



April 13, 2020

The Inclusive Framework
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Dear Sir or Madam,

USCIB appreciates the opportunity to comment on the Public Consultation Document: Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy (hereinafter the consultation document).

General Comments

USCIB supports the view that because platform operators are operating in a global economy and inconsistent domestic rules may lead to increased costs and harmful barriers to the development of their business, model rules for reporting with respect to sellers in the sharing or gig economy could be very helpful. If designed well, such an approach can avoid the need for more onerous and disproportionate measures on platform operators.

USCIB cautions, however, that the model rules need to be carefully considered and take into account the unique features of the sharing and gig economy. It is extremely important that any model recommend appropriate lead time. If the rules are implemented as currently designed it will likely take 18 to 24 months to design systems and onboard data, as from the point at which clear legislation and guidance is available (including technical specifications) – such lead-time could be reduced if the requirements to determine tax residence and verify personal data are simplified in line with comments below. Because platform operators do not have face-to-face contact with their sellers it is much more difficult to collect the information necessary to perform due diligence. This is especially true for existing sellers.

The OECD should also keep in mind that these rules will be implemented with software and that software does not exercise judgment. That is, when the software is designed yes/no questions will be designed and results will flow from the answers to those questions. Thus, standards such as “reason to know” must have defined terms and cannot be open-ended. Generally, platform operators need to be able to rely on the information that is provided to them by sellers so countries considering imposing requirements on platform operators need to support these requirements with consistent requirements on local sellers to provide the platform operators with the required information to enable them to report.

The OECD should only require information that is necessary for accurate reporting and should stick to the minimum data required to achieve the policy objectives. Each additional piece of information that is required will cause some sellers to drop off the platform. They may then seek out less compliant platforms or other options to avoid having to provide this information. Thus, excessive information may have a negative effect on compliance.

The OECD should also consider the impact of privacy rules on platform operators’ ability to request, share and retain information. To the extent that these rules would require platform operators to request, share and retain information that they might be required to delete under privacy rules, the model rules should ensure that appropriate exceptions to privacy rules are adopted to permit compliance with the reporting

rules. The same principle would apply to any provisions within the Model Code of Conduct requiring sharing of data.

Whatever guidance is ultimately adopted, the OECD should encourage countries to stick to the model. Even small deviations when multiplied over many jurisdictions can significantly reduce the effectiveness of the model rules and can further hamper levels of compliance. What steps can the OECD take to avoid another Standard Audit File for Tax type experience?

The OECD should also ensure that reporting frameworks are as consistent as possible for both direct and indirect tax in order to reduce burdens on businesses, and we would expect that Working Parties 9 and 10 are working together to ensure this. As such, the best practice design principles for data-sharing that have already been developed by WP9 (and which are currently being reconsidered in the context of the sharing and gig economy) should be respected in the ultimate design.

Finally, the time for commenting is too short. This is an entirely new system that needs to be properly vetted. USCIB hopes that there will be additional opportunities for comment or consultation as these rules are developed.

Specific Comments

Objectives and driving factors

As pointed out above, standardization is extremely important. While USCIB recognizes that the OECD guidance is “soft law”, the OECD should take whatever steps it can to encourage standardization.

USCIB supports the proposal to have the platform operator report only to its home jurisdiction, similar to the country-by-country reporting regime. This would minimize the burden on the platforms and allow them to deal with a tax administration that they are already familiar with.

USCIB generally supports allowing business to confirm the identity and tax residency of the seller through government verification services. However, these systems need to be robust. They need to maintain accurate information and they need to be accessible and support high levels of access. Platform operators may need to check information on many sellers simultaneously, the systems cannot routinely crash because they are overloaded. Not only should the system be robust, but it should also allow platforms to verify information on a real-time basis. This is especially important for self-serve sign-on platforms where sellers are ready to sell immediately after onboarding. Real-time verification ensures “clean” data capture at the time of seller onboarding. Off-line post-onboarding verification creates operational complexity and disruption that would impose strain on the platform’s seller support operations.

The consultation document suggests that the model rules might be expanded beyond their proposed initial scope. While USCIB believes building on existing systems can be simpler and encourage compliance, we caution that the new model rules must be implemented and tested before the OECD considers expansion. Furthermore, we are aware that some jurisdictions may already be considering expanding the scope of the rules in their domestic implementation – where there is a policy need to do this, jurisdictions should be guided to mirror the OECD standard as far as possible.

Scope of Platform Operators and delegation mechanism

USCIB supports the inclusion of a delegation mechanism in order to ensure maximum flexibility for platform operators to determine how to report in a manner that works best for their individual circumstances. In particular there should be an option for 'group filing' whereby one designated entity within a consolidated group may file on behalf of all other group companies that may be operating relevant platforms. However, in order to improve certainty, we would suggest creating a default rule, which could be rebutted – this could limit the risk of duplicate or non-reporting, and aid enforcement. It would be difficult to ensure that each jurisdiction is a reportable jurisdiction – this may also change as sellers are added or subtracted from the platform. It is not clear what other mechanism would work better. With respect to jurisdictions that do not have a reporting relationship with the home country, perhaps the designated entity could enter into agreements with those local jurisdictions that would permit direct reporting. This might require some agreement with sellers that would permit that information to be exchanged.

Once the delegation is memorialized via commercial terms, all information reporting and compliance obligations, including audit defense, should sit with the party to whom the obligations have been delegated. Revenue authorities should not seek further action from the other platform operator besides proof the platform obligations have been delegated to another party.

USCIB recommends against reporting exemptions for start-ups in order to ensure a reasonably level playing field. Further allowing start-ups exemptions may increase the difficulty of complying once the start-up exemption is past. If exclusions are adopted, they should be carefully considered and take into account the fact that some platforms may only have a handful of active users in multiple jurisdictions, in which case it would be disproportionate to set up collection and verification procedures (which are likely to differ by jurisdiction). In other words, any exclusion would be most effective if it includes a threshold for a minimum number of active users and a minimum dollar threshold per Reportable Jurisdiction.

In general, additional clarity is needed on the definition of sharing economy and business models in scope. The rules appear to include B2C and C2C platforms, but it is generally unclear which types of B2B services are expected to be caught by the rules and in which sectors, so additional guidance should be provided here. Such guidance should also address how to deal with scenarios where the seller known to the platform is an agent or 'personal service company' with multiple sellers engaged below him (whereby the platform can only reasonably know the identity of the agent or PSC).

More guidance and examples should also be provided for on how to determine the Reportable Platform Operator, specifically for the travel sector. In the accommodation sector multiple platforms and Sellers can be identified with respect to one Property Listing/Relevant Service. There can be (integrated) property managers, GDS (Global Distribution Systems), and connectivity providers in between and accommodations can be offered on multiple platforms (without the Seller being aware of it).

Relevant Services

The definition of relevant services needs to be clearer. In particular, personal services needs more definition and examples within the guidance. It is not clear what significant infrastructure means. If, for example, medical professionals are found online, would the medical equipment be significant infrastructure to take them out of the definition of relevant services. Legal services? It is not clear that

legal services would require more infrastructure than manual labor. Travel companies often also offer activities at the destination like admission to a museum/attraction with a guided tour, dinner cruise, helicopter ride, (multi) day trips, wine tour, rafting etc. Do these services qualify as Personal Service?

More guidance should be provided to the reporting platform operator on

- How to identify the multiple components of a supply;
- How to split the consideration if it relates to multiple supplies offered for one price
- How to determine which component is considered as ancillary and which as principle component.

Example: Admission to an attraction + guided tour

It may be very difficult for the platform operator to distinguish the “services” portion of a transaction from the “goods” portion of the transaction.

In the VAT/GST legislation there are principles and guidelines developed on the above points. We suggest considering inclusion of these guidelines in the Model Rules.

We also suggest setting out a number of principles which can be applied to determine which models are excluded e.g.

- i) Any services provided by individuals or businesses directly to the platform itself, even if the allocation of opportunities to provide services is supported by an application or other ‘platform technology’ provided by the platform (or an associated entity) for that purpose; and
- ii) Marketplace scenarios which do not involve the supply of Relevant Services e.g. marketplaces for software licenses, resale of blocks of spare capacity in the cloud/on servers, supplies of goods.

Further guidance is also required on how businesses are expected to differentiate between individuals and business Sellers. The reporting obligation should be the same irrespective of whether the seller is a business vs individual. The OECD should consider removing the requirement to differentiate a seller between a business vs individual as the seller’s TIN should provide the respective revenue authority with the necessary information to identify the status of the seller.

Consideration

There should be a consistent and clear approach for both direct and indirect tax purposes with respect to how to determine the value and timing of the consideration that has to be reported. This refers to the taxable base and time of supply which can be different for direct and indirect tax purposes.

Is it considered as “reasonably knowable” if the Consideration is displayed on the website of the Reportable Platform Operator? There are instances whereby the bookings on the Platform are run through the system of a third party. Meaning that the Reportable Platform Operator may not have the required data in its system although the consideration is displayed on the website.

Excluded Sellers

Exclusion of large hotel operators

There should be an exclusion for hotel operators, but the proposed exclusion is not broad enough. Some chains do not own the hotels, but rather license the hotel name to a franchisee. For those chains, the 2000 room rental level may be too high. The franchisee may own one mid-sized property that would not meet the 2000 room requirement. Perhaps hotels could be distinguished by whether they have personnel on the premises on a daily basis to perform typical functions (check-in, cleaning, providing restaurant services), rather than on the basis of total rooms or a combination of total rooms plus other services that indicate the premises are a hotel rather than another type of accommodation.

In addition, it is not clear how to determine the 2000 Relevant Services per year. If one booking covers 14 nights, is this considered as 1 Relevant Service or 14 Relevant Services?

It will create an additional burden for the Reportable Platform Operator to assess the number of Relevant Services per year. This approach can be misleading if the hotel is active on multiple platforms.

To distinguish between Sellers in the sharing and gig economy and large hotel operators, the OECD should consider the number of units/rooms/apartments in a Property Listing per Reportable Seller (e.g. > 20 units).

Exclusion of large businesses

USCIB supports the exclusion for publicly related entities and entities related to the publicly treated entities, although it should be made optional. If platform operators opt to exclude these entities, it would be necessary to allow them to rely on the representations of the sellers as to this status. Platform operators might choose to report sales of Excluded Sellers to simplify the reporting process. Once a platform is obligated to report in the country, it is administratively easier to report transactions for all sellers instead of performing additional analysis to exclude certain sellers.

The OECD should consider excluding large non-publicly traded Sellers. The size of the business can be determined by the (worldwide) revenue of the Seller or the group in which the Seller belongs to. A revenue threshold criterion in addition to the above criteria can be considered. However, this information is not easily accessible by third parties. The jurisdictions should develop a mechanism to make the Reportable Platform Operators able to identify those Sellers in order to exclude these Sellers.

Local Services

USCIB believes that the local services rules maybe operationally impossible to implement. The platform operator may not have the information on the jurisdiction in which the services are performed.

Due Diligence Procedures

Standard of knowledge: USCIB has some comments on particular standards below, however, the most important point is that these standards must be implemented through the use of check lists built into software that can apply automatically. Therefore, it is essential that standards be objective and clear, not subject to subjective tests. “Reason to know” must have defined parameters and reflect the principle that businesses should only be required to take reasonable steps to identify where information is incorrect.

If the platform operator accepts information that does not violate any identified “reason to know” standard, then there should be no penalties on the platform operator if the information is later discovered

to be inaccurate. Once a platform operator discovers the information is inaccurate, then the platform operator should take steps (e.g., stop seller payout) until the seller provides correct information.

The cases set out on page 31 are not objectionable as to the existence of information that contradicts prior information, but there must be a defined set of criteria. Safe harbors are also required to limit liability for businesses acting in good faith.

Collection of Seller Information: As mentioned in the general comments section of this comment letter, countries must ensure that companies can comply with both these data collection rules and data privacy rules, e.g. the EU's GDPR.

Platforms should collect TINs; this is the most reliable piece of information and allows matching against the revenue authorities' records. If a TIN is available, the date of birth should not be required, as the government will already have this information associated with TIN. The purpose of collecting the seller's date of birth is not clear and this information may be information the seller does not wish to share, which may cause the seller to opt out of the platform. The date of birth might be a secondary piece of information, if the jurisdiction does not assign TINs or if the seller does not have a TIN, but if the TIN is the most reliable, the platform operator should not be required to collect the date of birth if a TIN is available.

In general, it would be highly burdensome and impracticable for platform operators to identify the holder of a financial account to which funds are paid, to the extent that this is different from the seller.

The OECD should consider how the need to collect data by 31 December will work for sellers who newly onboard the platform during the course of the year, especially in the later months, in light of the need to ensure a reasonable time period is allowed for collection. Stop payouts to sellers should be a last resort and a reasonable lead-time (minimum 90 days) would be required before platforms should take such action, also taking into account a reasonable revenue threshold for the seller (which would also align with the approach taken for other regulatory due diligence obligations). Platforms should have flexibility as to the process for obtaining seller information.

Verification of Seller Information: Platform operators need to be able to rely on information provided by sellers without onerous verification requirements. Although USCIB appreciates the desire to provide platform operators with flexibility, it is also important to have certainty. At a minimum, there should be a list of acceptable documents. Verifying this information would also require platform operators to collect and store sensitive information that might be inconsistent with privacy requirements. As a bare minimum any requirement to verify information must be supported by a suitable government verification service with real-time and bulk-check verification capability.

Determination of jurisdiction(s) of tax residence of Seller: Platform operators could determine a seller's residence based on the seller's address or TIN. The second option, determining tax residence based on substantially all local services being provided within a jurisdiction is more problematic. If the platform operator does not have the underlying information on where services are performed it might be impossible to apply this test. Also, the rolling nature of the 183-day period would require complex calculations to determine whether the test is satisfied. Further, even if the test could be performed accurately, it might be misleading as the seller may operate on multiple platforms – so looking at one platform might give a different impression of substantially all vs. looking at all the platforms.

The seller may also affirm its tax residence and the platform operator may rely on that if there is also a certificate of tax residence issued within the last 12 months. Certificates of tax residence are not always easy to obtain and requiring essentially continuous renewal is too burdensome, especially since the primary rule is the primary address of the seller, a much less onerous standard.

As the model rules seem to envisage reporting of multiple possible tax residences (based on the TIN[s], the local services test, government verification and seller affirmation), there is a concern that sellers may be issued with unexpected and unwarranted demands for underpayment. In this respect, it is also unclear whether a positive affirmation from a Seller as to their tax residence removes any need to report alternative tax residences that may be indicated and, if so, what the standard of knowledge is.

Time and Manner of Reporting

USCIB supports the rule requiring reporting necessary information to be reported in the fiat currency in which it was paid or credited, thus platform operators would not be responsible for complying with local law currency conversion rules.

OECD should provide additional guidance on how to quantify the number of services provided e.g. for delivery drivers it is the number of delivery-runs, for tradesmen it is one appointment etc.

The OECD should consider allowing jurisdictions to align reporting calendars with local tax years, not all of which are set by calendar year. Beyond this, it will only be possible for multi-national businesses to manage simultaneous reporting obligations in multiple countries on 31 January if the framework is truly standardised and this is respected by any implementing jurisdictions. The January 31st deadline is also challenging because companies may be closing their books for financial reporting purposes. A later deadline would be more reasonable. Especially in the first year due to:

- Large data to be verified and checked (with multiple data elements);
- Uncertainty on how to apply the rules in some instances;
- Unfamiliarity with the new processes;
- Technical problems can be expected with the uploading and transmission of the data.

The IRS requires the filing of a 1099-K for certain sharing and gig economy transactions. The 1099-K is based on reporting of gross payments. In practice, IRS 1099-K gross payments creates a lot of friction with sellers because it puts the burden on the seller to prove to the IRS which amounts should be excluded from taxable income. On the other hand, IRS 1099-MISC net payments creates less friction with sellers since they can tie the amounts reported to the cash received in their bank account. 1099-MISC reporting of net payments would align with paragraph A.27 of the consultation document.

The rules do not require reporting on financial accounts, which is appropriate, since doing so might be difficult depending on the pay system that the platform uses. In addition, financial account details are stored separately from other data elements for data security reasons – any reporting framework which requires these details to be reported together creates data security challenges and is highly burdensome to operate securely. Financial account details may also be subject to professional secrecy legislation in certain countries. If the OECD were to adopt such a system then reporting of the third party platform pay system should be sufficient.

The security of seller data is paramount, especially where there is a requirement to submit sensitive data that may be subject to privacy laws. It is fundamentally important that jurisdictions implementing the model rules create secure transmission processes, in order to uphold the integrity of the seller data.

Secondary Mechanism

If local registration is required in order to report via the secondary mechanism, this is likely to create significant burdens for foreign businesses, which may drive down compliance. As such, guidance should be provided to jurisdictions going down this path to consider a simplified registration process that does not bring about any additional tax obligations.

The framework for the secondary mechanism suggests that joint & several liability (JSL) rules be considered to aid enforcement, with any liability being removed where the platform operator complies. While we support the use of enforcement measures to ensure a level playing field where the secondary mechanism is invoked, we have concerns that such a JSL rule would be disproportionate and would lead to significant uncertainty for businesses— if the OECD wishes to recommend such an approach, as a minimum, it would need to build out the guidance in this area to create clear and proportionate principles under which JSL could be used.

Timing of Implementation

Since the publication of the consultation document, many countries have taken dramatic steps to stop or meaningfully limit the spread of COVID-19 and these changes are expected to have significant negative implications for economic activity. Consequentially, many industries, including travel, may be in a loss position this year and beyond. Liquidity and cash flow could become a significant issue for platform operators. The design and implementation of software to implement the model rules could be cost prohibitive in an economic downturn. Looking at the Foreign Account Tax Compliance Act and Common Reporting Standard as comparables, financial institutions took 18 months to design and implement software at significant costs (some financial institutions spent in excess of \$100 million to create reporting and onboarding systems).

Adding new reporting requirements in the next two years will create strain on platform operators. As such, we urge the OECD to delay implementation of the model rules until two years after the end of the most significant restrictions on economic activity.

Sincerely,

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