The Future of Digital Services Taxes

WIRTSCHAFTS UNIVERSITÄT WIEN VIENNA UNIVERSITY OF ECONOMICS AND BUSINESS

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LUISS University Rome

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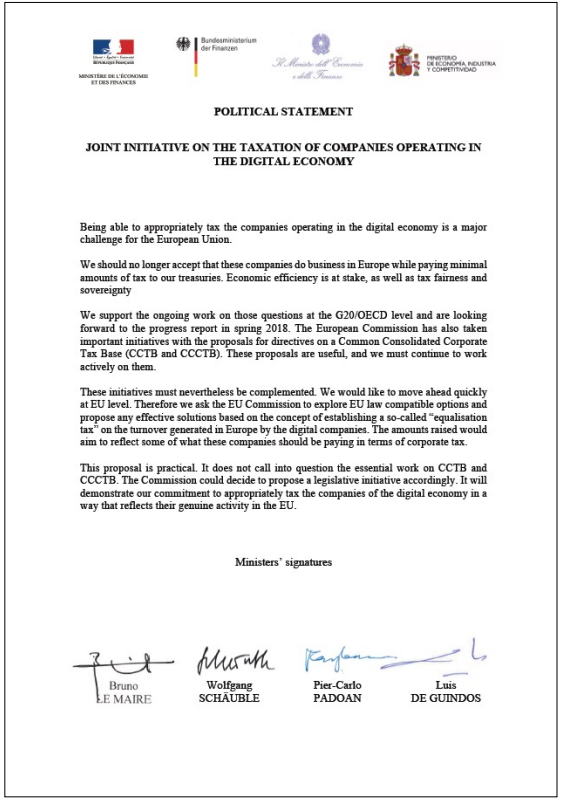
Background | *EU*

- **Context: OECD, UN and Unilateral Actions**
  - OECD BEPS Action 1 Report (October 2015) and Interim Report (March 2018) → Pillars 1 and 2
  - Work of the UN and unilateral action (e.g., Arts 12A, 12B UN MC, DPT, MAAL, Indian equalisation levy, Italian "web tax" etc)
- **Push in the European Union**
  - Political Statement – "Joint Initiative on the Taxation of Companies Operating in the Digital Economy" (9 September 2017)
  - Informal ECOFIN meeting in Tallinn on 16 September 2017 and Council conclusions on "Responding to the challenges of taxation of profits of the digital economy", Doc. 15175/17 FISC 320 ECOFIN 1064 (30 November 2017)
  - Commission's Communication "A Fair and Efficient Tax System in the European Union for the Digital Single Market", COM(2017)547 final (21 September 2017), and concrete proposals in March 2018 (SDP and DST
  - "Digital taxation" as part of the recovery plan (COM(2020)456), interdependence of OECD and EU work on the digitalized economy



POLITICAL STATEMENT

JOINT INITIATIVE ON THE TAXATION OF COMPANIES OPERATING IN THE DIGITAL ECONOMY

Being able to appropriately tax the companies operating in the digital economy is a major challenge for the European Union.

We should no longer accept that these companies do business in Europe while paying minimal amounts of tax to our treasuries. Economic efficiency is at stake, as well as tax fairness and sovereignty

We support the ongoing work on those questions at the G20/OECD level and are looking forward to the progress report in spring 2018. The European Commission has also taken important initiatives with the proposals for directives on a Common Consolidated Corporate Tax Base (CCTB and CCCTB). These proposals are useful, and we must continue to work actively on them.

These initiatives must nevertheless be complemented. We would like to move ahead quickly at EU level. Therefore we ask the EU Commission to explore EU law compatible options and propose any effective solutions based on the concept of establishing a so-called "equalisation tax" on the turnover generated in Europe by the digital companies. The amounts raised would aim to reflect some of what these companies should be paying in terms of corporate tax.

This proposal is practical. It does not call into question the essential work on CCTB and CCCTB. The Commission could decide to propose a legislative initiative accordingly. It will demonstrate our commitment to appropriately tax the companies of the digital economy in a way that reflects their genuine activity in the EU.

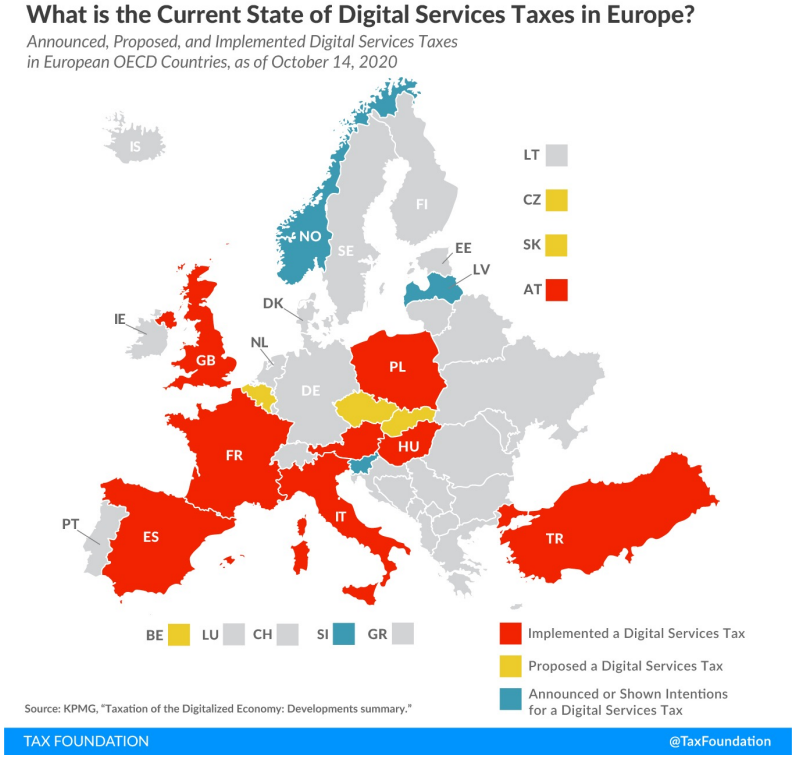
Ministers' signatures

Bruno LE MAIRE | Wolfgang SCHÄUBLE | Pier-Carlo PADOAN | Luis DE GUINDOS

DST | *Overview*

Commission's Communication **"Time to establish a modern, fair and efficient taxation standard for the digital economy"** (COM(2018)146 and Annex)		
Long-Term Solution: **Significant Digital Presence (SDP)**		Short-Term Solution: **Digital Services Tax (DST)**
Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018)147 and Annexes	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 – *No agreement in December 2019 (Doc. 14885/18 FISC 510 ECOFIN 1148 [29 November 2018] and Doc. 14886/18 FISC 511 ECOFIN 1149 [29 November 2018]), subsequent limitation to digital advertising services in March 2019 ("DAT"; Doc. 6873/19 FISC 135 ECOFIN 242 [1 March 2019]) and postponed in March 2019 (Doc. 7368/19 PRESSE 12 [12 March 2019]), but might be taken up again if no OECD consensus is reached (Dok. 9773/19 FISC 281 ECOFIN 528 [7 June 2019]). – But: Unilateral implementation/adoption of DSTs/DATs in various (Member) States, e.g., Austria, Czech Republic, France, Italy, Hungary, Spain, but also in third States, such as, e.g., Turkey and the UK. – Inception impact assessment Ares(2021)312667 on a "Digital Levy"*
Impact Assessment SWD(2018)81 and SWD(2018)82		

DST | *Overview*



Source: https://taxfoundation.org/digital-tax-europe-2020/

DST | *Policy Objectives*

- **DST contemplated as an "interim" solution** → 3% tax on revenues stemming from the supply of certain digital services" initially from "[1 January 2020]" (without a sunset-clause) → *Note that the proposed DAT had a sunset clause in Art 25(4), referring to (1) the OECD work and (2) 31 December 2025.*
- Generally: "Equalisation tax on turnover of digitalised companies"
  - The "amounts raised would aim to **reflect some of what these companies should be paying in terms of corporate tax**" (see the Political Statement – Joint Initiative on the Taxation of Companies Operating in the Digital Economy (9 Sept. 2017), signed by a number of EU finance ministers).
  - But: Gross (turnover) versus net (income) taxation *– E.g., Bauer, Five Questions about the Digital Services Tax to Pierre Moscovici, ECIPE OCCASIONAL PAPER 04/2018.*

DST | *Policy Objectives*

- **Place of profit taxation ≠ place of value creation**, "notably in the case of business models heavily reliant on user participation"
  - Perceived misalignment between **"input obtained by a business from users"** and establishment or attribution
  - What is **"value creation"**? Data/user participation and/or algorithms? Consumption? Is it relevant for profit taxation? Where does it happen and to what extent?
  - DST as appropriate taxation of **location-specific rents**? (I.e., as an "optimal tariff".) *– E.g., Cui, Wei, The Superiority of the Digital Services Tax over Significant Digital Presence Proposals, National Tax Journal 72(4), 839-856 (2019); Cui, The Digital Services Tax: A Conceptual Defense, 73 Tax L. Rev. 69 (2019); Kim, Digital Services Tax: A Cross-Border Variation of the Consumption Tax Debate, 72 Alabama L. Rev. 131 (2020); Shaviro, Digital Services Taxes and the Broader Shift From Determining the Source of Income to Taxing Location-Specific Rents, NYU Law and Economics Research Paper No. 19-36.*

DST | *Structure*

An interim tax of 3% on revenues made from three main types of services, where the main value is created through user participation.

Online placement of advertising

Sale of collected user data

Digital platforms that facilitate interactions between users

... and provided by businesses with:

Total annual worldwide revenue above

750 M€

Total annual revenue from digital activities in the EU above

50 M€

DST | *Structure*

- Taxable are **both foreign and domestic transactions and companies** (Pt 25 of the Preamble)
- Base → **Gross revenues** (not profits) net of VAT and other similar taxes from three categories of "taxable services" (Art 3 DST)
  - **Category 1 (~ DAT):** Placing of **advertisements** on a digital interface, not collection of user data or use for own business purposes
  - **Category 2:** Making available **multi-sided digital interfaces** ("intermediation services") (exclusive of, e.g., financial, investment and crowdfunding services), but not, e.g., underlying transactions, e-commerce, or supply of digital content or communication services
  - **Category 3:** Transmission of **user data**
- Thresholds → **Worldwide revenues > € 750 million** and **taxable EU revenues > € 50 million** at a consolidated level (Art 4 DST)

DST | *Structure*

- Place of taxation → **Location of users** (Art 5, 6 DST) → IP address or other form of geolocation
- Rate → **3%** (Article 8 DST)
- Expected revenues → **€ 5 bn.** (other estimations around € 1,8 bn.), unclear **compliance costs** (Opinion SEC(2018)162 of 21 March 2018)

DST | *Scope and Nexus*

Service	Location in a Member State (IP or geolocation)	Revenue Proportion
Placing of advertisements on a digital interface (Article 3(1)(a) DST)	Advertising appears on user's device (Art 5(2)(a) DST)	Number of times an advertisement has appeared on users' devices (Art 5(3)(a) DST)
Making available multi-sided digital interfaces ("intermediation services") (Article 3(1)(b) DST)	User's device for concluding underlying supply of goods or services (Art 5(2)(b)(i) DST)	Number of users having concluded underlying transactions (Art 5(3)(b)(i) DST) – *Irrelevance of place of underlying transaction (Art 5(4)(a) DST)!*
	User's device for opening account in other cases (Art 5(2)(b)(ii) DST)	Number of users holding an account (Art 5(3)(b)(ii) DST)
Transmission of user data (Article 3(1)(c) DST)	Data generated from the user having used a device (Art 5(2)(c) DST)	Number of users from whom data transmitted has been generated (Art 5(4)(c) DST) – *Irrelevance of tax period!*

Criticism | *Overview*

- No consensus on either merit or need of equalization taxes in the **OECD's interim report of March 2018** (paras 403 et seq.), but some considerations on the design of interim measures (paras 412 et seq.)
- DSTs are not part of the current OECD work on **Pillars 1 and 2**
- Broader **economic questions**, e.g., impact on investment, innovation, welfare and growth, distortion of consumer choices and business decisions, benefits the older over digital technology etc.
- Main **lines of legal criticism against unilateral or EU DSTs**
  - Does it conflict with (or potentially override) **bilateral tax treaties**?
  - Does it violate **EU fundamental freedoms** (Art 49, 54, 56 TFEU) and/or **EU state aid rules** (Art 107 TFEU)?
  - Does it violate international **trade law and policy**?
  - Does it fall within the **EU's competence** under Art 113 TFEU?
  - Is it barred by **Art 401 VAT Directive**, which prohibits domestic taxes that can "be characterised as turnover taxes"?

Criticism | *Tax Treaties*

- Is a DST a tax on "elements of income" within the meaning of **Art 2(2), (4) OECD-MC** and covered by tax treaties (Art 5, 7 and 23 OECD MC)?
- Discussion on design features in the OECD 2018 Interim Report (pp. 181-183)
- Arguments ***for*** DSTs being taxes on "elements of income"
  - Gross basis, but lump-sum expenses taken into account via the 3% rate (taking into account "different profit margins"; Pt. 35 of the Preamble) → "Disguised" net tax
  - OECD MC also covers gross-basis taxes (e.g., on dividends and interest)
  - Economic incidence of a DST
  - "Intent" of the legislation "to reflect some of what these companies should be paying in terms of corporate tax"
- Arguments ***against*** DSTs being taxes on "elements of income"
  - Flat tax rate, impossibility to deduct expenses in any situation and equal applicability to residents and non-residents
  - OECD MC does not employ a comprehensive income notion (*Schanz/Haig/Simons*)
  - Taxpayer-related thresholds are revenue-based
  - No credit for DST against corporate tax

Criticism | *Tax Treaties*

- Overall, **likely not a covered tax** and not barred by Art 5, 7 OECD MC (or no treaty override). *– E.g., Hohenwarter/Kofler/Mayr/Sinnig, Qualification of the Digital Services Tax under Tax Treaties, Intertax 2019, 140. –* Would be no issue if it were a "real EU tax", as it would then not be "imposed on behalf of a Contracting State" under Art 2 OECD-MC.
- In any event: Unrelieved **double taxation** with regard to profit taxation? → No credit, but expectation "that Member States will allow businesses to deduct the DST paid as a cost from the corporate income tax base in their territory, irrespective of whether both taxes are paid in the same Member State or in different ones" (Pt. 27 of the Preamble) → *Revenue shifts between Member States!*
- *Note:* No foreign tax credit under **proposed US rules** because DSTs fail the "jurisdictional nexus requirement" (see the proposed U.S. Treas. Reg. § 1.901-2(c))

Criticism | *Freedoms and State Aid*

- Criticism that the **revenue thresholds and covered services** in the DST, though facially neutral, in fact and by intention …
  - … target largely foreign (US) taxpayers or groups, lead to **indirect nationality discrimination**, and
  - … grant **aid** to smaller (EU) taxpayers below the thresholds (→ violation of Art 107, 108 TFEU).
- *E.g., Mason/Parada, Digital Battlefront in the Tax Wars, 92 TNI 1183 (2018); Mason/Parada, Company Size Matters, BTR 2019, 610; Mason, What the CJEU's Hungarian Cases Mean for Digital Taxes, 98 TNI 161 (2020); Mason/Parada, The Legality of Digital Taxes in Europe, 40 Virginia Tax Rev. 175 (2020).*
- Note: Potential **state aid** would be no issue if the DST were in an **EU Directive**, as any aid would then not be imputable to a Member State and hence not fall under the prohibition of Art 107, 108 TFEU (T-351/02, ***Deutsche Bahn***, paras. 101-103). – Similar considerations for the fundamental freedoms? *(E.g., Mason, A Political-Process Defense of Deference to EU Directives, Virginia Law and Economics Research Paper No. 2018-17)*

Criticism | *Freedoms and State Aid*

Case	COM	GC	AG	ECJ
Commission v Poland	Decision C(2016) 5596	GC, 16 May 2019, T-836/16 and T-624/17	AG Kokott, 15 October 2020, C-562/19 P	ECJ, 16 Mar. 2021, C-562/19 P (Appeal of 2 July 2019)
Commission v Hungary	Decision (EU) 2017/329	GC, 27 June 2019, T-20/17	AG Kokott, 15 October 2020, C-596/19 P	ECJ, 16 Mar. 2021, C-596/19 P (Appeal of 6 Aug. 2019)
Vodafone (HU)	—	—	AG Kokott, 13 June 2019, C-75/18	ECJ, 3 Mar. 2020, C-75/18
Tesco-Global (HU)	—	—	AG Kokott, 4 July 2019, C-323/18	ECJ, 3 Mar. 2020, C-323/18
Google Ireland (HU)	—	—	AG Kokott, 12 Sept. 2019, C-482/18	ECJ, 3 Mar. 2020, C-482/18

Criticism | *Freedoms and State Aid*

- ***Vodafone*** and ***Tesco – Fundamental Freedoms***
  - In March 2020, the ECJ's Grand Chamber upheld the Hungarian progressive (!) turnover-based advertisement tax in C-75/18, ***Vodafone***, and the Hungarian progressive (!) turnover-based store retail tax in C-323/18, ***Tesco***
  - Progressive turnover-based taxes are **not by themselves discriminatory** (even if they disproportionally affect foreing companies and irrespective [?] of any intent by the legislature):

> 50 In that context, and contrary to what is maintained by the Commission, progressive taxation may be based on turnover, since, on the one hand, the amount of turnover constitutes a criterion of differentiation that is neutral and, on the other, turnover constitutes a relevant indicator of a taxable person's ability to pay.
>
> 56 In the light of all the foregoing, the answer to the first question is that Articles 49 and 54 TFEU must be interpreted as not precluding the legislation of a Member State that establishes a progressive tax on turnover, the actual burden of which is mainly borne by undertakings controlled directly or indirectly by nationals of other Member States or by companies that have their registered office in another Member State, due to the fact that those undertakings achieve the highest turnover in the market concerned

  - For details see the Statement of the CFE ECJ Task Force in ECJ-TF 2/2020!

Criticism | *Freedoms and State Aid*

- ***Vodafone*** and ***Tesco*** and ***Commission v Poland*** and ***Commission v Hungary*** – ***State Aid***
  - The Court in ***Vodafone*** and ***Tesco*** found the State aid questions inadmissible of (for lack of connection with a general aid scheme).
  - In ***Commission v Poland*** (C-562/19 P) and ***Commission v Hungary*** (C-596/19 P), the Court confirmed the General Court's holdings that no illegal State aid exists
    - Again, the "amount of turnover constitutes, in general, a criterion of differentiation that is neutral and a relevant indicator of the taxable person's ability to pay".
    - The characteristics constituting the tax, which include progressive tax rates, form, „in principle, the reference system or the 'normal' tax regime for the purposes of analysing the condition of selectivity. That said, it cannot be ruled out that those characteristics may, in certain cases, reveal a manifestly discriminatory element, which it is, however, for the Commission to demonstrate."
  - See also General Court in ***Commission v. Poland*** (T-836/16 und T-624/17) and ***Commission v. Hungary*** (T-20/17) and likewise AG Kokott in her Opinions in ***Vodafone*** and ***Tesco*** (AG Kokott, 15 October 2020, C-562/19 P and C-596/19 P).

Criticism | *Trade*

- Is a DST a (disguised) restriction on international trade under **WTO rules because of revenue thresholds**?
  - Between 120-150 companies would be affected by the DST, 50% of them from the US.)
  - *E.g., Mitchell/Voon/Hepburn, Taxing Tech: Risks of an Australian Digital Services Tax under International Economic Law, [2019] Melb. J. Int. Law. 88.*

Criticism | *Trade*

- Investigation by the **US Trade Representative** (USTR) under § 301 of the Trade Act of 1974
  - USTR has determined that „France's Digital Services Tax is unreasonable or discriminatory and burdens or restricts U.S. commerce" (84 Fed. Reg. No. 235, 66956, based on an extensive report of December 2, 2019) – *Noting, inter alia, that for advertising 8 of 9 covered companies are US, and for digital interfaces 12 of 21 covered companies are US (and none France-based).*
  - Same conclusions regarding the investigations with respect to DSTs adopted or under consideration by Austria (86 Fed. Reg. No. 12, 6406), Brazil, the Czech Republic, the ***European Union***, India (86 Fed. Reg. No. 7, 2478), Indonesia, Italy (86 Fed. Reg. No. 7, 2477), Spain (86 Fed. Reg. No. 12, 6407), Turkey (86 Fed. Reg. No. 7, 2478), and the United Kingdom (86 Fed. Reg. No. 12, 6406). – *For the opening of the investigations see 85 Fed. Reg. No. 109, 34709.*
  - But: Measures (tariffs) suspended (e.g., 86 Fed. Reg. No. 7, 2479).

The act, policy, or practice covered in the investigation, namely the French DST, is unreasonable or discriminatory and burdens or restricts U.S. commerce, and is thus actionable under section 301(b) of the Trade Act. In particular:

1. The French DST is intended to, and by its structure and operation does, discriminate against U.S. digital companies, including due to the selection of services covered and the revenue thresholds.
2. The French DST's retroactive application is unusual and inconsistent with prevailing tax principles and renders the tax particularly burdensome for covered U.S. companies.
3. The French DST's application to revenue rather than income contravenes prevailing tax principles and is particularly burdensome for covered U.S. companies.
4. The French DST's application to revenues unconnected to a physical presence in France contravenes prevailing international tax principles and is particularly burdensome for covered U.S. companies.
5. The French DST's application to a small group of digital companies contravenes international tax principles counseling against targeting the digital economy for special, unfavorable tax treatment.

Criticism | *Trade*

- Really, also the ***European Union*** under US investigation?
  - USTR has opened investigations with respect to a **DST under consideration by the European Union** (85 Fed. Reg. No. 109, 34709):

> *The European Union:* The European Commission is considering a DST as part of the financing package for its proposed COVID–19 recovery plan. The EU DST is based on a 2018 DST proposal that was not adopted.

  - But it is unclear what the **"digital tax"** mentioned in the recovery plan should look like (COM(2020)456). The Commission's Communication "The EU budget powering the recovery plan for Europe" (COM(2020)442) implies that it would not be a DST:

> A digital tax would build on OECD work on corporate taxation of a significant digital presence; the Commission actively supports the discussions led by the OECD and the G20 and stands ready to act if no global agreement is reached. A digital tax applied on companies with a turnover above EUR 750 million could generate up to EUR 1.3 billion per year for the EU budget.

Criticism | *Legal Basis*

- Proposal based on **Article 113 TFEU** → Harmonization concerning **"other forms of indirect taxation"** if necessary for the Internal Market
  - Is the DST an **"indirect" tax**? → DST taxpayers = supposed bearers of the tax → "Direct" tax (AG Kokott, 12 Sept. 2019, C-482/18, *Google Ireland*) → Art 115 TFEU? What is the economic incidence of the DST? Is it "cost increasing"?
  - Is it a **"harmonization"**? → Unlike Art 401 VAT Directive, the DST would not exclude similar other national taxes.
  - Is it **necessary for the Internal Market and proportional**? → Is the danger of potential distortions by different national measures enough? Is it sufficient that unilateral measures were/are in place or planned in 11 EU Member States? In any event, can non-discriminatory, destination-based unilateral taxes lead to relevant distortions of the Internal Market? – *E.g., Nogueira, The Compatibility of the EU Digital Services Tax with EU and WTO Law: Requiem Aeternam Donate Nascenti Tributo, ITAXS 1-2019, 1.*

Criticism | *Legal Basis*

- Competence under **Art 116 TFEU** to eliminate distortions of the conditions of competition in the internal market (i.e., qualified majority instead of unanimity)? → Answer given by Mr Moscovici on behalf of the European Commission to the Parliamentary questions E-001797/2019, E-001797/2019(ASW) (27 June 2019):

> The Commission finds that, as part of the adoption process of the proposal for a Directive on the Digital Services Tax (DST), the specific conditions required for triggering Article 116 of the Treaty on the Functioning of the European Union (TFEU) are not fulfilled. In order to put forward a proposal under Article 116, it must be established that there is a difference between Member States' provisions which creates a distortion of competition in the internal market that needs to be eliminated
>
> The Commission considers that the multiplication of different national taxes on digital services could create barriers to the proper functioning of the internal market, which is the main reason why the harmonisation of the DST was proposed[1].
>
> Article 116 TFEU is not a possible legal basis for proposals on tax harmonisation, such as the common consolidated corporate tax base (CCCTB) and the DST. Articles 113 and 115 TFEU are the only legal bases allowing the Council to adopt measures of approximation of Member States' laws, regulatory or administrative provisions concerning taxation.

Criticism | *VAT*

- Is a DST incompatible with the **EU VAT system**?
  - DST is not a "turnover tax" barred by Art 401 VAT Directive because it would not be an all-phase, input-deduction tax that generally applies to transactions relating to goods or services (C-475/03, ***Banco Populare di Cremona***). *– E.g., Kofler/Mayr/Schlager, Taxation of the Digital Economy: "Quick Fixes" or Long-term Solution? ET 12/2017, 523 (531).*
  - Confirmed for the Hungarian turnover-based advertisement tax in C-75/18, ***Vodafone***, and for the Hungarian turnover-based store retail tax in C-323/18, ***Tesco***.

> 64 Unlike VAT, this tax, which is based on the net turnover of the taxable person concerned, is not charged at each stage of that process, does not contain a mechanism comparable to that of the right to deduction of VAT, and is not based on the value added at the various stages of that process.
>
> 65 That circumstance is sufficient ground to conclude that the special tax does not display all the essential characteristics of VAT and is, consequently, not subject to the prohibition laid down in Article 401 of the VAT Directive (see, by analogy, judgment of 12 June 2018, *Viking Motors and Others*, C-475/17, EU:C:2018:636, paragraph 43).

  - Note: Would be no issue if it were an **EU Directive** or a "real EU tax", as it would then be on the same level of secondary law as the VAT Directive.

DST | *Outlook*

- **OECD Pillar 1 as an end to unilateral measures (such as DSTs)?** (Note the recent positive sentiment to reach a "consensus-based solution by the July meeting of G20 Finance ministers" in the OECD's Februar 2020 report to the G20).

> 6. Pillar One seeks to adapt the international income tax system to new business models through changes to the profit allocation and nexus rules applicable to business profits. Within this context, it expands the taxing rights of market jurisdictions (which, for some business models, are the jurisdictions where the users are located)[6] where there is an active and sustained participation of a business in the economy of that jurisdiction through activities in, or remotely directed at, that jurisdiction.[7] It also aims to significantly improve tax certainty by introducing innovative dispute prevention and resolution mechanisms. Pillar One seeks to balance the different objectives of Inclusive Framework members and result in the removal of relevant unilateral measures.
>
> **10.3. Removal of unilateral measures**
>
> 847. As stated in the Outline, it is expected that any consensus-based agreement must include a commitment by members of the Inclusive Framework to implement this agreement and at the same time to withdraw relevant unilateral actions, and not adopt such unilateral actions in the future.[3]

- **OECD Pillar 1 as an end to unilateral measures (such as DSTs)?** – What about the earlier (and now withdrawn) US "safe harbour" approach?

> 168. The United States contemplates that such a safe harbour implementation of Pillar One would be part of an overall agreement that replaces digital services taxes and similar unilateral measures, with the effect that the benefits of increased administrability, greater tax certainty, and mandatory binding dispute resolution procedures would be the primary motivations for MNEs to avail themselves of Pillar One as a safe harbour.
>
> 169. Many other jurisdictions have expressed scepticism about an elective approach. In addition to noting the outstanding questions around how an elective regime would operate, they have argued that the objectives of Pillar One would be frustrated in cases where MNEs do not elect into the new rules, and have noted the perverse incentives it could create for jurisdictions to introduce unilateral measures, or increase the breadth and rate of existing unilateral measures, in order to protect against that outcome. They believe that an optional basis would create inconsistency across similar businesses and lead to distortions. They also take the view that an elective regime would undermine the policy justification for reallocating profit to market jurisdictions, threatening its coherence/sustainability and reducing the likelihood of international consensus. Some have further questioned the legal effect of a safe harbour approach, given that such a safe harbour can only be provided in a coordinated manner by jurisdictions if they have the relevant taxing rights in the first place, which will not be the case for all in a safe harbour approach. Further, others emphasise that the tax challenges of the digitalising economy specifically result from their interplay with longstanding international tax principles which therefore need to be addressed with a view to overcoming political challenges.

DST | *Outlook*

- **EU Commission's Action Plan for Fair and Simple Taxation supporting the Recovery Strategy**, COM(2020)312 and Annex:
  - A deep **reform of the corporate tax system to fit our modern and increasingly digitalised economy** is now even more important to support growth and generate needed revenues in a fair way, by **realigning taxing rights with value creation and setting a minimum level of effective taxation of business profits**. The Commission is actively supporting the global discussions led by the OECD and the G20 and stands ready to act if no global agreement is reached. Before the end of the year, the Commission will set out the next steps, following up on the global discussions in an **Action Plan for Business Taxation for the 21st century.**
- A non-legislative initiative on **"Business Taxation for the 21st century"** was initially ***announced for Q4 2020 in the Commission's*** Work Programme for 2020.

DST | *Outlook*

- Commissions Communication on ***"Europe's moment: Repair and Prepare for the Next Generation"***, COM(2020)456

> The funds raised will need to be repaid through future EU budgets - not before 2028 and not after 2058. To help do this in a fair and shared way, **the Commission will propose a number of new own resources**. These could include a new own resource based on the Emissions Trading Scheme, a Carbon Border Adjustment Mechanism and an own resource based on the operation of large companies. It could also include a new digital tax, building on the work done by the Organisation for Economic Co-operation and Development (OECD). The Commission actively supports the discussions led by the OECD and the G20 and stands ready to act if no global agreement is reached. These will be in addition to the Commission's proposals for own resources based on a simplified Value Added Tax and non-recycled plastics.

- **EU Commission's Work Programme 2021**, COM(2020)690 and Annex:

> To uphold fairness in the digital world, the EU will continue to work for an international agreement for a fair tax system that provides long-term sustainable revenues. Failing this, the Commission will propose a **digital levy** in the first half of next year. In the same spirit of a fair business environment, the Commission will propose a legal instrument to **level the playing field as regards foreign subsidies**.

- Proposal for a **"digital levy"** announced for Q2/2021. – *See the Inception impact assessment Ares(2021)312667 and Pt A.29 of the Council Conclusions EUCO 10/20 (21 July 2020)*

> The work undertaken in the OECD Inclusive Framework to find a global consensus-based solution that addresses the tax challenges of the digitalisation of the economy is considered and should be factored into the final design and scope of the initiative, as it is important not to undermine the ongoing discussions at the OECD nor to fuel international trade tensions. The initiative should be designed in a way that is compatible with the international agreement to be reached in the OECD as well as broader international obligations.
>
> The baseline scenario will take account of developments at international level. The Commission will identify additional policy options, such as:
>
> - A corporate income tax top-up to be applied to all companies conducting certain digital activities in the EU
> - A tax on revenues created by certain digital activities conducted in the EU
> - A tax on digital transactions conducted business-to-business in the EU

Thank you!

WU
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