

# Taxation of the Digital Economy in the EU



**27 September 2024**  
**2024 Copenhagen EU Tax Law Conference**  
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**Institute for Austrian and International Tax Law** • [www.wu.ac.at/taxlaw](http://www.wu.ac.at/taxlaw)



# Overview

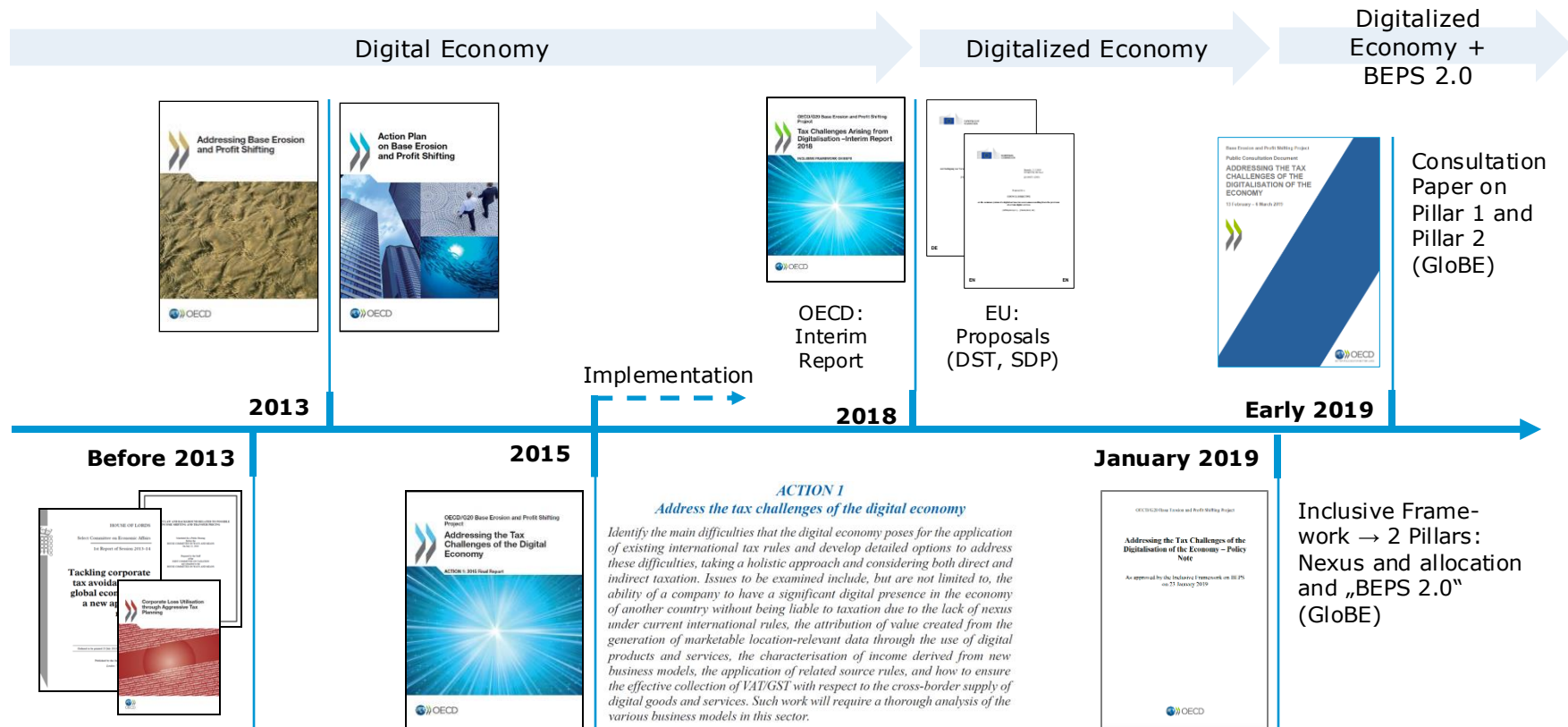
- **Part I** – The EU and the OECD's Two-Pillar Solution
- **Part II** – Significant Digital Presence (SDP) and Digital Services Tax (DST)
- **Part III** – EU Digital Levy?

# *Part I*

## The EU and the OECD's Two-Pillar Solution



# OECD | *Two Pillar Solution*



# OECD | *Two Pillar Solution*

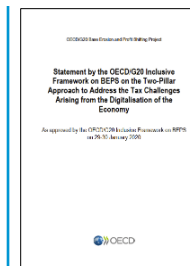
Digitalized economy + BEPS 2.0

Digitalized (and consumer-facing) economy + BEPS 2.0



Full G20 support for a consensus-based two-pillar solution and since then various progress reports by the OECD (e.g., Oct. 2019, Feb. 2021, April 2021, July 2021, Oct. 2021) and ongoing commitment by the G20 to the Two Pillar Approach (e.g., June 2019, Nov. 2020, July 2021, Oct. 2021, July 2022)

Outlines for Pillar 1 and 2 – „[M]embers of the Inclusive Framework affirm their commitment to reach an agreement on a consensus-based solution by the end of 2020“



Since 2019

January 2020

May 2019

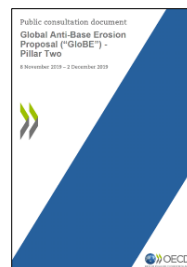


Program for technical work on both pillars

October 2019

Consultation Paper on the “Unified Approach” for Pillar 1

November 2019



Consultation Paper on Pillar 2

December 2019



„Safe harbor“-approach of the US for Pillar 1

# OECD | *Two Pillar Solution*

Digitalized (and consumer-facing) economy  
+ BEPS 2.0

Large, profitable MNEs + BEPS 2.0

Blueprints for  
Pillars 1 and 2,  
report on  
economic  
impact and  
Public  
Consultation



October 2020

OECD,  
Statement on  
a Two-Pillar  
Solution (1  
July 2021)



July 2021

## PRESS RELEASES

Joint Statement from the United States, Austria, France, Italy, Spain, and the United Kingdom, Regarding a Compromise on a Transitional Approach to Existing Unilateral Measures During the Interim Period Before Pillar 1 is in Effect

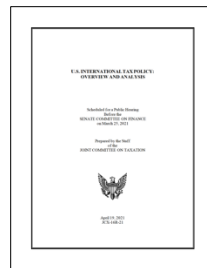
[October 2021 Statement](#),  
and extended in [2024](#)

June 2020



US find  
themselves  
"at an  
impasse"  
regarding  
Pillar 1

April 2021



US Joint Committee  
on Taxation, U.S.  
International Tax  
Policy: Overview  
And Analysis, JCX-  
16R-21 (April  
2021)

October 2021



OECD, Statement on a Two-Pillar Solution (8 October 2021) → [As of June 2023, 139 Members of the OECD/G20 Inclusive Framework on BEPS joining the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy \(including Brazil, China, USA\)](#)



## Amount A

- Progress Report on Amount A of Pillar One (July 2022) and Factsheet
  - Nexus and revenue sourcing (Feb. 2022)
  - Tax base determinations (Feb. 2022)
  - Scope (Apr. 2022)
  - Extractives exclusion (Apr. 2022)
  - Regulated financial services exclusion (May 2022)
- Progress Report on the Administration and Tax Certainty Aspects of Pillar One (Oct. 2022)
  - Tax certainty framework for Amount A (May 2022)
  - Tax certainty for issues related to Amount A (May 2022)

2022

2022/2023/2024

2025



- Outcome Statement (July 2023 – 142 IF members [May 2024])
- Amount A: Multilateral Convention
  - Multilateral Convention on Amount A (MLC), including withdrawal and standstill of DSTs etc (Oct. 2023, consultation Dec. 2022) – Finalization announced for Mar. 2024 with start of the signing process of the MLC announced for June 2024 – See also Progress Report COM(2023)377
  - Overview (Oct. 2023) and Explanatory Statement (ES) (Oct. 2023)
  - Understanding on the Application of Certainty for Amount A of Pillar One (UAC) (Oct. 2023)
  - Updated economic impact assessment (Oct. 2023)
- Amount B (Report Feb. 2024, updated June 2024, and MCAA Sept. 2024 – Annex to Chapter IV of the TPG from 1 Jan. 2025; consultations Dec. 2022, July 2023)
- Entry into force once a critical mass of jurisdictions as defined by the MLC have ratified it (600 points)
- Standstill for DSTs
  - Standstill for DSTs etc from Oct. 8, 2021 – Dec. 31, 2023 (October 2021 Statement)
  - Extended for Jan. 1, 2024 – Dec. 31, 2024 (or the entry into force of the MLC) (July 2023 Outcome Statement)
  - Threshold: 30 jurisdictions accounting for at least 60% of UPEs of the in-scope MNEs ratify before end of 2023 (July 2023 Outcome Statement) → MLC

# OECD (and EU) | *Pillar Two*

Proposal for a  
**Directive**  
implementing  
Pillar Two,  
**COM(2021)823**  
(Dec. 22, 2021)



- Some MS's concerns addressed in the **compromise texts** in Doc. 10497/22 (21 June 2022) and Doc. 6975/22 (Mar. 12, 2022)
- Complex political process (vetos, EP Resolution P9\_TA(2022)0290) and Joint Statement by France, Germany, Italy, Netherlands and Spain (9 September 2022) ("G5")
- Council Directive (EU) 2022/2523, [2022] OJ L 328/1 ("**Pillar Two Directive**") (including a Council Statement regarding Pillar One in Doc. 15349/22)

- Entry into force** → Fiscal years beginning from **Dec. 31, 2023** (for IIR), **Dec. 31, 2024** (for UTPR) (Art. 56)
- Council and Commission Statement on **subsequent OECD guidance** (Doc. 14732/1/23, Oct. 2023) (based on Art. 32 and Pt. 24 of the Preamble)
- Safe harbours** → Agreement by (non-OECD member) Cyprus (Mar. 2023 and Oct. 2023)
- Delayed application of IIR/UTPR** under Art. 50 by Estonia, Latvia, Lithuania, Malta, and Slovakia (Notice C/2023/1536, Dec. 2023)
- FAQs on technical issues (Dec. 2023)
- Note: **ATAD evaluation** (Ares(2024)5539672)

**Dec. 2021**

**Model Rules**  
(Dec. 20, 2021),  
**Commentary**  
(Mar. 14, 2022),  
**Examples** (Mar.  
14, 2022) and  
**Factsheet** –  
Announced Model  
Treaty Rule for  
STTR



- Consultations on Implementation Framework (Mar. 2022), GloBE Information Return (Dec. 2022) and tax certainty (Dec. 2022)
- Report "Tax Incentives and the Global Minimum Corporate Tax" (Oct. 2022) – EU Parliament Research Note, PE 749.793,
- UN work on extractive industries (E/C.18/2023/CRP.39), special economic zones (UNCTAD/DIAE/INF/2023/1) and investment treaties (IIA Issues Note 4/2023)
- TIWB support for developing countries

## Further Developments

**2022/2023/2024**

- Safe harbors and penalty relief (Dec. 2022)
- Administrative Guidance: Feb. 2023, July 2023, and Dec. 2023 → Consolidated Commentary Dec. 2023 (Apr. 2024); June 2024
- GloBE Information Return (July 2023)
- STTR model rule and commentary (July 2023) and MLI (Oct. 2023)
- Minimum Tax Implementation Handbook (Oct. 2023)
- FAQs (June 2024) and FAQs on Qualified Status (June 2024)
- Next: Peer review process



- EU Implementation of the **OECD's Two Pillar Solution** → Pt 2.2. in the Communication on "Business Taxation for the 21st Century", COM(2021)251 (see also Pt. 2.3 of the Commission work programme 2022: Making Europe stronger together, COM(2021) 645).

Once agreed and translated into a multilateral convention, the application of Pillar 1 will be mandatory for participating countries. **In order to ensure its consistent implementation in all EU Member States**, including those that are not Members of the OECD and do not participate in the Inclusive Framework, the **Commission will propose a Directive for the implementation of Pillar 1 in the EU**.

In order to ensure its consistent application within the EU and compatibility with EU law, **the principal method for implementing Pillar 2 will be an EU Directive that will reflect the OECD Model Rules with the necessary adjustments**. The implementation of a global agreement on minimum effective taxation will also have implications for existing and pending EU Directives and initiatives (see box 2 below).

Potential proposal for a **Pillar One Directive**

**Pillar One Directive** → Council Directive (EU) 2022/2523, [2022] OJ L 328/1.

- Pillar One-based **own resource for the EU budget** (€ 2.5-4 bn./yr)? → Pt 2.1. in the Communication on "The next generation of own resources for the EU Budget", COM(2021)566

**The Commission proposes an own resource equivalent to 15% of the share of the residual profits of the largest and most profitable multinational enterprises** that are reallocated to EU Member States under the agreement on a reform of the international tax framework. On 8 Oct

Amended Proposal COM(2023)331 for the "First Basket": A "uniform call rate of **15%** to the share of residual profit of multinational enterprises reallocated to Member States pursuant to [the Pillar One Directive]" – **Relief for Amount A?**

- Commission Proposal for **BEFIT** ("**Business in Europe: Framework for Income Taxation**"), COM(2023)532 with Annexes
  - Does not refer to "digital" and **does not prescribe formulary apportionment** (Art 45-49) for the transitional period from 1 July 2028 and 30 June 2035 (but rather a pre-BEFIT profit-based allocation)
  - Withdraws the proposals for a C(C)CTB → Proposal for a Council Directive on a Common Corporate Tax Base (COM(2016)685), and Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2016)683)
- Note: **Report of the EU Parliament on the CCCTB** (A8-0051/2018, Mar. 2018)

Article 28 – paragraph 1 – formula

*Text proposed by the Commission*

$$\text{Share A} = \left( \frac{1}{3} \frac{\text{Sales}^A}{\text{Sales}_{\text{Group}}} + \frac{1}{3} \left( \frac{1}{2} \frac{\text{Payroll}^A}{\text{Payroll}_{\text{Group}}} + \frac{1}{2} \frac{\text{No of employees}^A}{\text{No of employees}_{\text{Group}}} \right) + \frac{1}{3} \frac{\text{Assets}^A}{\text{Assets}_{\text{Group}}} \right) * \text{Con'd Tax Base}$$

*Amendment*

$$\text{Share A} = \left( \frac{1}{4} \frac{\text{Sales}^A}{\text{Sales}_{\text{Group}}} + \frac{1}{4} \left( \frac{1}{2} \frac{\text{Payroll}^A}{\text{Payroll}_{\text{Group}}} + \frac{1}{2} \frac{\text{No of employees}^A}{\text{No of employees}_{\text{Group}}} \right) + \frac{1}{4} \frac{\text{Assets}^A}{\text{Assets}_{\text{Group}}} + \frac{1}{4} \left( \frac{1}{2} \frac{\text{Data collected}^A}{\text{Data collected}_{\text{Group}}} + \frac{1}{2} \frac{\text{Data exploited}^A}{\text{Data exploited}_{\text{Group}}} \right) \right) * \text{Con'd Tax Base}$$

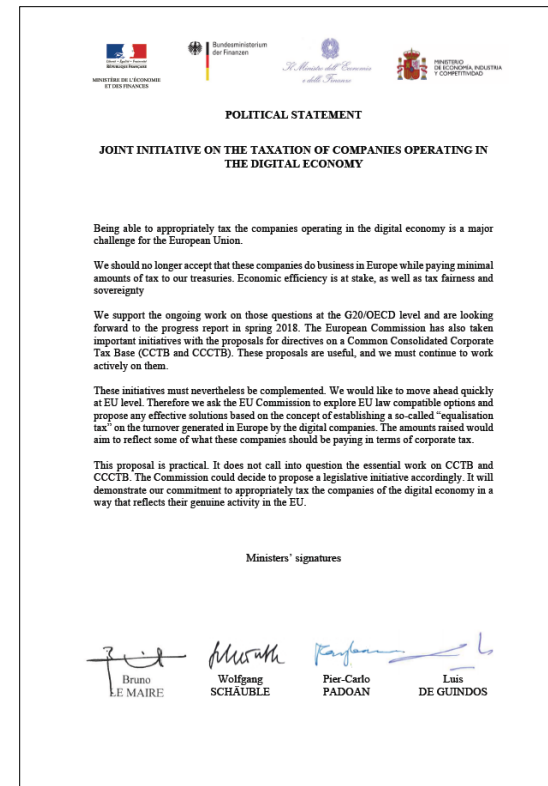
# *Part II*

## Significant Digital Presence (SDP) and Digital Services Tax (DST)



# Pre-Pillars Proposals | Background

- **2015 Action 1 Final Report** and **2018 OECD Interim Report** → No consensus, no recommendations
  - **Significant economic presence**: “virtual” (“digital”) permanent establishments → “Long-term solution”
  - **Withholding tax for digital transactions** → “Quick fix”
  - **Equalisation levies**, e.g., DSTs → “Quick fix”
- 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



# Pre-Pillars Proposals | *SDP and DST*

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: <b>Significant Digital Presence (SDP)</b>		Short-Term Solution: <b>Digital Services Tax (DST)</b>
Proposal for a Council Directive laying down rules relating to the corporate taxation of a <b>significant digital presence</b> , 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 <b>digital services tax</b> on revenues resulting from the provision of certain digital services, COM(2018)148 – <i>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 <b>digital advertising services</b> 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 and in third States.</i>
Impact Assessment SWD(2018)81 and SWD(2018)82		

# Pre-Pillars Proposals | *SDP*


## Where to tax?

Under the proposed new rules, companies would have to pay tax in each Member State where they have a significant digital presence, reaching **one** of the following thresholds:

- ✓ **Revenues from supplying digital services exceeding €7 million** 
- ✓ **Number of users exceeding 100,000** 
- ✓ **Number of online business contracts exceeding 3,000** 

## What to tax?

The attribution of profit will take into account the market values of:

- ✓ **Profits from user data**  
(e.g. placement of advertising) 
- ✓ **Services connecting users**  
(e.g. online marketplace, platforms for "sharing economy") 
- ✓ **Other digital services**  
(e.g. subscription to streaming services) 



- EU Commission proposal for a “**Significant Digital Presence**” (“SDP”)

## Nexus

### Art 4 of the Proposal

3. A 'significant digital presence' shall be considered to exist in a Member State in a tax period 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 with respect to the supply of those services by the entity carrying on that business, taken together with the supply of any such services through a digital interface by each of that entity's associated enterprises in aggregate:

- (a) the proportion of total revenues obtained in that tax period and resulting from the supply of those digital services to users located in that Member State in that tax period exceeds EUR 7 000 000;
- (b) the number of users of one or more of those digital services who are located in that Member State in that tax period exceeds 100 000;
- (c) 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.

2. The profits attributable to or in respect of the significant digital presence shall be those that the digital presence 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.

3. For the purposes of paragraph 2 the determination of profits attributable to or in respect of the significant digital presence shall be based on a functional analysis. In order to determine the functions of, and attribute the economic ownership of assets and risks to, the significant digital presence, the economically significant activities performed by such presence through a digital interface shall be taken into account. For this purpose, activities undertaken by the enterprise through a digital interface related to data or users shall be considered economically significant activities of the significant digital presence which attribute risks and the economic ownership of assets to such presence.

4. In determining the attributable profits under paragraph 2, due account shall be taken of the economically significant activities performed by the significant digital presence which are relevant to the development, enhancement, maintenance, protection and exploitation of the enterprise's intangible assets.

## Attribution of profits

### Art 5 of the Proposal

5. The economically significant activities performed by the significant digital presence through a digital interface include, inter alia, the following activities:

- (a) the 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).

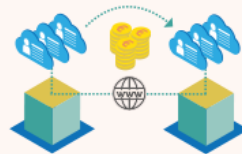
6. In determining the attributable profits under paragraphs 1 to 4, taxpayers shall use the profit split method unless the taxpayer proves that an alternative method based on internationally accepted principles is more appropriate having regard to the results of the functional analysis. The splitting factors may include expenses incurred for research, development and marketing as well as the number of users and data collected per Member State.

# Pre-Pillars Proposals | *DST*

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€

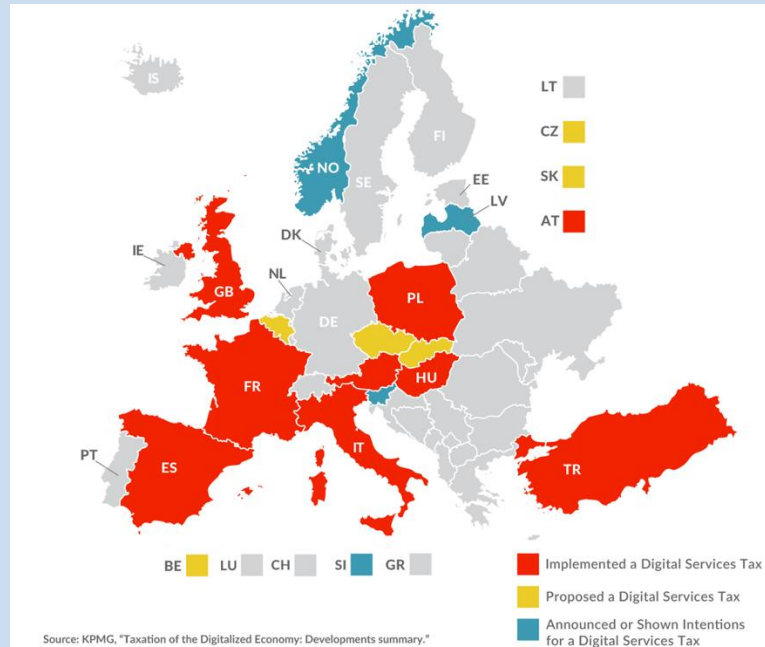
Total annual revenue from  
digital activities in the EU above



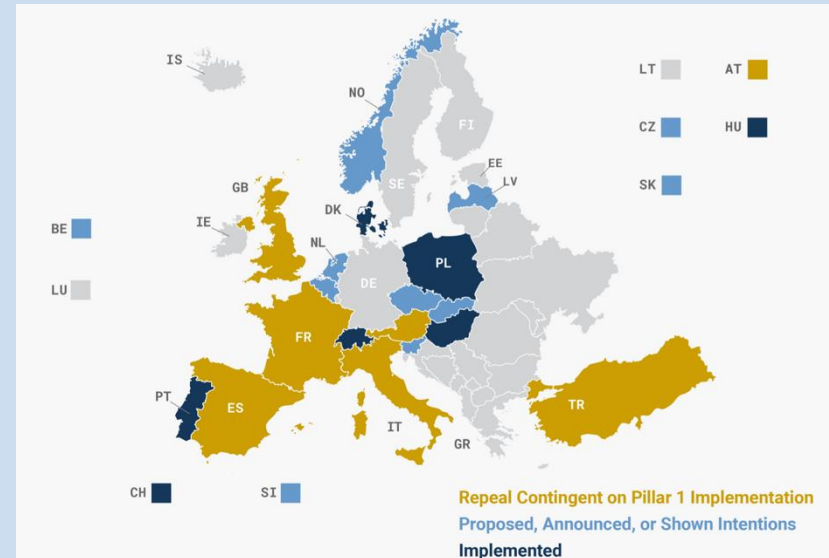
50 M€

# DST | Overview

Unilateral DSTs (Oct. 2020)



Unilateral DSTs (Feb. 2024)



- **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.*
- **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.*

- 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, Doc. 6873/19 FISC 135 ECOFIN 242 [1 March 2019]): 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)
- 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 (Ar 3(1)(a))	Advertising appears on user's device (Art 5(2)(a))	Number of times an advertisement has appeared on users' devices (Art 5(3)(a))
Making available multi-sided digital interfaces ("intermediation services") (Art 3(1)(b))	User's device for concluding underlying supply of goods or services (Art 5(2)(b)(i))	Number of users having concluded underlying transactions (Art 5(3)(b)(i)) – <i>Irrelevance of place of underlying transaction (Art 5(4)(a))!</i>
	User's device for opening account in other cases (Art 5(2)(b)(ii))	Number of users holding an account (Art 5(3)(b)(ii))
Transmission of user data (Art 3(1)(c))	Data generated from the user having used a device (Art 5(2)(c))	Number of users from whom data transmitted has been generated (Art 5(4)(c)) – <i>Irrelevance of tax period!</i>



- 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** → Rather: Commitment to remove DSTs etc
- 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, incidence (e.g., Congressional Research Service, R47988 (Apr. 2024) and IN12399 (Aug. 2024); *Kaźmierczak*, Intertax 2024, 635)
- 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)? → CJEU's Grand Chamber in C-75/18, *Vodafone*, in C-323/18, *Tesco*, in C-562/19 P, *Commission v Poland*, and in C-596/19 P, *Commission v Hungary*
  - Does it violate international **trade law and policy** or **investment agreements**?
  - 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"? → CJEU's Grand Chamber in C-75/18, *Vodafone*, in C-323/18, *Tesco*

- 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)?
- 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. – Discussion on design features to avoid treaty conflicts in the OECD 2018 Interim Report (pp. 181-183). – Would likely 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 US rules** (see U.S. Treas. Reg. § 1.901-2 and § 1.903-1 and IRS Notice 2023-80)
  - Not a **"covered tax" under Pillar Two** (Art 4.2.1 para. 36 Pillar Two Commentary [2024]), **standstill and rollback under Pillar One**, but only if the tax meets certain criteria (and is, e.g., not covered by a tax treaty) (Art 38, 39 of Multilateral Convention on Amount A (MLC))

- Criticism that the **revenue thresholds and covered services** in the DST, though facially neutral, in fact and by intention (→ *Note: Criterion under Art 38, 39 of Multilateral Convention on Amount A (MLC)*) ...
  - ... 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).
  - For the compliance of EU secondary law with the **fundamental freedoms**, the CJEU employs the "manifest error" threshold (e.g., C-203/12, Billerud, and C-390/15, C-390/15, RPO).

# Criticism | *Freedom and State Aid*

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

- 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 the report of December 2, 2019) – *E.g., for advertising 8 of 9 and for digital interfaces 12 of 21 covered companies are US-based.*
  - Further investigations (85 Fed. Reg. No. 109, 34709) (and same conclusions) 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 **UK** (86 Fed. Reg. No. 12, 6406)
  - Imposition and suspension of **tariffs** (against France and **Austria**, **India**, **Italy**, **Spain**, **Turkey**, and the **UK**) and subsequently **compromise on a transitional approach** to existing unilateral measures during the interim period before Pillar 1 is in effect with the **UK**, **Austria**, **France**, **Italy**, **Spain** (2021 Statement and 2024 Update), **Turkey** (2021 Statement and 2024 Update) and **India** (2021 Statement and 2024 Update) (initially until Dec. 31, 2023, prolonged until June 30, 2024)
  - Same concerns for the recently introduced **Canadian DST** (“Digital Services Tax Act”) by the US (USTR press release of Feb. 2022, and Congressional Research Service, IN12399) and request for United States-Mexico-Canada Agreement (USMCA) Dispute Settlement Consultations in August 2024.
  - Note: Unilateral measures, outside **WTO framework** → Risk of mutually retaliatory measures, “trade war” (Lee-Makiyama, ECIPE OCCASIONAL PAPER 5/2018)

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.

- DST 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.*



- 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<sup>1</sup>.

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.

# Excursus | Pillar One

- Commitment to **remove DSTs** already in 2020 Blueprint and in the Statement of 8 October 2021
- **DSTs etc** → Art 38, 39 of the Multilateral Convention on Amount A (MLC) – **Removal of DSTs or no Amount A allocation to that jurisdiction**
  - Art 39(2) MLC defines **"digital services tax or relevant similar measure"** → Market-based criteria (location of customers or users), applicability to foreign or foreign-owned businesses either by its terms or factually because of revenue thresholds
  - But: Excludes taxes that are not "treated by that Party as outside the **scope of any agreements**" (e.g., DTCs) → **Art. 12B UN MC on automated digital services**
- **Standstill for DSTs** etc from Oct. 8, 2021 to Dec. 31, 2023 (October 2021 Statement) → Extended for Jan. 1, 2024 to Dec. 31, 2024 (or the entry into force of the MLC) (July 2023 Outcome Statement), subject to "critical mass"

Table 1. Annex-A - List of Existing Measures Subject to Removal

Enacting Jurisdiction	Description of the Measure	Legal Act	Effective Date
Austria	Digital Services Tax	Digital Tax Act 2020	1 January 2020
France	Digital Services Tax	Law no. 759/2019	1 January 2019
India	Equalisation levy on online advertisement services	Finance Act 2016 (Law no. 28/2016), Section 165	1 April 2016
India	Equalisation levy on e-commerce	Finance Act 2016 (Law no. 28/2016), Section 165A	1 April 2020
Italy	Digital Services Tax	Budget Law 2019 (Law no. 145/2018), Article 1, Subsections 35-49	1 January 2020
Spain	Digital Services Tax	Law no. 4/2020, of October 15	15 January 2021
Tunisia	Digital Services Tax	Finance Law 2020 (Law no. 78/2019), Article 27	1 January 2020
Türkiye	Digital Services Tax	Law no. 7194, Articles 1-7	1 March 2020
United Kingdom	Digital Services Tax	Finance Act 2020 (2020 c. 14), Part 2	1 April 2020

# Excursus | Pillar One

## Pillar 1 is unlikely to succeed

In addition, and more importantly, Pillar 1 is unlikely to succeed. It would reallocate to market jurisdictions some of the profits of the world's largest (above €20 billion in revenues) and most profitable (above 10 percent profitability on sales) companies. A quarter of their rent (defined as exceeding 10 percent profitability) would be allocated to market jurisdictions based on a revenue key, whether or not the company has a physical presence in that jurisdiction.

Pillar 1 largely responds to the call by some EU countries to tax digital transactions in the countries where customers are located. The removal of digital services taxes in countries including France, Italy and Spain was conditional on the implementation of Pillar 1, and EU countries have agreed that without implementation of Pillar 1, a European digital services tax will be implemented. Pillar 1 requires a multilateral convention that has not yet been approved or signed. Even if it is, it is unlikely to be ratified, since this would require a two-thirds majority in the US Senate. The issue of the taxation of tech companies will therefore remain unresolved, implying tensions between the EU and US in the next five years.

Digital service taxes are distortive and will ultimately be passed on to consumers

## Engage with the US and seek an alternative solution if Pillar 1 fails

Digital service taxes are distortive and will ultimately be passed on to consumers, making them a 'European tax on the Europeans' rather than a tax on the American tech giants. In case of a roadblock in the negotiation, a very large base and low-rate tax could be a way out, in consultation with the US.

# *Part III*

## EU Digital Levy?



- EU Commission's Communication on *"The EU budget powering the recovery plan for Europe"*, COM(2020)442

Companies that draw huge benefits from the EU single market and will survive the crisis, also thanks to direct and indirect EU and national support, could contribute to rebuilding it in the recovery phase. This could include an own resource based on operations of enterprises which, depending on its design, could yield around EUR 10 billion annually.

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.

- 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**.

# Outlook | *EU Digital Levy?*

- Proposal for a **“digital levy”** announced for Q2/2021. – *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
- Put on hold in light of the ***Two Pillar Solution***, not part of the 2022 Work Programme ([COM\(2021\)645](#)), the 2023 Work Programme ([Annex to COM\(2022\)548](#)) or the 2024 Work Programme ([COM\(2023\)638](#))



- **Current status #1** (Answer given by Mr Gentiloni on behalf of the European Commission, E-004139/2022 of 3 March 2023)

The work on Pillar 1 should lead to a Multilateral Convention ('MLC') to be signed and ratified and Model Rules to be used for implementing them in national legislation.

According to the new timeline agreed by the Organisation for Economic Co-operation and Development (OECD) Inclusive Framework members, a signing ceremony of the MLC should be held in June 2023 with the objective of enabling it to enter into force in 2024 once a critical mass of jurisdictions as defined by the MLC have ratified it. It is vital that all parties continue to contribute to the finalisation of the technical work in order to ensure that the MLC agreement complies with the new timeline agreed by the OECD Inclusive Framework.

The Commission considers the implementation of the OECD Pillar 1 agreement to be a key priority in the area of corporate taxation and will propose a Directive as soon as the work at the OECD is sufficiently mature.

The Commission will regularly reassess the situation. If appropriate, it will consider submitting a legislative proposal to address the tax challenges arising from the digitalisation of the economy in the absence of the implementation of the Pillar 1 solution.

# Outlook | *EU Digital Levy?*

- **Current status #2** (European Parliament Resolution [P9\\_TA\(2022\)0404](#) of 23 November 2022 [own resources])

*(7a) The OECD aims for the Multilateral Convention implementing the OECD/G20 IF Pillar 1 Agreement to enter into force in 2024. However, as the successful implementation of the OECD/G20 IF Pillar 1 Agreement at international level by certain key third countries is not yet guaranteed, it is necessary for the Commission and the Member States to regularly reassess the situation. In the event of clear lack of progress by end of 2023, the Commission should submit a legislative proposal for a digital levy or a similar measure. Such a digital levy or proceeds resulting from a similar measure should then be considered an own resource of the Union in order to generate revenues by 2026.*

- **Current status #3** (Commission Staff Working Document [SWD\(2023\)331](#) of 20 June 2023 [own resources])

A tax on the digital economy is not part of this assessment, given the ongoing international discussions in the context of the OECD. The EU has always considered the OECD's Two-pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy a paradigm-changing reform of the international corporate tax system. Its implementation remains a key priority in the area of corporate taxation for the EU and its Member States. Enormous progress has been made following the October 2021 agreement. Certain building blocks now remain to be completed to pave the way for the signature of the Multilateral Convention before the end of the year.. Against such backdrop, the EU will not consider further measures on the digital sector, as long as the OECD's Pillar One is in preparation or in place.

# Thank you!



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