

# EU and OECD present possible solutions to the taxation of the digital economy

## KPMG Luxembourg Tax Alert 2018



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**On 21 March 2018, the European Commission issued two directive proposals: one on a 3% Digital Services Tax (as a short-term solution), the other on a digital permanent establishment concept (as a long-term solution).**

**The release of the proposals (and other communications) comes within a week of the OECD's Interim Report, "Tax Challenges Arising from Digitalisation," published on 16 March 2018.**

### Background

The taxation of enterprises that use digital technology has been high on the political agenda for months: the OECD's Interim Report has been in the works, and EU-level discussions have intensified particularly since September 2017.



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Both initiatives—the Commission's and the OECD's—should be seen in the broader context of the fight against base erosion and profit-shifting (BEPS). Indeed, the Interim Report follows up on work from 2015 done under Action 1 of the BEPS Project.

Additionally, the European Council's conclusions on "Responding to the challenges of taxation of profits of the digital economy" were adopted by the ECOFIN in December 2017 (see [Tax alert 2017-22](#)). Its intent was to help define a common EU approach to the issue, while highlighting the urgency of finding global agreement on a policy response.

### The EU Commission's proposals

On 21 March 2018, the European Commission presented a series of measures aimed at ensuring a fair and efficient taxation of digital businesses operating within the EU.

#### *Digital Services Tax*

The [proposal for a Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services](#) intends to prevent disparities arising within the EU as a result of the implementation of unilateral initiatives by Member States. It proposes a coordinated approach to tax revenues from certain digital services.

- The Digital Services Tax (DST) would apply as of 1 January 2020 and would be levied at the single rate of 3% on gross revenues.

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- The DST would apply to certain digital services, including the supply of advertising space, the making available of marketplaces that facilitate transactions directly between users, and the transmission of collected user data. The supply of digital content or payment services, as well as trading venue and regulated crowdfunding services, would be excluded.
- Businesses that cumulatively meet certain thresholds would be subject to the DST, i.e. entities with a total annual worldwide revenue above €750 million and a total annual revenue stemming from digital services in the EU above €50 million. If the entity is part of a consolidated group, thresholds should be assessed at the level of the group.
- The DST would be due in the Member State(s) where the users are located. If the users are located in different Member States, the proposal also provides for the tax base to be attributed between Member States based on certain allocation keys.

The directive also provides for cooperation between Member States in the form of a one-stop-shop mechanism, allowing taxpayers to have a single point of contact to fulfil all administrative obligations in relation to the new tax (i.e. identification, reporting, and payment). In addition, taxpayers should have the possibility to deduct the DST from their corporate income tax liability, so as to partially mitigate double taxation.

#### *Digital Permanent Establishment*

The [proposal for a Directive laying down rules relating to the corporate taxation of a significant digital presence](#) has a broader scope than the Digital Services Tax. It is designed to introduce a taxable nexus for digital businesses operating within the EU with limited or no physical presence. It also sets out the principles for attributing profits to businesses having such a “significant digital presence.”

- The directive aims to tax, under the normal corporate income tax system of a Member State, profits generated by businesses providing certain digital services and having a “significant digital presence” within this Member State.
- The notion of “significant digital presence” builds on the existing permanent establishment concept and covers any digital platform such as a website or a mobile application that meets one of the following criteria:
  - the annual revenue from providing digital services in a given Member State exceeds €7 million;
  - the annual number of users of such services is above 100,000; or
  - the annual number of online contracts concluded with users in a given Member State exceeds 3,000.
- The directive would be applicable to EU taxpayers as well as to enterprises that are established in a non-EU jurisdiction and that have no double tax treaty with the Member State in which they have a significant digital presence. However, it would not affect taxpayers established in a non-EU jurisdiction where there is a double tax treaty in force, unless that treaty includes a similar provision on digital presence.
- The proposed rules on profit allocation are mainly based on the current OECD framework applicable to permanent establishments and suggest the profit split as preferred method. Nevertheless, the directive also details a list of economically significant activities that should be taken into account to reflect the fact that value is created where users are based and data is collected.

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Finally, the measures proposed by the European Commission include [Recommendations to the Member States](#) to amend their double tax treaties with third countries, so that the above rules also apply to non-EU companies. The

objective of the recommendations is to address situations involving non-EU jurisdictions without violating the Member States' existing treaties.

It is expected that, once a Member State applies provisions to comply with the above concept of a digital permanent establishment with respect to another country, that Member State will also cease to apply the DST with respect to that country.

The proposals will now be submitted to the European Parliament for consultation and to the Council for adoption by unanimity.

### **OECD Interim Report**

Running in parallel to the work performed at the EU level, discussions have been taking place in the OECD Inclusive Framework on similar issues.

On 16 March, 2018, the OECD published its interim report regarding taxation of the digital economy under the title "[Tax Challenges Arising from Digitalisation](#)." This was sooner than planned as the expected publication date was April 2018.

The report, which is the result of a consensus reached among more than 110 member countries, presents an in-depth analysis of the different digitalised business models and how they create value. It describes a number of characteristics that are frequently observed in these businesses, such as a wide digital footprint with limited or no physical presence, heavy reliance on intangible assets, and the importance of data and user participation.

Considering how the changes associated with digitalisation are increasingly affecting a growing number of businesses, the OECD reiterates its previous conclusions that it would be difficult or impossible to ring-fence the digital economy from the rest of the economy.

While the OECD recognises that progress has been made in the implementation of the BEPS project, with some evidence that certain multinationals are already changing their tax arrangements, the report also underlines that the underlying issue of how the right to tax is allocated between jurisdictions has not been addressed.

In this respect—and although members agreed that the two key factors of the existing tax framework, namely nexus and profit allocation rules, need to be reviewed in the light of digital businesses—the report also acknowledges that there are currently divergent views on how the issue should be approached.

As regards interim measures, the report clarifies that there is no consensus on the need for, or the benefit of, such measures and therefore does not recommend introducing any. However, it does provide some guidance for jurisdictions that are considering immediate action.

Finally, the report briefly touches upon the impact of digitalisation on tax policy and tax administration, in particular with respect to non-standard work and to the use of new technologies such as blockchain and crypto-currencies.

The report was presented to the G20 leaders on 19-20 March 2018, and an update should be provided by 2019, with the aim of working towards a consensus-based solution in 2020 with the self-proclaimed objective of finding a long-term solution for the taxation of the digital economy.

### **KPMG Luxembourg comment**

Both the Council and the European Commission have on numerous occasions expressed their preference for a coordinated tax policy response to the challenges raised by the digitalisation of the economy at the global level.

However, they have also pointed out the lack of consensus and the limited progress made at the OECD level in implementing a global standard to justify unilateral action at the EU level.

One of the main questions now is whether these proposals will be approved by all EU Member States, which requires unanimity.

Some Member States have expressed their concerns with respect to the functioning of the DST. These concerns are, for example, that the DST is a revenue tax, which means that the tax must also be paid when the company makes a loss. High and low margin companies pay the same level of tax, as the tax is based on revenues. Finally, this DST will not be creditable against corporate income tax in the home country of the company, as normally only profit taxes can be taken into account as foreign tax credit. In this respect the possibility to deduct the DST as an expense should only partially mitigate the risk of double taxation.

Luxembourg is one of these concern-expressing voices. The Luxembourg government has mentioned its worry that an EU DST would only make the EU less competitive by comparison to non-EU countries. In its opinion, the EU should align on OECD initiatives and tax profits instead of turnover.

The other major concern is how the United States will react to these proposals, as the European Commission estimates that around 120 to 150 companies will fall within the scope of the new rules, of which half are expected to be located in the United States and a third in the EU.

During the G20 on 19-20 March 2017 in Buenos Aires, the United States already expressed its concerns too. It may decide to introduce countermeasures if the EU were to adopt these proposals.

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