



Taxation of the digital economy

The European Commission proposals

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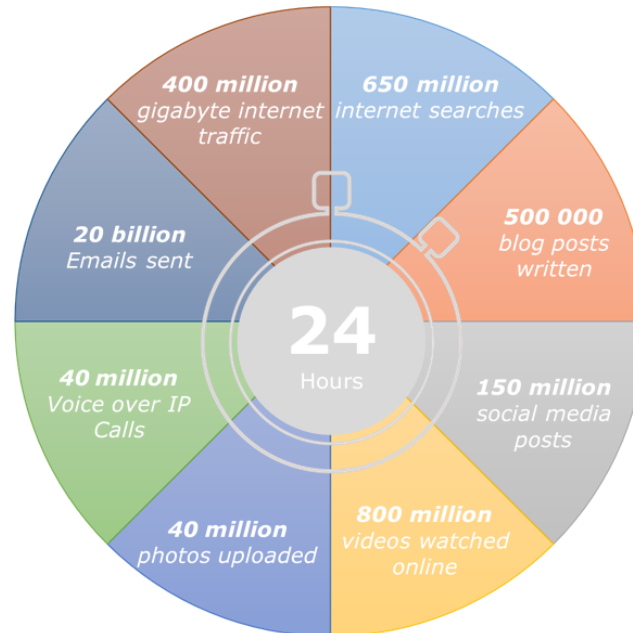
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IFA Sofia 9 November 2018

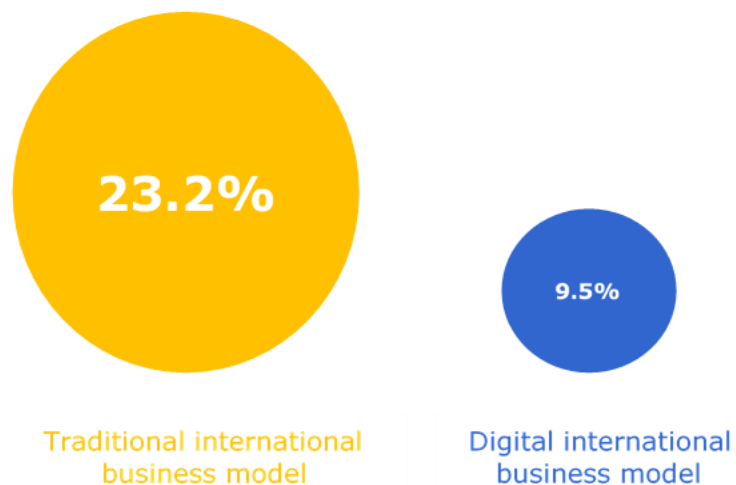
Why do we need new rules for the taxation of the digital economy?

This is what happens on an
EU Internet Day
More than...



Why do we need new rules for the taxation of the digital economy?

Effective average tax rate in the EU



Why do we need new rules for the taxation of the digital economy?

- Why are the current ones not good enough?
 - Physical presence: seat or permanent establishment
 - Principle that profits should be taxed where value is created
- Why does the EU have to deal with this?
 - International problem asks for international solution
 - Preferably global solution – if not already EU-wide
 - Avoiding national disparities

The Commission proposals of 21 March 2018

- Commission communication, Time to establish a modern, fair and efficient taxation standard for the digital economy, COM(2018)146.
- Proposal for a Council directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018)147.
- Commission recommendation of 21.3.2018 relating to the corporate taxation of a significant digital presence, C(2018)1650
- Proposal for a Council directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018)148.

Why four texts and three proposals?

- Preferred outcome: global solution → G20/OECD
- Interim solution needed:
 - MSs have or are currently enacting legislation
 - Possible disruption of the internal market
 - Specific request from a number of MS for a quick initiative taxing the digital economy

Why four texts and three proposals?

- Communication:
 - explaining the overall structure of proposals and “raison d’être”
- Proposal directive on Significant Digital Presence:
 - long term global solution
- Recommendation on Significant Digital Presence :
 - for relations with third countries & double taxation treaties
- Proposal directive on Digital Services Tax:
 - short term interim solution

In (chrono)logical order of implementation

- 1. Directive on Digital Services Tax
- 2. Directive on Significant Digital Presence
- 3. Recommendation on Significant Digital Presence

Proposal for a directive on Digital Services Tax

- Legal basis: article 113 TFEU
 - « harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation »
 - « necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition »
- Full harmonisation?
 - Probably not
- Interaction with current and future national legislation?
 - Complex

Proposal for a directive on Digital Services Tax

- Subject matter (article 1):
 - establishment of
 - common system of
 - digital services tax
 - on the revenues resulting from
 - the provision of certain digital services

Proposal for a directive on Digital Services Tax

- Taxable revenues (article 3):
- The following services:
 - « the placing of a digital interface of advertising targeted at users of that interface »
 - « the making available to users of a multi-sided digital interface which allows 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 »
 - « the transmission of data collected about users and generated from users' activities on digital interfaces »

Proposal for a directive on Digital Services Tax

- General purpose:
 - Targeted scope
 - Services where the participation of a user in a digital activity constitutes an essential input for the business carrying out that activity and which enable that business to obtain revenues therefrom → those business models which would not be able to exist in their current form without user involvement
 - What is subject to taxation are the revenues obtained from the monetisation of the user input, not the user participation in itself
 - no taxation of what is already taxed, i.e. delivery of goods or services subject to VAT
- Quantum:
 - “total gross revenues, net of value added tax and other similar taxes” (article 3(2))

Proposal for a directive on Digital Services Tax

- « the placing of a digital interface of advertising targeted at users of that interface »
- What are we talking about?
 - Ads on websites
 - Why?
 - it is the way in which the owner of a website/page typically monetises user traffic and the user data are taken into account for the purposes of the placement of the ads
 - Triangular situation: website – advertiser – web surfer visiting the website/page
 - consideration of contract between website and advertiser depends on views by web surfers

Proposal for a directive on Digital Services Tax

- « the making available to users of a multi-sided digital interface which allows 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 »
- What are we talking about?
 - Platforms/marketplaces: the interface allows users to get in touch with other users
 - But:
 - Not communication services: users know each other before using the interface
 - Not payment services: users know each other before making a payment
 - Not the facilitation of underlying supply of goods or services between the users of the interface
 - Not the supply of digital content e.g. video, audio or text

Proposal for a directive on Digital Services Tax

- « the transmission of data collected about users and generated from users' activities on digital interfaces »
- What are we talking about?
 - The transmission for consideration of data obtained from the users' activities on digital interfaces
 - But:
 - Not a tax on the collection of data
 - Not a tax on the use of data collected by a business for the internal purposes of that business
 - Not a tax on the sharing of data collected by a business with other parties for free

Proposal for a directive on Digital Services Tax

- Taxable person (article 4):
- Two cumulative conditions:
 - total worldwide revenues exceeding EUR 750.000.000
 - total taxable revenues in the EU exceeding EUR 50.000.000

Proposal for a directive on Digital Services Tax

- Place of taxation (article 5(1)): General rule:
 - « Taxable revenues obtained by an entity in a tax period shall be treated for the purposes of this Directive as obtained in a Member State in that tax period if users with respect to the taxable service are located in that Member State in that tax period.
 - « The first subparagraph applies irrespective of whether such users have contributed in money to the generation of those revenues. »

Proposal for a directive on Digital Services Tax

- Place of taxation (article 5(2)):
- Assumptions: If service Article 3(1)(a):
 - « the advertising in question appears on the user's device at a time when the device is being used in that Member State in that tax period to access a digital interface. »

Proposal for a directive on Digital Services Tax

- Place of taxation (article 5(2)):
 - Assumptions: If service Article 3(1)(b):
 - « (i) if the service involves a multi-sided digital interface that facilitates the provision of underlying supplies of goods or services directly between users, the user uses a device in that Member State in that tax period to access the digital interface and concludes an underlying transaction on that interface in that tax period;
 - « (ii) if the service involves a multi-sided digital interface of a kind not covered by point (i), the user has an account for all or part of that tax period allowing the user to access the digital interface and that account was opened using a device in that Member State. »

Proposal for a directive on Digital Services Tax

- Place of taxation (article 5(2)):
- Assumptions: If service Article 3(1)(c):
 - « data generated from the user having used a device in that Member State to access a digital interface, whether during that tax period or any previous one, is transmitted in that tax period. »

Proposal for a directive on Digital Services Tax

- Place of taxation (article 5(5)):
 - « the Member State where a user's device is used shall be determined by reference to the Internet Protocol (IP) address of the device or, if more accurate, any other method of geolocation »

Proposal for a directive on Digital Services Tax

- Miscellaneous
 - Rate (article 8):
3%
 - One-stop-shop mechanism

Proposal for a directive on Significant Digital Presence

- Legal basis: article 115 TFEU
 - « for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market »
 - traditionally used for direct taxation

Proposal for a directive on Significant Digital Presence

- Subject matter (article 1):
 - « Extending the concept of a permanent establishment as it applies for the purposes of corporate tax in each Member State, so as to include a significant digital presence through which a business is wholly or partially carried on »
 - « establishes certain principles for attributing profits to or in respect of a significant digital presence for corporate tax purposes. »

Proposal for a directive on Significant Digital Presence

- Scope (article 2):
 - « applies to entities irrespective of where they are resident for corporate tax purposes, whether in a Member State or in a third country »
 - However, if an entity is resident in a third country with which the particular Member State has a DTC:
 - « applies only if that convention includes provisions similar to Articles 4 and 5 of this Directive in relation to the third country and those provisions are in force »

Proposal for a directive on Significant Digital Presence

- Significant digital presence (article 4):
- « if the business carried on through it consists wholly or partly of the supply of digital services through a digital interface and one or more of the following conditions is met (on a group basis):
 - (a) total revenues obtained from supply of digital services to users located in the Member State exceed EUR 7.000.000
 - (b) number of users of those digital services located in that Member State exceeds 100.000
 - (c) number of business contracts for supply of digital services concluded by users in that MS exceeds 3.000

Proposal for a directive on Significant Digital Presence

- Definition of « digital services » (article 3(5)):
- « services which are delivered over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology, including in particular:
 - (a) supply of digitised products, incl. software and upgrades of software
 - (b) providing or supporting a business or personal presence on an electronic network such as a website or a webpage
 - (c) automatically generated from a computer via the internet or an electronic network in response to specific data input by the recipient

Proposal for a directive on Significant Digital Presence

- (d) the transfer for consideration of the right to put goods or services up for 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
- (e) Internet Services Packages of information in which the telecommunications component forms an ancillary and subordinate part → packages going beyond mere internet access and including other elements such as content pages giving access to news, weather or travel reports, playgrounds, website hosting, access to online debates etc.
- (f) services listed in Annex II

Proposal for a directive on Significant Digital Presence

- But excluding
 - those listed in Annex III
 - the sale of goods or other services facilitated by using the internet or an electronic network

Proposal for a directive on Significant Digital Presence

- Definition of « revenues » (article 3(6)):
 - « proceeds of sale and of other transactions, net of value added tax and other taxes and duties collected [...], whether of a monetary or non-monetary nature, including proceeds from disposals of assets and rights, interest, dividends and other profit distributions, proceeds of liquidations, royalties, subsidies and grants, gifts received, compensations and ex-gratia payments »
 - also includes « non-monetary gifts made by a corporate taxpayer »
 - Does not include « equity raised by a corporate taxpayer or debt repaid to it »

Proposal for a directive on Significant Digital Presence

- Profits attributable to or in respect of the SDP (article 5):
 - Those profits « that the DP would have earned if it had been a separate and independent enterprise performing the same or similar activities under the same or similar conditions, in particular in its dealings with other parts of the enterprise, taking into account the functions performed, assets used and risks assumed, through a digital interface »
 - « the determination of profits attributable to or in respect of the SDP shall be based on a functional analysis »
 - « due account shall be taken of the economically significant activities performed by the SDP which are relevant to the development, enhancement, protection and exploitation of the enterprise's intangible assets »

Proposal for a directive on Significant Digital Presence

- « The economically significant activities performed by the DSP through a digital interface include:
 - (a) collection, storage, processing, analysis, deployment and sale of user-level data;
 - (b) the collection, storage, processing and display of user-generated content;
 - (c) the sale of online advertising space;
 - (d) the making available of third-party created content on a digital marketplace;
 - (e) the supply of any digital service not listed in points (a) to (d). »
- Taxpayers shall use the profit split method

Recommendation on Significant Digital Presence

- Article 2 Directive SDP: « Scope » :
 - « applies to entities irrespective of where they are resident for corporate tax purposes, whether in a Member State or in a third country »
 - However, if an entity is resident in a third country with which the particular Member State has a DTC:
 - « applies only if that convention includes provisions similar to Articles 4 and 5 of this Directive in relation to the third country and those provisions are in force »

Recommendation on Significant Digital Presence

- Objective of the Recommendation: « 1. General »
 - « This Recommendation puts forward a proposal for adaptations to the double tax conventions of Member States with non-Union jurisdictions in order,
 - first, to extend the concept of a permanent establishment so as to include a significant digital presence through which the business of an enterprise is wholly or partly carried on in another jurisdiction, and,
 - second, to include rules for attributing profits to or in respect of a significant digital presence. »

Recommendation on Significant Digital Presence

- « 2. Recommendation »
 - Not surprisingly aligned on Directive SDP
 - (a) Definition of a significant digital presence
 - (b) Rules for attributing profits to or in respect of a SDP
 - (c) Definition of economically significant activities performed by the SDP through a digital interface
 - (d) Profit split method for determining the attributable profits
 - (e) Reference to Directive on SDP

Q&A session

Thanks for your attention