

## ECOFIN agrees to extend discussions on Digital Services Tax, taking into account a new proposal from France and Germany

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### Executive summary

On 4 December 2018, members of the Economic and Financial Affairs Council (ECOFIN, or the Council)<sup>1</sup> discussed the European Commission's proposal to establish a digital services tax (DST) during their monthly meeting.

According to a press release<sup>2</sup> issued at the conclusion of the meeting, ministers based their discussions on two key documents:

- ▶ A DST compromise text containing the elements that the Austrian Presidency says have the most support from Member States.
- ▶ A joint declaration<sup>3</sup> by the French and German delegations, which was put forward to the ministers, in which they invite the European Commission and the Council to amend and refocus its draft directive for a DST to a tax base referring to the provision of advertisements only, on the basis of a 3% tax on turnover.

The Austrian Presidency recommended that the Council working group continues working on the basis of the latest Presidency compromise text as well as the elements proposed in the Franco-German declaration, with the aim of reaching an agreement as soon as possible. Pierre Moscovici, the European Commissioner for Economic and Financial Affairs, Taxation and Customs, is reported as mentioning a March timeframe. Any agreement, importantly, would

come after an anticipated January 2019 communication from the Organisation for Economic Co-operation and Development (OECD) on digital taxation.

In addition to discussions on digital taxation, the Council also adopted three short legislative acts aimed at adjusting some of the European Union's (EU) value added tax (VAT) rules, in order to fix four specific issues pending the introduction of a new VAT system. Ministers also endorsed a report to the European Council on tax issues, as well as a report by the Code of Conduct group on business taxation, together with Council conclusions, which also addressed cooperation with jurisdictions outside the EU.

## Detailed discussion

### Background

On 21 March 2018, the European Commission (the Commission) issued [two proposals](#) for new directives that would deliver new ways to tax digitalized forms of business activity.

The Commission's proposals focus on a two-phased approach: an interim solution, referred to as the DST and a longer term *Council Directive laying down rules relating to the corporate taxation of a significant digital presence* (SDP).

The DST proposal was for a gross revenues (i.e., turnover) tax, set at a uniform rate of 3% across all EU Member States, while the SDP proposal focuses on a new concept of digital permanent establishment (PE), along with revised profit attribution rules.

Following a thorough analysis of all technical issues contained in the DST proposal, 29 November 2018 saw the Austrian Presidency<sup>4</sup> put forward a compromise proposal<sup>5</sup> containing the elements that they believe have the most support from Member States. This was one of many compromise texts that have been offered to ministers since the initial DST proposal was made in March 2018.

The main elements in the latest compromise proposal (i.e., the differences from any earlier compromise proposals) are as follows:

- ▶ Member States shall adopt the DST by 31 December 2021 and apply it from 1 January 2022.
- ▶ The rate is set at 3%, and will apply to the proportion of taxable revenues allocable to each Member State. The DST can be deductible against the corporate tax base.
- ▶ The DST will apply to taxable revenues from:
  - Targeted advertising on a digital interface (where the entity placing advertising does not own the digital interface, it is the advertising entity which is considered to have the DST revenue, not the owner of the site)
  - The making available of multi-sided digital interfaces (i.e., intermediation services where there is interaction between users) and
  - The sale of user data collected about users and generated from users' activities on digital interfaces.
- ▶ The compromise proposal includes exemptions for the sale of data from sensors, the supply of payment services and the supply of regulated financial services by regulated financial entities. Provision of non-regulated services by regulated entities may fall within the DST. Intra-group revenues are also excluded, as are the sale of own goods and services online and the supply of digital content.
- ▶ The threshold is €750m worldwide revenues *and* €50m EU taxable revenues.
- ▶ User location will determine where the revenues are taxed, and where the location of the user's device is relevant, the IP address is used. For advertising, the revenues would be taxed where the user's device is located when they view the advertisements in the period. For multi-sided digital interfaces where users interact with each other, the revenues will be taxed where the user devices conclude the underlying transaction in the period. For other multi-sided interfaces, the revenues will be taxed where the user opened the account on their device. For the sale of data, where the user accessed a digital interface and data was transmitted (for the current or previous tax periods). The directive sets out the proportion of an entity's' taxable revenues to be treated as obtained in a Member States, e.g., in proportion to the number of times an advertisement has appears on users device in the period.
- ▶ Groups can nominate an entity to pay and fulfil filing obligations for the DST. Identification of each taxable person in each Member State will be required no later than 30 days from the end of the first tax period (calendar year) covered by the DST. DST returns (whether consolidated or single) and payment will be due 90 days following the end of the tax period.
- ▶ By 31 December 2020, if sufficient progress has been made by the OECD, the European Commission will propose postponing the application of the directive, or repeal it.

- ▶ The DST directive will expire upon the “entry into application” of revisions to international corporate tax standards as agreed at the OECD, or by December [X] at the latest. The [X] is up for debate at the ECOFIN meeting. A proposed 10-year life span was reportedly discussed (although not agreed) by the EU working parties, and the Netherlands is understood to have said that three years should be the maximum period for this tax.

The ECOFIN press release notes that at this stage, a number of Member States are not willing to accept the compromise proposal, while a few others are not satisfied yet with some specific points in the text.

### The Franco-German joint declaration

During the same meeting, ministers also examined a Franco-German joint declaration on the taxation of digital companies and minimum taxation.<sup>6</sup> Within the joint declaration, the two Member States reaffirmed their determination to establish a fair and effective taxation of large digital companies that will contribute to the modernization of the EU's tax systems.

France and Germany expect the OECD will reach an agreement by 2020 on proposals aimed at tackling the challenges raised by the digitalization of the economy and tax avoidance, and note that both countries will discuss proposals relating to a minimum taxation model that have been suggested by the United States, France and Germany and which have been discussed recently at G7 and G20 levels. The joint declaration notes that France and Germany are committed to immediately implement an OECD outcome into binding European law.

Specifically, the joint declaration invites the European Commission and the Council to:

- ▶ Amend and focus its draft DST directive on a tax base referring to the placing on a digital interface of advertising targeted at users of that interface, on the basis of a 3% tax on turnover and;
- ▶ To submit proposals in due course on taxing the digital economy and minimum taxation in line with the work of the OECD.

The joint declaration urges the Council to adopt a legally-binding directive on a DST without delay, and in any case before March 2019 at the latest. It also proposes that such DST will enter into force on 1 January 2021, if no

international solution has been agreed upon - though it does not note exactly what form and by whom that agreement may take.

The joint declaration also notes that in a case where such an international solution has been agreed and subsequently translated into EU law before 1 January 2021, the implementation of the DST directive should be withdrawn [by a majority vote] and should expire by 2025.

Importantly, the joint declaration notes that the DST directive would not prevent Member States from introducing in their domestic legislation a digital tax on a broader base - potentially including, among other things, previously in-scope items such as:

- ▶ Making available to users of a multi-sided digital interface that 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;
- ▶ Transmission (*for consideration*) of data collected about users and generated from users' activities on digital interfaces.

### Council also addresses four specific VAT issues

At the meeting, ECOFIN adopted three short legislative acts aimed at adjusting some of the EU's VAT rules in order to fix four specific issues pending the introduction of a new VAT system.

These relate to:

- ▶ Call-off stock: The text provides for a simplified and uniform treatment for call-off stock arrangements, where a vendor transfers stock to a warehouse at the disposal of a known acquirer in another member state.
- ▶ The VAT identification number: To benefit from a VAT exemption for the intra-EU supply of goods, the identification number of the customer will become an additional condition.
- ▶ Chain transactions: To enhance legal certainty in determining the VAT treatment of chain transactions, the texts establish uniform criteria.
- ▶ Proof of intra-EU supply: A common framework is established for the documentary evidence required to claim a VAT exemption for intra-EU supplies.

These adjustments are due to apply from 1 January 2020.

## Other endorsements by ECOFIN

At the meeting, ministers also endorsed a report<sup>7</sup> to the European Council on tax issues, as well as a report by the Code of Conduct group on business taxation,<sup>8</sup> together with Council conclusions,<sup>9</sup> which also address cooperation with jurisdictions outside the EU.

## Implications

While Commissioner Moscovici had voiced his hopes in recent weeks that “a deal [on the DST] was doable by Christmas” this is clearly no longer the case. In essence, nothing has been decided and there are more steps required to reach any form of conclusion.

Any concrete direction for the EU as a grouping now seems to be extended to March 2019 at the earliest. Political pressure remains very high on the Council to show some kind of solution before the European Parliament elections in May 2019. Moreover, other Member States (and non-EU jurisdictions) may or may not proceed with their own similar unilateral proposals to ensure their objectives are reached.

Taxpayers should remain especially aware of the OECD’s ongoing discussions with input and support from France, Germany and the United States regarding some form of minimum taxation regime that would be income tax aligned and not focused on turnover or revenue taxes. In this regard, the OECD may release some form of clarifying statement in January 2019, ahead of an interim report due later that year. Taxpayers should also note that any such substantial revisions to the cross-border may have a multi-year runway, resulting in significant administration challenges of any domestic DST’s adopted in the meantime.

Lafayette G. “Chip” Harter, Deputy Assistant Secretary for International Tax Affairs at the US Treasury Department noted at an EY co-sponsored event on 3 December 2018 in Washington, DC, that he was “happy to report that very real progress is being made and that a work plan is being developed for a multilateral agreement for standards [at the OECD].”

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## Endnotes

1. ECOFIN is a configuration of the Council of the European Union and is composed of the economics and finance ministers of the 28 European Union Member States.
2. <https://www.consilium.europa.eu/en/meetings/ecofin/2018/12/04/>.
3. <https://www.consilium.europa.eu/media/37276/fr-de-joint-declaration-on-the-taxation-of-digital-companies-final.pdf>.
4. The Austrian Presidency runs until 31 December 2018, at which point it is handed over to Romania for a further six-month period.
5. <http://data.consilium.europa.eu/doc/document/ST-14886-2018-INIT/en/pdf>.
6. <https://www.consilium.europa.eu/media/37276/fr-de-joint-declaration-on-the-taxation-of-digital-companies-final.pdf>.
7. <http://data.consilium.europa.eu/doc/document/ST-14601-2018-INIT/en/pdf>.
8. <http://data.consilium.europa.eu/doc/document/ST-14364-2018-INIT/en/pdf>.
9. <http://data.consilium.europa.eu/doc/document/ST-14363-2018-INIT/en/pdf>.

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