

Some tax considerations regarding the collaborative economy

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Abstract

Within the framework of the digital economy, the collaborative economy is based upon the idea of sharing instead of possessing. It is a concept that has seen constant, unstoppable and rapid growth as it uses computer platforms to share and exchange products and services that, in turn, expand to provide an open and clear threat to traditional businesses. At the same time, the phenomenon provides many opportunities and a number of challenges that call for a response. That is why its activities need to be regulated at both national and international levels to safeguard the rights of all the players involved, whilst also ensuring compliance with their obligations, particularly in terms of taxes.

The tax treatment of the collaborative economy is a complex and by no means unified issue, depending as it does upon the specific type of initiative in question and also the operator(s) involved. Furthermore, it is a phenomenon that must, on occasions, be dealt with from an international tax standpoint, since a number of different national tax systems may come into play at once as transnational transactions may be involved. To this end, there is a pressing need to establish forms of cooperation between tax authorities in areas such as information and collection to ensure proper implementation of taxation systems.

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Keywords

collaborative economy, participatory consumption, platforms, regulation, taxation

Topic

taxation

Algunas consideraciones fiscales sobre la economía colaborativa

Resumen

La economía colaborativa, en el marco de la economía digital, está basada en la idea de compartir en vez de poseer. Es una realidad que aumenta de forma constante e imparable a una gran velocidad, pues utiliza plataformas electrónicas para compartir e intercambiar productos y servicios que, a su vez, se expanden en un abierto y claro desafío a las empresas tradicionales. Este fenómeno presenta, al mismo tiempo, muchas oportunidades, pero también ciertos retos a los que debe darse una adecuada respuesta. Por ello, es preciso que esta actividad sea objeto de regulación, tanto a nivel nacional como internacional, a los efectos de preservar los derechos de todos los agentes implicados en la misma, al tiempo que se garantiza el cumplimiento de sus obligaciones, en especial, las fiscales.

El tratamiento fiscal de la economía colaborativa es complejo y no es único, pues depende del concreto tipo de iniciativa de que se trate y también del operador implicado. Además, en muchas ocasiones es un fenómeno que debe ser analizado desde el punto de vista de la fiscalidad internacional, ya que entran en concurrencia distintos ordenamientos tributarios nacionales, al tratarse de operaciones transnacionales. A estos efectos, resulta imprescindible establecer vías de colaboración entre las plataformas y las administraciones tributarias en materia de información y recaudación que aseguren la correcta aplicación del sistema tributario.

Palabras clave

economía colaborativa, consumo participativo, plataformas, regulación, fiscalidad

Tema

fiscalidad

1. Introduction

Recent years have seen a paradigm shift marked by the growing phenomenon of what is called the “collaborative economy”, a technology-based form of consumption that enables access to certain goods and services on a sharing and efficient basis. This is quite an innovative system that has a significant impact upon both society and the economy and that affects, in particular, tourism-related sectors such as transport, accommodation and eating out. Furthermore, far from being a passing fad, it has already become rooted in our society, affecting the way we understand work,

property and commercial relations and changing habits in the provision of and access to goods and services.

In addition to the aforementioned innovation and importance of the collaborative economy, note should also be taken of its dynamism and complexity: all in all, it represents quite the challenge for both governments and traditional businesses, much like e-commerce did previously. So it is that there is a need for regulation of this activity, at both national and international levels (bearing in mind the origin of this activity and the characteristics of the operators taking part in it), to safeguard the rights of all the players involved whilst also

ensuring compliance with their obligations, particularly in terms of taxes. Spain boasts neither any systematic regulation of the matter nor any modification of associated sector-specific regulations. Nor has it introduced any tax measures directly aimed at encouraging this kind of business activity.¹

2. The impact of the collaborative economy and the importance of its taxation

2.1. The characteristics of the collaborative economy

Within the framework of the digital economy, the collaborative economy is based upon the idea of sharing instead of possessing. It is a concept that has seen constant, unstoppable and rapid growth as it uses computer platforms to share and exchange products and services that, in turn, expand to provide an open and clear threat to traditional businesses. In this new scenario, supply and demand do not refer simply to the possession of goods, but rather shared access to their enjoyment, characterised by the creation of lasting products suitable for intensive use (as they can be enjoyed either by a number of people or throughout the lifetime of the same consumer and user), in contrast to the rapid consumption and built-in obsolescence of products in the consumer society.²

Additionally, the collaborative economy might also be an alternative for finding a way out of the economic crisis as it has great job creation potential, whilst also representing a way of making the market economy more balanced and sustainable. In this context, as is also the case with services, products too are not only sold but also hired, redistributed and shared. This is why one hears of collaborative or participatory consumption, defined as the traditional way of sharing, exchanging, lending, hiring and giving away, redefined through technology and communities to make the service more efficient and scalable.

There is a wide range of very different initiatives within the collaborative economy: those based not on the acquisition of products but rather their use for a certain period of time; redistribution markets that redistribute used goods or sell them at below market price; and collaborative lifestyles involving people with shared interests coming together to share and exchange less tangible assets, such as time and space.³

2.2. The players involved

Three different players can be distinguished within the collaborative economy: service providers, intermediaries and users. Service providers share assets, resources and time via the Internet or mobile apps. They can come in the form of private individuals offering services from time to time, either paid or free of charge, or professional service providers.

For their part, intermediaries bring providers and users together, facilitating transactions between them, again on a paid or free basis. Connections are made using an online (collaborative) platform, via the Internet or a mobile app. With regard to users, it should be noted that they can occasionally be both producers and consumers.⁴

2.3. Opportunities and risks

Aware of the potential of the collaborative economy but also of the questions it raises, the European Economic and Social Committee issued an opinion on the matter in 2014 entitled "Collaborative or participatory consumption, a sustainable model for the 21st century" (2014/C 177/01). In it, the Committee notes that it "represents an innovative complement to a production economy in the form of a use-based economy offering economic, social and environmental benefits. It also offers a way out of the economic and financial crisis, by enabling people to exchange things for others that they need". And accordingly that "it could also represent an opportunity to get back on track towards sustainable economic, social and human development in an environmentally-friendly way". This Opinion is in line with the Europe 2020 strategy, which proposes consumption of goods and services in line with smart, sustainable and

1. The only measure passed was Law 5/2015, of 27 April, promoting business financing, which provides for crowdfunding.
2. Sustainable consumption was recognised by the United Nations in 1999 as a basic consumer right.
3. According to Cañigueral (2014, pp. 33-37), collaborative lifestyles can be broken down into four main categories: collaborative consumption, the maker movement and peer production, participatory budgeting and distributed capital and open knowledge.
4. In this context, the term "prosumer" is used to refer to this dual producer-consumer role.

inclusive growth and that impacts job creation, productivity and economic, social and territorial cohesion.⁵

The Opinion highlights how “excesses of hyper-consumption have helped produce an inequality gap between producing and consuming regions, where social exclusion and obesity, and waste and deprivation, exist unhappily side by side. Collaborative or participatory consumption can offer an additional market tool for kick-starting and regenerating the single market, cleaning it up and making it more balanced and sustainable, provided that it has fixed structures” and how “the concept of collaborative or participatory consumption also provides an opportunity for the most vulnerable groups, especially families experiencing financial hardship or who may have been excluded from the traditional credit channels for purchasing the goods they need, given the current social climate. It is also an option, however, for those who are able to access the goods and services market in the normal way, but who consciously choose not to do so, out of commitment to their personal values”.

Despite the potential of the collaborative economy, it also raises numerous challenges and its complexity calls for trust, national and international regulation and the oversight of the sector's practices to safeguard the rights and obligations of all the players involved. Alongside this regulation, there is also a need to identify when the collaborative economy covers social needs and when it constitutes a business activity. Thus, when dealing with a for-profit activity, regulation should, as has been noted, be aimed at “making operators responsible for compliance with regulations on safety, advertising, patents and trademarks, consumer protection, competition law and... tax regulations”.⁶

To this end, the Committee concludes that the Commission must tackle the issue since “given the complexity and importance of the emergence of collaborative or

participatory consumption, the relevant institutions need, on the basis of the necessary studies, to regulate the practices carried out within these forms of consumption, in order to establish the rights and responsibilities of all the stakeholders involved. Firstly, collaborative or participatory consumption can meet social needs in situations where there is no commercial interest and, secondly, it can help, as a for-profit activity, to create jobs, while complying with the rules on taxation, safety, liability, consumer protection and other essential rules”.⁷

Reflecting this recommendation, two years later, on 2 June 2016, the European Commission, in its Communication “A European agenda for the collaborative economy” (COM/2016/0356 final), highlighted the role of the collaborative economy as a source of income. To do this, the Commission provides guidelines on how current European Union legislation should be applied to the sector. It also clarifies the key questions faced by authorities and market operators alike: the type of market access requirements that can be established; criteria for determining responsibility should problems arise; measures for the protection of users; criteria for determining the existence of an employment relationship; and applicable taxation. Indeed, taxation constitutes one of the main challenges in the development of the collaborative economy in every respect.

With regard to this latter issue, the Commission notes that “like all economic operators, those in the collaborative economy are also subject to taxation rules” and encourages Member States to continue their simplification efforts, increasing transparency and clarifying the application of tax rules to the collaborative economy, indicating that collaborative platforms should proactively cooperate with national tax authorities in recording economic activities and facilitate tax collection. It also identifies key tax compliance-related issues, including “difficulties

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5. Other EU strategies directly or indirectly affecting collaborative consumption are the Communication “on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan”, the European Social Innovation Initiative and the Digital Agenda for Europe.
 6. Ruiz Garijo (2017, p. 56).
 7. To this end, the Committee suggests to the Commission the following lines of action: as a first step, the basic rights and principles already enshrined in EU law to protect the public should be compiled. Next, the relevant studies need to be drawn up to identify any potential barriers to the operation of these activities and any problems that would need to be solved, emphasising the European added value of adopting a measure with European scope. Sufficient financial resources would have to be allocated to this. A database containing exchanges of experiences and best practices in collaborative or participatory consumption should also be set up and made accessible to all consumers. Awareness-raising and information campaigns on collaborative or participative consumption could also be organised. Lastly, it should endeavour to harmonise legislation on cross-border issues and those bringing European added value to the matter.

in identifying the taxpayers and the taxable income, lack of information on service providers, aggressive corporate tax planning exacerbated in the digital sector, differences in tax practices across the EU and insufficient exchange of information". To do this, the Commission holds that Member States "should apply functionally similar tax obligations to businesses providing comparable services. Raising awareness on tax obligations, making tax administrators aware of collaborative business models, issuing guidance, and increasing transparency through online information can all be tools for unlocking the potential of the collaborative economy".

3. Some considerations from a tax viewpoint

The tax treatment of the collaborative economy is a complex and multifaceted issue, depending as it does on the type of initiative in question (transport, accommodation, financing, philanthropy, etc.) and also the operator involved (platform, user or service provider). Additionally, it is frequently a phenomenon that should be analysed from an international taxation standpoint given that it can involve transnational transactions.

Generally speaking, operating a collaborative platform entails an arrangement of material and human resources regarded as an economic activity if performed with the aim of becoming involved in the production or distribution of goods or services. Businesses doing this must be taxed like any other when they charge a commission on or obtain earnings from services provided under value added tax or corporate income tax (if a legal entity) or personal income tax (if an individual). The problem in such cases is one of delocalisation as the platforms in question may have no physical presence in their users' countries.

Additionally, the platforms can act as potential partners with

the tax authorities as they record economic activities. This cooperation may, for example, include the establishment of duties to provide specific information, to make withholdings or the establishment of a case of tax liability.⁸

There are doubts as to the precise nature of the activity carried out by those providing services or offering goods for consideration via collaborative platforms, as the issue to be clarified is whether the earnings obtained and the services provided fall within the scope of a business or professional activity or not for the purposes of income tax and value added tax. It is difficult to regard individuals involved in this collaborative economy as being businesspersons or professionals subject to the two taxes.⁹

In any case, three types of significant problems can be identified with regard to the taxation of the collaborative economy. The first is associated with uncertainty about the applicable regulations, giving rise to issues with compliance with the various tax obligations. To avoid this, it is important to review applicable regulations to create equitable competition conditions for businesses providing the same services and to bolster tax information actions regarding the sector. Furthermore, applicable taxation should not discourage participation in this economic activity as this participation by private individuals is sometimes sporadic in nature and, additionally, any profits arising are tiny or non-existent.

A second block of problems to be resolved is associated with classification. Firstly, the facts revealing the economic capacities of each of the possible manifestations of the collaborative economy must be identified, taking into account the principles of equal treatment and neutrality in taxation.¹⁰ As one author has noted, this "will require them to be subject to proper and proportional tax treatment that prevents, on the one hand, being labelled as such thereby facilitating evasion of the tax charge on business transactions, earnings of different types and consumption that do not significantly differ from those taking place in the traditional market for goods and services, but also, on

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8. In this regard, Ruiz Garijo argues that a new case of joint tax liability could be established, allowing either the platform or the business or individual providing the service through it to be targeted. Ruiz Garijo, *op. cit.*, p. 70.
 9. Nevertheless, in the property rental sector and for VAT purposes, the landlord is in principle subject to the tax. However, in general letting housing, including garages and ancillary structures and any furniture jointly let with it, is VAT-exempt in Spain (Art. 20. One. 23 of Law 37/1992, on VAT).
 10. The Communication "A European agenda for the collaborative economy", advocates the idea of a level playing field to inspire taxation in this sector to ensure that tax regulations do not give rise to distortions in competition.

the other, undue penalisation of innovative experiences that are essentially cooperative or even charitable in nature, in which no significant economic gains arise or which create positive externalities meriting incentivising tax treatment".¹¹

Additionally, operators taking part in the collaborative economy do not represent an easy fit with some tax concepts as they may simultaneously act as service providers and users, on a for-profit or non-profit basis, habitually or otherwise. This is the case with the concepts of businessperson and professional for the purposes of classifying and quantifying earnings in the taxation of income and for the purposes of distinguishing between civil and trading legal relations in the taxation of consumption.

Lastly, the third category of problems is due to the existence of numerous platforms operating on a transnational level and the vast range of acts and dealings with a tax impact arising in the collaborative economy. This makes oversight by the tax authorities difficult which may lead to situations of tax fraud, even though the potential of the use of the platforms' technology and the intermediary role they play provide opportunities for greater oversight and simpler compliance with any possible tax obligations. Furthermore, it should not be forgotten that technology, in fact, improves the traceability of transactions. To this end, it is essential to establish forms of cooperation between the platforms and the tax authorities in terms of information and collection to ensure proper application of the taxation system.

In particular, in Spain, a specific obligation of this type has been established for the purpose of preventing tax fraud in Article 54 ter of the General Regulations on tax management and inspection actions, introduced by the amendment created by Royal Decree 1070/2017, of 29 December. This new obligation to provide regular information affects people and undertakings, in particular collaborative platforms, playing an intermediary role in the assignment of the use of housing for tourism purposes and entails the identification of the

assignor and assignee of the use of such housing in Spain.

Nevertheless, as noted above, it is important to combine measures in the fight against tax fraud with preventive ones (such as enhancing the information on the tax obligations of collaborative service users and providers). Furthermore, a balance should be sought between measures against tax fraud and efficient tax administration when dealing with instances of negligible or non-existent wealth.

4. The OECD's and European Union's positions on the taxation of the digital economy

Aware of the widespread perception that the majority of businesses in the digital economy make profits without paying taxes in the place in which they arise, both the Organisation for Economic Co-operation and Development (OECD) and the European Union have addressed the issue and adopted a series of measures.

4.1. The Organisation for Economic Co-operation and Development

Based on some preliminary works on permanent establishments, since 2013 and in partnership with the G20, the OECD has been promoting the BEPS (Base Erosion and Profit Shifting) project, given that the erosion of tax bases and profit shifting is a worldwide problem calling for global solutions.¹² The BEPS action plan, published in October 2015, contains measures for improving the coherence of international tax standards, boosting their focus on the economic substance and guaranteeing a more transparent tax environment.¹³ These entail changes with regard to bilateral tax treaties, including a minimum standard to prevent treaty shopping; revisions to the transfer pricing rules, which determine the tax treatment of intra-group

11. Montesinos Oltra (2016, p. 47).

12. BEPS refers to tax base erosion and profit shifting encouraged by the existence of undesired gaps or mismatches between different national tax systems that can be exploited by multinationals to make profits disappear for tax purposes or to shift profits to locations where there is little or no real activity.

13. The 15 actions envisaged in the BEPS project are: Action 1: addressing the tax challenges of the digital economy. Action 2: neutralising the effects of hybrid mismatch arrangements. Action 3: designing effective controlled foreign company (CFC) rules. Action 4: limiting base erosion involving interest deductions and other financial payments. Action 5: countering harmful tax practices more effectively, taking into account transparency and substance. Action 6: preventing the granting of treaty benefits in inappropriate circumstances. Action 7:

transactions, to focus on the substance of the transactions rather than their legal form; and an update of the framework for evaluating the potential harmful effects of preferential regimes introduced by governments, with a specific focus on patent boxes and tax rulings.

Action 1 focuses on the digital economy, although it has not given rise to any satisfactory outcomes to date. Even though the report on Action 1 posits a series of measures, it does not recommend any of them as it awaits the results of the other BEPS project actions, and undertakes to issue another report in 2020.

In this final report, *Addressing the Tax Challenges of the Digital Economy, Action 1*, of October 2015, the OECD notes the need to respond to the consequences of digitalisation with regard to the notion of the permanent establishment, accepting the idea of the “significant economic presence” or by means of the creation of innovative forms of taxation by way of new types of withholding tax or taxes on certain types of transactions to offset the lower tax collected from businesses involved in the digital economy.

In March 2018, the OECD published an interim report, *Tax Challenges Arising from Digitalisation*, in light of the imminent approval by the Commission of a package of measures in this field. In this report, although it still fails to recommend any measures and acknowledges that there is no agreement in this regard between States, the OECD analyses the pros and cons of the different possible measures with indications of what they should be like if a State decides to implement them and additionally takes a positive view of the changes taking place in businesses in the digital economy arising from the adoption of the remaining BEPS actions.

4.2. The European Union

For its part, on 21 September 2017 the European Commission published its Communication on a Fair and Efficient Tax System in the European Union for the Digital Single Market in connection with the adoption of the full VAT package in the same year.

More recently, on 21 March 2018, the European Commission approved a raft of measures on the taxation of the digital economy: a Communication to the European Parliament and the Council; a proposal for a Directive on the virtual permanent establishment, which the Commission regards as an integrated long-term solution; and a proposal for a Directive on a tax on certain digital services, the so-called “Google tax”, which the Commission sees as an interim solution to rapidly tackle the issue.¹⁴

In the Communication, entitled “Time to establish a modern, fair and efficient taxation standard for the digital economy”, the Commission notes the challenges in adapting existing corporate taxation rules to the current state of play and acknowledges the need for a new tax framework that is up-to-date with digital business models. It concludes that there is a need for an international solution to the challenges of taxing the digital economy, a solution that represents a challenge due to the complex nature of the problem and the wide variety of issues that need to be addressed.

Likewise, the proposal for a Directive on the virtual permanent establishment will be applicable to all taxpayers subject to corporate taxation in one or more Member States and to entities resident in third countries.¹⁵ This proposal establishes both the rules for determining the existence of a virtual permanent establishment as the consequence of a “significant digital presence” and also the rules for attributing profits to it.

For these purposes, a permanent establishment as a

preventing the artificial avoidance of permanent establishment status. Actions 8 to 10: aligning transfer pricing outcomes with value creation. Action 11: establishing methodologies to collect and analyse data on BEPS and the actions to address it. Action 12: mandatory disclosure rules for aggressive tax planning schemes. Action 13: revised guidance on transfer pricing documentation. Action 14: making dispute resolution mechanisms more effective (amicable procedures). Action 15: development of a multilateral instrument to streamline the implementation of measures.

14. The Commission's wish is for both Directives to come into force on 1 January 2020.

15. Unless the entity is resident for tax purposes in a third country that has a convention for the avoidance of double taxation with the Member State in which there is a significant digital presence. In such a case, the proposal recommends that Member States modify their conventions to include this virtual permanent establishment. This means that, in practice, the implementation of this future Directive will be limited as it will be difficult to amend conventions with some countries such as the United States.

consequence of a significant digital presence will be considered to exist if one or more of the following criteria are met: if the proportion of total revenues obtained in a tax period and resulting from the supply of digital services to users located in a Member State in that tax period exceeds €7,000,000; if the number of users of one or more of these digital services who are located in the Member State in that tax period exceeds 100,000; and if the number of business contracts for the supply of any such digital service that are concluded in that tax period by users located in that Member State exceeds 3,000.

As for the criteria for attributing profits to this permanent establishment, functional analysis must be performed. Here the economically significant activities carried out by the significant digital presence through a digital interface include, inter alia, the following activities: the collection, storage, processing, analysis, deployment and sale of user-level data; the collection, storage, processing and display of user-generated content; the sale of online advertising space; and the supply of any digital service not listed above.¹⁶

Finally, the proposal for a Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services aims to establish an interim tax on digital services at a rate of 3% on gross revenues (sales) obtained in the EU from a series of activities whose common denominator is the creation of value through the interaction of users on the Internet. Accordingly, it is not the profit obtained by such businesses that is taxed but rather their sales. These activities are, in particular,

the following: online advertising; making websites available (multi-sided digital interfaces) to users which allow users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users; and the transmission of data collected about users which has been generated from such users' digital activities.

Taxable persons will be entities with worldwide revenues of more than €750 million and taxable revenues within the EU of more than €50 million, irrespective of whether they are established in a Member State or in a third-party jurisdiction. In this respect, rules are established about the place of taxation based on the location of the users of the taxable service (location of the device or tax residence, depending upon the case). Additionally, for the purpose of dealing with possible cases of double taxation when revenues are simultaneously subject to this new taxation and corporate taxation and to prevent the tax charged from being passed on to end users, Member States must allow businesses to deduct the new tax as a cost from their corporate income tax base. The tax will fall due annually, and the idea is for its management to be simplified by using a self-declaration system with the cooperation of Member States and a one-stop-shop system allowing businesses to manage and pay the tax in a single Member State.

Given that both proposals for directives would, if applicable, have to be adopted unanimously and bearing in mind their object, their approval would not seem easily achievable, particularly bearing in mind the OECD's unsuccessful ventures with regard to the digital permanent establishment.

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16. In determining the profits attributable to the permanent establishment, the profit split method will be used unless the taxpayer proves that an alternative method is more appropriate, having regard to the results of the functional analysis.

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