Recent Developments of Taxation in the Platform Economy

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I. Introduction

Tax policy of the digital economy continues to make headlines in the world of taxation. Since 2020 and our last contribution, several legal developments within this particular sector have taken place in the field of EU tax law. As already expected back then, these initiatives – that have meanwhile (partly) materialised, have focused primarily on two points: the minimum taxation of multinational corporations (MNEs) with a very high revenue[1] and the allocation of taxing rights among the involved states. This focus stems from the efforts of the OECD and the OECD Inclusive Framework, and it largely ignores the taxation of *individuals* that fall within the scope of the so-called digital economy and the platform economy.

The COVID-19 pandemic and the ensued need to "work from home" challenged the traditional foundations of source and residence taxation notably for people that resided in countries other than the ones they worked in. In order to avoid disruption, the taxation of cross-border workers, who were the most affected by the pandemic, was resolved through bilateral special agreements based on "exceptional measures and circumstances". These agreements would, usually, create a legal fiction for teleworkers, suggesting that even if these persons worked from "home" (residence country), their time there would not be considered in the calculation of the number of ("working") days spent outside the state of employment (source country). Similar solutions were adopted for social security contributions.

Although the recent COVID crisis highlighted the tax challenges that arise from cross-border teleworking in relation to both "the taxation of wages and the taxation of company profits" in that they may result in double taxation and/or increased administrative burdens for taxpayers, em-

1 Council Directive (EU) 2022/2523 of 14 December 2022 on Ensuring a Global Minimum Level of Taxation for Multinational Enterprise Groups and Large-Scale Domestic Groups in the Union (the "GloBE Directive").

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ployers and tax administrations alike,[2] the issues that arise from teleworking or even from digital nomadism are not necessarily the same as those that arise from work in the platform economy, where the interposition of the platform may perplex (or facilitate) the administration and collection of taxes.

As already stated in the previous contribution, the loss in tax revenue from tax evasion in the platform shadow economy is huge.[3] This is due to a series of factors varying from deliberate non-disclosure, inadvertent misreporting, underreporting or non-reporting due to administrative difficulties, and strategic choices or misrepresentations in status qualification (confusion as to whether the worker would qualify as a contractor or as an employee). Some of these problems were partly mitigated through the adoption of the so-called DAC7.[4]

II. The DAC7 and its Implementation

1. DAC7 Content and Relevance

In line with the OECD Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy (MRDP),[5] DAC7 aimed at introducing, at an EU-wide level, the obligation to report income earned through digital platforms and the exchange of such information among Member States. This would be effectuated through common reporting rules facilitated for both platform operators and users alike and would allow Member States to receive a more complete set of data and to collect tax revenues more efficiently. The primary idea behind the adoption of DAC7 was "to protect public finances and limit [...] the socio-economic

2 European Economic and Social Committee, Taxation of Cross-Border Teleworkers and Their Employers (2022).

3 *Pantazatou, Katerina*, Taxation of the Platform Economy: Challenges and Lessons for Social Security, in: Becker, Ulrich/Chesalina, Olga (eds.), Social Law 4.0: New Approaches for Ensuring and Financing Social Security in the Digital Age, Baden-Baden: Nomos 2021, pp. 363-393.

4 Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation, OJ L 104, 25.3.2021, pp. 1-26.

5 OECD, Model Rules for Reporting by Platform Operators with Respect to Sellers in the Sharing and Gig Economy, 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 (accessed on 1 September 2024).

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consequences" of the COVID-19 pandemic,[6] and not the coordination or facilitation of the taxation of platform workers. This is in line with the MRDP that acknowledges that the reason for introducing common reporting rules was that certain activities carried out through platforms "may not always be visible to tax administrations or be self-reported by taxpayers", as "the development of the gig economy entails a shift from traditional work relations under employment contracts to the provision of services by individuals on an independent basis, which is not typically subject to third-party reporting".

The same difficulties that arise in the platform economy were acknowledged in the preamble of the Directive:

> "The cross-border dimension of services offered through the use of platform operators has created a complex environment where it can be challenging to enforce tax rules and ensure tax compliance. There is a lack of tax compliance and the value of unreported income is significant. Tax administrations of Member States have insufficient information to correctly assess and control gross income earned in their country from commercial activities performed with the intermediation of digital platforms. This is particularly problematic where the income or taxable amount flows via digital platforms established in another jurisdiction."[7]

To combat the loss of revenue from unreported income in the platform economy, DAC7, in line with previous initiatives in the field of administrative cooperation, built on common reporting rules and the automatic exchange of information. The "burden" of reporting the relevant income to the tax administrations falls on the so-called "platform operators", who are entities that contract with the (so-called) sellers to make available all or part of a platform to such sellers.[8] Sellers, in turn, are platform users, either individuals or entities, that are registered at any moment during the reportable period on the platform and carry out a relevant activity.[9] The "relevant activity" qualification is an important one, as in cases where the activity performed through the platform does not fall within the scope of

6 Communication from the Commission to the European Parliament and the Council COM (2020) 312 final of 15 July 2020, An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy.
7 DAC7 (fn. 4), Preamble, Recital 6.
8 DAC7 (fn. 4), Annex Sec. I, A (2).
9 DAC7 (fn. 4), Annex Sec. I, B (1).

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the Directive, the platform is not obliged to report. According to the definitions provided in DAC7, ""Relevant Activity" means an activity carried out for Consideration and being any of the following: (a) the rental of immovable property, including both residential and commercial property, as well as any other immovable property and parking spaces; (b) a Personal Service; (c) the sale of Goods[10]; (d) the rental of any mode of transport. The term "Relevant Activity" does not include an activity carried out by a Seller acting as an employee of the Platform Operator or a related Entity of the Platform Operator."[11] The aforementioned definition encompasses several terms that need further clarification and/or definition. Indeed, DAC7 provides for most of them, including what qualifies as "consideration",[12] as well as what is a "personal service".[13] While all activities that fall under the "relevant activity" scope constitute potential sources of income for the "sellers", the one that comes closer to a professional activity, in the sense of employment and/or a stable profession, is the "personal service". Such personal services could include IT services, data entry, copywriting and/or services that can be carried out physically offline, whereby the platform acts as a mere facilitator between the provider and the recipient (e.g. transportation, delivery, cleaning). As with the OECD MRDP, the main feature for qualifying as a "personal service" for DAC7 purposes is that the service is adapted or modified to some extent based on a specific request from a user.[14] Accordingly, other services provided through platforms, which are not, however, adapted to the users' requests (e.g. with pre-recorded digital

10 The inclusion of the sale of goods under the "relevant activity" largely expands the scope of the Directive as it brings more platform sellers into the scope of DAC7 (e.g. sellers on well-known platforms such as Amazon, e-Bay, Etsy, or even Facebook, which has its own marketplace).

11 DAC7 (fn. 4), Annex Sec. I, A (8). This last sentence has created ambiguity as to whether activities performed by a related entity of the platform operator may fall within the "relevant activity" ambit.

12 "Consideration" means compensation in any form, net of any fees, commissions or taxes withheld or charged by the reporting platform operator, that is paid or credited to a seller in connection with the relevant activity, the amount of which is known or reasonably knowable by the platform operator, DAC7 (fn. 4), Annex Sec. I, A (10).

13 "Personal Service" means a service involving time- or task-based work performed by one or more individuals, acting either independently or on behalf of an entity, and which is carried out at the request of a user, either online or physically offline after having been facilitated via a platform, DAC7 (fn. 4), Annex Sec. I, A (11).

14 See definition above (fn. 13) and OECD (2023), Model Reporting Rules for Digital Platforms: Frequently Asked Questions updated in January 2023, Sec. I, q. 11.

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content like online courses) fall outside the "personal service" scope and, thus, outside the scope of DAC7.

DAC7 is premised on the idea that the unreported revenue from the platform economy is due to the difficulties encountered by tax authorities in verifying the tax obligations of the "sellers". This task is now transferred to the "reportable platform" that is responsible for verifying the tax obligations of the sellers. Before the adoption of DAC7 some Member States would have in place unilateral reporting obligations, whereas others would not impose such obligations at all. In some Member States, platforms were even required to collect some types of taxes on behalf of the tax authorities (e.g. Italy, France). In the cases of a complete absence of reporting obligations, reporting would be left completely to the "good will" of the platform users ("sellers"). In addition, the different requirements across Member States often created an additional administrative burden for platform operators, as they had to comply with many national standards of reporting.[15] Therefore, it became essential not only to introduce a reporting obligation, but to do so in a standardised manner that would apply across the internal market. Considering that most of the income or taxable amounts of the sellers on digital platforms flow cross-border, the reporting was complemented by the automatic exchange of information between tax authorities of different Member States that were eligible for taxing the earned income. This way, the different tax authorities had the necessary information to enable them to assess income taxes and value added tax (VAT) due correctly.

2. Remaining Questions and Problems

The adoption of DAC7 is certainly a positive development as regards the taxation of the platform economy – which had previously been largely affected by the black economy and tax evasion. The Directive has not solved many of the existing problems that were identified in our last contribution. In this respect, DAC7 does not add anything to the work relationship conundrum – whether the service providers should qualify as employees or as contractors. This remains an issue for the Member States and is resolved on an ad hoc basis. The Directive is, instead, *income-based*. It aims to ensure that the income made by individuals or corporations through the platform economy – *for the platforms that qualify as reportable platforms*, is reported. It does not, however, aim to resolve how this income should

15 DAC7 (fn. 4), Preamble, Recital 7.

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be taxed, nor where should it be taxed or what type of income is produced (income from employment or other type of income). However, the Directive implicitly suggests that if the primary problem of the identification of potential taxpayers and their taxable income is resolved (through reporting and the automatic exchange of information), then the rest should follow.

Specifically, each reporting platform operator needs to report, with regard to each reportable seller that carries out the reportable activity, "the *total Consideration* paid or credited during each quarter of the Reportable Period and the number of Relevant Activities in respect of which it was paid or credited; [and] any fees, commissions or taxes withheld or charged by the Reporting Platform Operator during each quarter of the Reportable Period."[16] The reporting platform operator is also required to collect from the sellers and provide to the tax authorities more information, including a VAT registration number (if applicable), the Tax Identification Number (TIN), and, under certain conditions, a tax residency certificate. In collecting this information, the platform is obliged to carry out its due diligence obligations as described in the Directive. If a seller does not provide the information required in the Directive "after two reminders following the initial request by the Reporting Platform Operator, but not prior to the expiration of 60 days, the Reporting Platform Operator shall close the account of the Seller and prevent the Seller from re-registering on the Platform or withhold the payment of the Consideration to the Seller as long as the Seller does not provide the information requested."[17]

One problem that has been identified in the context of DAC7 is the possibility given to several "sellers" and "platforms" to fall outside the remit of DAC7, and thus escape the reporting obligations. Specifically, due to the registration requirement on the platform for sellers, it has been pointed out that if a business carries out activities in its own name directly via its own software, it will not qualify as a "seller" because it does not need to register on the platform for the purpose of being connected to users.[18] Similarly, the related party operating software may be considered a platform operator, since it does not contract with sellers.[19] The OECD has also clarified that

16 DAC7 (fn. 4), Annex Sec. III, B (2) (e) and (f).

17 DAC7 (fn. 4), Annex Sec. IV, A (2).

18 *Bravo, Nathalie*, The Meaning of Platform under DAC7: More Clarity Needed, Kluwer International Tax Blog (27 June 2023), https://kluwertaxblog.com/2023/06/27/the-meaning-of-platform-under-dac7-more-clarity-needed/#_ftnref14 (accessed on 1 September 2024).

19 Ibid.

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when the platform operator supplies the goods or services to the customers acting in its own name and on its own behalf, it is outside the scope of the reporting obligations.[20] Thus, in case the platform operator acts as an undisclosed agent, supplying goods or services in its own name and on behalf of the seller, the OECD clarifications suggest that such a case would fall outside the scope of the DAC7 reporting obligations. However, this approach largely ignores that the risk of tax avoidance with respect to the income realised by the seller would still exist, triggering the raison d'être of DAC7.[21]

Other problems that have arisen in the context of DAC7 relate to the visibility (on behalf of the platform) of the consideration paid to the seller. In many cases the business model of the platform allows the platform operator to have visibility over the consideration paid to the seller. However, this is not always the case and according to DAC7, there is no expectation that the platform operator puts in place additional procedures to gain access to information on the consideration where it is not otherwise known or reasonably knowable.[22] However, as Bravo notes, there are cases where the knowledge of the consideration (and its amount) is not always clear.[23] Such cases may include software that facilitates the digital (re)ordering of goods sold by well-established wholesalers to retailers. Its operator has knowledge of the number of items ordered and their regular prices, but not of the fulfilment of the orders, the issuing of invoices and the relevant payments, as all the payments are directly made to the wholesalers.[24]

3. Can Social Security Learn Anything from Taxation?

In the past 3 years, the focus of tax law has been on the taxation of *corporations* operating in the sphere of the digital economy. DAC7 has been a modest, yet important step towards combatting the platform shadow economy and facilitating the "workers" income declaration to the tax authorities

20 OECD Optional Module, OECD Model Rules.
21 *Persiani, Alessio*, DAC7: Some Thoughts on the Different Roles of Platform Operators and the Appropriate Definition of the Scope of Reporting Obligations, 4 EC Tax Review (2023), p. 163, 170.
22 See for the definition of "consideration" fn. 12.
23 *Bravo*, *Nathalie*, The Meaning of Platform under DAC7: More Clarity Needed (fn. 18).
24 Ibid.

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with the help of the platform. Accordingly, DAC7 contributes to fighting the phenomenon of undeclared work and the concomitant phenomenon of the evasion of taxes and social security contributions.[25] This development further contributes to the financing of social security schemes by providing adequate revenue to the Member States while also providing a framework that assists in fighting bogus self-employment.

However, most of the other problems that were pointed out in the last contribution[26] have not been resolved yet. Thus, the question remains whether social security can learn anything from taxation. By ensuring that the income that arises across different Member States and through different platforms is reported to the relevant tax authorities, DAC7 could prove to be a useful tool also for the purpose of calculating social security contributions, at least those that are (earned) income-related.

In addition, one could reasonably argue that since taxes and social security contributions are so alike, the administration and collection of social security contributions should be carried out by the respective tax authorities. As has been argued in the past, "[r]egardless of whether social security contributions are treated as taxes under the constitution and laws of a particular country, they are justifiably considered as taxes [...] because the contributions are imposed by legislation that involves the same issues as other tax legislation and that interacts with other tax laws, particularly the individual income tax law."[27]

One fundamental difference in the platform economy, however, is the cross-border flows that are somehow inherent to platform work. In this context, more than one state is usually involved; the worker/services provider may reside in a place other than the place where the service is "consumed".[28] At first sight, this is not a problem for taxation that allows different Member States (residence and source countries) to impose taxes on the income that arises, although sometimes double taxation may en-

25 *Mineva, Daniela/Stefanov, Ruslan*, Evasion of Taxes and Social Security Contributions. European Platform Undeclared Work. September 2018, https://www.ela.europa.eu/sites/default/files/2021-09/Evasion%20of%20Taxes%20and%20Social%20Security%20Contributions.pdf (accessed on 1 September 2024).

26 *Pantazatou*, *Katerina*, Taxation of the Platform Economy: Challenges and Lessons for Social Security (fn. 3).

27 *Williams, David*, Social Security Taxation in V. T. Thuronyi (ed.), Tax Law Design and Drafting, Vol. 1, IMF 1996, p. 347.

28 This problem appears much more in the case of digital nomads that may or may not necessarily use "intermediary" platforms to sell their services.

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sue.[29] However, this is/would be a problem for social security contributions that are supposed to be paid only in one Member State. In such a case, which state would be responsible for the imposition and collection of the social security contributions? It appears, thus, that the collection of social security contributions by tax authorities could work in cases where both the service and the provider are located in the same place. Despite the shortcomings of DAC7, especially those relating to the Directive's scope (covered platform operators and "relevant activity"), domestic tax authorities should have the relevant income information to, possibly, calculate and collect social security contributions (as long as those are based on earned income through work).

This certainly does not mean that the taxation and tax laws have solved all the problems that could arise in the context of working in the digital and/or platform economy. The OECD and the UN Model Tax Conventions that constitute the model rules upon which most double tax conventions (DTC) are based are not fit to allocate taxing rights in cases of digital work. This is because the relevant rules are (still) linked with the physical presence of the employee at the "workplace".[30] However, in cases of digital and/or platform work, it has become difficult to identify the "workplace", as "workers" are often not physically present in their employer's residence state nor do they perform activities related to businesses in the country where they are working remotely.[31] This situation may allow platform workers to escape taxation in several states (especially if they stay there for short periods) and may jeopardise other states' taxing rights. While the qualification of the "work status" (employee/services provider) is an additional problem to resolve, it is left primarily to national law to decide.

In this sense, EU and international tax law are certainly not yet mature enough to provide a solution to the multiple problems that arise. One first step in fighting undeclared work has been taken with the adoption of DAC7. However, tax law is based on bilateral agreements that allocate taxing rights in cross-border situations. The application of the right provision in these DTCs depends on the qualification of the work relationship, which is, in turn based on national law. The qualification of the "residence" of the

29 See *Pantazatou*, *Katerina*, Taxation of the Platform Economy: Challenges and Lessons for Social Security (fn. 3), p. 363, 378.

30 Ibid.

31 *Pignatari, Leonardo Thomaz*, The Taxation of "Digital Nomads" and the "3 Ws": Between Tax Challenges and Heavenly Beaches, Intertax 51 (2023) 5, p. 384, 392.

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"worker" is another difficult hurdle to surpass, especially in cases of digital nomads.

There are, of course, certain cases in which the tax legal framework will be able to identify the state that has the right to tax the income that arises from work in the platform economy. But this would apply to the few, uncomplicated cases, where the "worker" resides in one place for a relatively long period and exercises his work from there. In addition, this may be one of the many taxes workers in the platform economy would have to pay. They may have to pay taxes on income from employment (or the provision of independent services) in other states or even in the same state if their work in the platform economy has an ancillary character. Under these circumstances, it would be difficult for the tax authorities of one state to bear the burden of collecting social security contributions in the state where "taxes are paid", because as income may be obtained in more than one state, taxes may also be paid in multiple states. As long as the state taxes that income, it is not interested in the activity generating the income and whether it has an ancillary character or not, making it irrelevant (and very difficult) to identify the *one state* where the main activity is exercised in order to ensure that social security contributions are paid there.

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