can be considered as an information society service as defined in Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015. The ECJ concluded that such services do indeed have the nature of information society services.

However, in this judgment, the ECJ refers in several paragraphs to the service provided by AIRBNB as an intermediary service. The conclusion of the judgment itself states:

“(…) that an intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or nonprofessional hosts offering short-term accommodation, while also providing a certain number of services ancillary to that intermediation service, must be classified as an ‘information society service’ under Directive 2000/31.”

From our point of view, 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 services for VAT purposes**. We are aware that each platform has its own business model but they all share common essential elements. The fact that these services are provided through the internet should not interfere in their consideration as intermediary services for VAT purposes, since the platforms have a proactive role in the connection of two parties (the host and the guests), which exceeds the mere authorisation to use an “automated software” or a “marketplace” own by the platforms. Thus, these platforms supply intermediary services to the guests and to the host.

2. PLACE OF SUPPLY

The qualification of the operations at stake as intermediation, presupposes an active intervention or liaison between, on one hand, the hosts, who are responsible for carrying out the main operation to which the intermediation service relates and, on the other hand, the guests.

The intermediary bills the intermediated the amount of the commission he receives for performing the intermediation services. This service, however, constitutes a separate operation from the main operation to which it relates and is subject to an autonomous treatment in particular as regards the rules for the location of operations, unless expressly provided otherwise.

Where the intermediation service provided by these platforms to the host shall be located will ultimately depend on how Member States define the ‘provision of accommodation in the hotel sector and similar sectors’. Indeed, reference to the ‘hotel sector’ and the national competence to delimit such a concept is included in article 135(2) of the VAT Directive.

Therefore, depending on the definition of “provision of accommodation in the hotel sector and similar sectors” adopted by each Member State in conjunction with the place of taxation rules in the VAT Directive, the following possibilities can be distinguished:

- 1) If a Member State consider typical platform in the immovable property accommodation sector as similar to hotel accommodation (rule of article 31 of Implementing Regulation): then Article 44 of VAT Directive applies to intermediary services provided to the hosts and therefore the service should be taxed where the host is established or has a fixed establishment. That is to say, if the host place of establishment is not located in the Member state of the accommodation, the immovable property object of this operation must be considered as his fixed establishment.

Additionally, Article 46 of VAT Directive applies to the intermediary service provided to the guests. Therefore, such service is to be taxed where the underlying service takes place, which is the territory where the immovable property lies, according to Article 47 of VAT Directive, which determines the place of taxation of the accommodation service provided by the host to the guest.

- 2) If a Member State consider typical platform in the immovable property accommodation not similar to a hotel accommodation (Article 31 of Implementing Regulation is not applicable): Article 47 of VAT Directive applies for both intermediary services: the one rendered to the host and the service rendered to the guest, as Article 47 applies independently of the condition of the recipient. Article 47 applies again to the accommodation service provided by the host to the guest.

3. CONSIDERATION AS ELECTRONICALLY SUPPLIED SERVICES FOR VAT PURPOSES.

Intermediation usually occurs when its purpose is to facilitate the contact between different persons with a view they can agree on a transaction among them, which can consists of a supply of goods or services.

Those services provided in a digital environment, to qualify as intermediation services, require an active participation by the intermediary that goes beyond an automatic provision using only a minimal human intervention (within the meaning of article 7^o (1) of the VAT Implementing Regulation).

Assuming that the hosting service is provided directly by the host to the guest, the question may arise whether the services provided by the platform (for the guest, the host or both) should be considered an electronic supply of services.

As regards the characterization of “electronically supplied services”, Article 7 (1) of Council Implementing Regulation (EU) No 282/2011) of 15 March, as amended in 2013 by Regulation Implementing Regulation (EU) No 1042/2013 of 7 October for the implementation of the VAT Directive considers that it covers services:

- i. Delivered via the Internet or an electronic network;
- ii. Essentially automated;

- iii. Involving minimal human intervention; and
- iv. For which it is impossible to secure its supply in the absence of information technology.

For the assessment of the notion of “minimal human intervention” included in the definition of “electronically delivered services”, the emphasis has to be put on the supplier involvement, regardless of the level of human intervention on the client side.

Looking at how the services under review are provided, it seems that it does not meet the conditions set out in the VAT Council Implementing Regulation to be defined as electronically supplied services.

Our understanding is that the services provided by platforms that are active in this sector are not limited to the provision of a platform that, in an automated manner, enables hosts and guests to be connected. On the contrary, other functionalities are provided. These additional services or functionalities are key to determine if the services provided by the platform by electronic means have to be considered as an intermediation in an accommodation service or an electronically supplied service. The following additional services provided by such a platform serve as an example:

- **Reviews and references:** These platforms usually offer a place whereby hosts and guests may leave an assessment of each other.

In certain cases, where a host receives mediocre ratings or negative comments or cancels confirmed reservations, the platform may suspend the listing, cancel a reservation or even prohibit access to the site..

- **Customer support:** Platforms such as those referred to in this document usually have a “Help center” allowing Hosts and Guests getting answers about the use of the platform in an automated way.

However, a manual intervention from the companies’ customer support can also happen for some bookings, when there is a problem with them. (Companies indicate it is merely a mean to better enjoying the platform services; without the possibility of getting customer support, less people would make use of the platform).

Moreover, if hosts and guest require further assistance at some point, they may contact the companies’ customer service team. For instance, this customer support team may decide to compensate the host if there was any damage in their property.

- **The company’s fees** are linked to the final price paid by the guest, as a percentage of the final price, using an algorithm whose details are currently unknown for these Member States. We believe that “using algorithms which take into account factors such as the city and the area where the accommodation is located, the holiday season, the number of days a Guest wishes to rent the accommodation and the number of persons staying, contributes to link the fee to the specifications of each singular guest’s request and property rented.

- **Host Protection Insurance**, the platform often provides also a guarantee to the hosts for the damages incurred in the building during the accommodation service.
- **These platforms usually offers additional online services.**

Some of them require to meet certain standards, which are established by the platform itself. In order to assess the fulfilment of those standards, some physical in-site visits to the buildings and specific checks might be performed on behalf of the platform.

If the platform only provides information in order to host and guest to get connected and only provides information by electronic means in an essentially automated manner, there is no doubt that the service would be considered as an electronic supplied service.

Moreover, the platform provides a wide set of services which imply the interest of the platform for the conclusion of the underlying transaction and for providing a good service and becoming a trusted online platform. If there is any problem, the customer expects that the problem will be solved by the platform and this is one of the reasons why they use this particular type of platforms. The platform intervention guarantees the underlying transaction is going to be completed in proper conditions.

Although the service is delivered over the Internet, Spain does not consider the service is an essentially automated service. This type of intermediation requires a dynamic involvement, which these platforms execute by offering not only a website but also a wide range of ancillary services, implying many of them an active human intervention, exercising decisive influence on the conditions under which the underlying service is provided.

Provided there are no other elements to conclude otherwise, we consider the services provided by these companies through their platforms cannot be subsumed in the definition of electronically supplied services.

4. QUESTION

All being said, the Commission and Member states are requested to give their opinion on the following matter:

The nature or qualification for VAT purposes of the services offered by the operator of an electronic platform as described on this request for the short-time leasing or letting of an immovable property and supplied to both, the hosts (or lessor) and the guest or lessees.