



COMMISSION EUROPÉENNE
SECRETARIAT GÉNÉRAL

Direction B - Prise de décision & Collégialité
SG.B.3 - Secrétariat du Groupe des Relations Interinstitutionnelles (GRI)

Bruxelles, le 26 octobre 2018

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<p>GRI du 26 octobre 2018 point 3.3.</p>

NOTE À L'ATTENTION DES MEMBRES DU GRI

Objet : **Proposition de directive du Conseil concernant le système commun de taxe sur les services numériques applicables aux produits tirés de la fourniture de certains services numériques – 2018/0073 CNS (21.03.18)**

Suite à la réunion du Groupe, Mmes et MM. les membres du GRI trouveront en annexe une fiche révisée préparée par la DG TAXUD sous l'autorité du cabinet de M. MOSCOVICI et en accord avec le cabinet de M. DOMBROVSKIS.

Annexe:

GRI MEETING OF 26 October 2018

NOTE TO THE MEMBERS OF THE GRI

Subject: Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services

Preparation of a Commission position in view of Coreper/ ECOFIN

Ref.: COM (2018) 148 final, 2018/0073 (CNS)

Procedure: Special legislative procedure (consultation)

Council(s): Coreper II/ ECOFIN

Rapporteur(s): Paul Tang (S&D/ NL)

Lead parliamentary committee(s): ECON

Associated parliamentary committee(s): IMCO and JURI decided not to give an opinion.

On 21 March 2018, the Commission adopted a package of initiatives to ensure fair and efficient taxation of the digital economy. The package includes two legislative proposals: (1) a proposal for a Directive on the corporate taxation of a Significant Digital Presence (SDP), also referred to as the comprehensive solution; and (2) a proposal for a Directive on the common systems of a tax on the revenues derived from the supply of certain digital services (Digital Service Tax or DST), also referred to as the interim solution.

This note focusses on the proposal for a DST which is a priority both for the Commission and for the AT Presidency. It aims to prepare the Commission's position on the latest compromise text prepared by the AT Presidency which will be discussed at the Coreper of 31 October in view of the ECOFIN of 6 November, where the Presidency aims to have a policy debate in view of reaching a general approach during the December ECOFIN. The Commission's aim is to already now have some flexibility to facilitate discussions towards the possible agreement at the December ECOFIN. This fiche includes the information available on 26~~5~~ October (following the latest Council meeting at technical level on the Presidency compromise text and the High Level Working Party meeting) and, in case of major amendments, will be updated after the High Level Working Party meeting of 26 October (when remaining legal/political issues will be discussed) and/ or the Coreper of 31 October.

The open issues are: 1) the narrowing of the scope of the proposal by removing the transmission of data. No amendment is proposed in this respect by the AT Presidency.

2) the introduction of an allowance
3) the repeal of the One Stop Shop for tax collection.

; 4) the introduction of a sunset clause that provides legal certainty on the temporary nature of the DST by setting a

specific expiry date for the Directive. [REDACTED] and 5) the coexistence of the DST with other current (or future) national taxes of similar nature. [REDACTED]

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1. BACKGROUND

1.1. Objective of the proposal

On 21 March 2018, the European Commission adopted a package of initiatives to ensure that digital business activities are taxed in a fair and growth-friendly way in the EU. The package includes two legislative proposals: (1) a proposal for a Directive on the corporate taxation of a Significant Digital Presence (SDP), also referred to as the comprehensive solution; and (2) a proposal for a Directive on the common systems of a tax on the revenues derived from the supply of certain digital services (Digital Service Tax or DST), also referred to as the interim solution. The proposals are the EU contribution to the international discussions on this topic which are taking place, in response to a mandate from the G20, at the Organisation for Economic Co-operation and Development (OECD) and which aim at finding a consensus-based, comprehensive solution by 2020.

This note focusses on the proposal for a DST.

This proposal answers a call for immediate action from certain Member States to address in an interim way the taxation of the digital economy. Indeed Member States may face pressure to act on this issue, given the risk that their corporate tax bases could be significantly eroded over time and also due to the perceived unfairness of the situation. This is why several Member States have introduced or are planning to put forward measures aimed at addressing quickly this issue in a targeted way. However such unilateral measures can be very diverse in terms of scope and their rationale, and they risk fragmenting the Single Market and distorting competition. Therefore, the Commission has put forward a harmonised approach for an interim measure that minimises such risks, until a comprehensive solution is in place at the international level.

The proposed tax is meant to be a simple interim measure to deal with the most extreme mismatches between the location of taxation and user value creation. It would apply to the gross revenues resulting from the provision of certain taxable services heavily reliant on user participation (advertising, intermediation services, and transmission of data for consideration), when supplied by taxable persons. Taxable persons are defined as entities exceeding both a worldwide revenue threshold of EUR 750 million and a Union threshold of taxable revenues of EUR 50 million. The proposed tax would have a fixed rate of 3% and would be payable by the taxable person providing the taxable services.

1.2. Date of the Commission proposal

21 March 2018

1.3. Opinion of national parliaments

Eight national Parliaments gave an opinion on the DST proposal. CZ, ES and PT gave a positive opinion, whilst NL, MT, IE and DK gave a negative opinion. BE's opinion is neither positive, nor negative and does not concern subsidiarity.

The main criticisms and concerns from the national Parliaments of NL, MT, IE and DK revolve around the European level as the right scale for action. National parliaments argue that the DST does not respect the subsidiarity principle and national competence on taxation. They argue that a global solution to be found at the OECD and development should be privileged over an EU initiative. Furthermore, IE's national Parliament is concerned with the design of the DST (favouring large Member States, taxing loss-making companies, lack of a sunset clause).

1.4. Opinions of the Economic and Social Committee and the Committee of the Regions

The Economic and Social Committee (EESC) adopted its opinion in July 2018 and the Committee of the Regions adopted an own initiative opinion on 23 October.

Major concerns expressed by the EESC includes the harmful effects of DST, namely due to the design of the tax. The EESC fears that the non-flexible 3% rate as well as the focus on turnover would affect SMEs and start-ups. Additionally, the EESC is concerned with possible unequal economic outcome of the DST, at the expense of smaller Member States. Finally, the EESC wants to make sure that the DST has an expiry date ensuring the measure is withdrawn once a comprehensive solution has been found.

The opinion of the Committee of the Regions is broadly supportive of the Commission's digital tax proposals. The Committee of the Regions suggested amendments to the DST Directive to remove the transmission of data from the scope and include a sunset clause linked to the adoption of the Significant Digital Presence proposal. As regards the Significant Digital Presence proposal, the Committee of the Regions suggested narrowing down the scope of the digital services covered and increasing the permanent establishment threshold from EUR 7 million to EUR 10 million. The Committee of the Regions expressed the view that the impact assessment is not sufficiently comprehensive.

1.5. Opinions of other institutions and bodies

n/a.

2. STATE OF PLAY IN THE EUROPEAN PARLIAMENT

2.1. Developments in the European Parliament

The ECON Committee considered its draft report on 9 October. The vote in ECON is scheduled for 3 December and Plenary will debate and vote in January.

Overall, the Parliament supports the DST proposal.

2.2. EP amendments

The report of MEP Tang suggests several amendments related to the following points:

1. Broadening the scope by including other types of digital services (i.e. making available of digital content and online retail).
2. Increasing the tax rate to 5%.
3. Requiring the Commission to carry out audits with the Member States of identification every three years.
4. Introducing a sunset clause to provide legal certainty on the temporary nature of the DST.
5. Introducing a review clause: after three years the Commission should make an assessment of the application of the DST and present a report accompanied, where appropriate, by proposals for its review.

The draft amendments are more ambitious than the original Commission proposal which may raise some economic and legal risks. The broadening of the scope and the increase in the tax rate appear to be the most problematic draft amendments for the Commission. Due to the specific nature of the tax (applied on gross revenues stemmed from activities where the user play a central role in value creation), a broader scope and a higher tax rate would risk over-burdening certain companies. The draft amendments also go in the opposite direction than the one followed by the Council.

3. STATE OF PLAY IN THE COUNCIL

3.1. Developments in the Council

The need for fair and efficient taxation of the digital economy was identified at the Union level under the Estonian Presidency in the Communication of the Commission "A Fair and Efficient Tax System in the European Union for the Digital Single Market"¹, adopted on 21 September 2017. This was followed by the conclusions adopted on 19 October 2017 by the European Council² that underlined the "*need for an effective and fair taxation system fit for the digital era*". Furthermore, the ECOFIN Council Conclusions of 5 December 2017³ noted the interest of many Member States for temporary measures, such as a levy based on revenues from digital activities in the Union, and considered that these measures could be assessed by the Commission. On 21 March 2018, the European Commission adopted its package of initiatives for a fair and efficient taxation of the digital economy, under the BG Presidency.

Since the start of the AT Presidency, the Commission's package has regained momentum. The European Council conclusions of 28 June 2018 invited the Council to take forward the work on the Commission proposals on digital taxation."

Following a high-level meeting on 5-6 July 2018, Member States agreed on the prioritisation of the discussions on the Digital Services Tax proposal - short term, interim

¹ COM(2017) 547 final.

² European Council meeting (19 October 2017) – Conclusions (doc. EUCO 14/17).

³ Council Conclusions of 5 December 2017 – Responding to the challenges of taxation of profits of the digital economy (FISC 346 ECOFIN 1092).

solution and the informal ECOFIN of 7-8 September concluded on a political commitment to agree on the Digital Services Tax proposal by the end of the year.

The large majority of Member States are actively participating in the technical discussions in an effort to arrive at a compromise text which is acceptable by all delegations. The Working Party on Tax Question of 25 October discussed a comprehensive version of the compromise text prepared by the AT Presidency. The file ~~will~~ has also been discussed ~~also~~ at the Council High Level Working Party meeting of 26 October where the discussion ~~will~~ focused on: i) the legal aspects (opinion of the Council Legal Service on the legal base of the proposal) and interaction of the DST with double taxation treaties); ii) state of play of the negotiation and way forward.

The file has been included in the agenda of the 31 October Coreper, aiming for a policy debate at the 6 November ECOFIN with a view to reaching a general approach during the December ECOFIN.

3.2. Proposed Council amendments

1. Definition of the scope of the proposal

Article 2 (Taxable revenues) of the Commission proposal qualifies as 'taxable revenues' the revenues resulting from the provision of each of the following services by an entity for the purposes of the Directive:

- (a) the placing on a digital interface of advertising targeted at users of that interface;
- (b) the making available to users of a multi-sided digital interface which allows users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users;
- (c) the transmission of data collected about users and generated from users' activities on digital interfaces.

The compromise text does not propose any amendments to the scope of the directive itself. The issue was discussed at the Council High Level Working Party of 25 September where the vast majority of Member States expressed a clear preference for keeping the scope as defined in the Commission proposal, with a few of them threatening to withdraw their support to the entire proposal should a modification of the scope significantly impact the revenue potential. At the same time, some other Member States requested to carve out from the proposal the transmission of data collected about users and generated from users' activities on digital interfaces as it could have negative impacts on the industry. The question of scope is still open and will be discussed at the ECOFIN on 6 November.

Proposed Commission's position: The Commission supports the AT Presidency approach of defending the original proposal.

2. Introduction of an allowance

The Commission proposal defines a 'taxable person' as an entity meeting both of the following conditions:

- (a) the total amount of worldwide revenues reported by the entity for the relevant financial year exceeds EUR 750 million;
- (b) the total amount of taxable revenues obtained by the entity within the Union during the relevant financial year exceeds EUR 50 million.

Many Member States expressed concerns on the risk of distortions introduced by the two thresholds system and offered several options to soften the effects. A few Member States suggested removing the global EUR 750 million threshold. Other Member States supported the idea of introducing an EU level tax allowance either in addition to or instead of the EU level threshold of EUR 50 million taxable revenues, in order to limit the cliff edge effect for companies either side of the threshold.

The current compromise text maintains the two thresholds and also proposes a tax allowance under Article 6a (chargeability). The total amount of taxable revenues obtained by the taxable person within the European Union shall be reduced by EUR 50 million. The share of each Member States in the allowance is equal to the share of each Member State's taxable revenues in the total amount of taxable revenues of that taxable person in the European Union.

However, several Member States (in particular the smaller ones) opposed the amendment, mainly for revenues concerns. The revenue potential of the DST is already limited. If the tax rate remains unchanged, the proposed tax allowance would reduce the revenue estimates by EUR 240 million overall, limiting the benefits of implementing the tax. As a result Member States remain divided on the approach to follow.

Proposed Commission's position:

3. Repeal of One-Stop Shop and finding an agreement on fully harmonised obligations

In order to manage the administrative aspects related to the DST, the Commission proposal foresees a One-Stop-Shop (OSS) simplification mechanism. The functioning of the OSS is based on the idea that a taxable person with DST liability in one or more Member State should enjoy a single contact point (the Member State of identification) through which all his DST obligations can be fulfilled (identification, submission of the DST return, and payment). That Member State of identification is responsible to share that information with the other Member States where DST is due, as well as to transfer the proportion of DST collected on behalf of such other Member States.

The AT Presidency proposed to remove the OSS as a method of collection of the DST on the grounds that it would not be proportionate to implement it (given the time and costs involved) for an interim tax. They consider it to be more efficient to establish harmonised obligations for taxable persons, without changing model of payment. The harmonised obligations would be done by means of implementing acts or directly amending articles in Chapters 3 (e.g. obligations) and 4 (e.g. administrative cooperation) of DST directive.

The large majority of Member States did not oppose the withdrawal of the OSS as the method of collection of the tax, aiming to adopt the most effective solution for DST collection, and a solution that would allow a smooth passage from the interim measure to the comprehensive measure.

Proposed Commission's position:

4. Sunset Clause

The Commission proposal does not include a sunset clause setting a specific expiry date for the Directive. However, in the Communication which is part of the package on the taxation of the digital economy the Commission has acknowledged that the DST should apply only until a comprehensive solution has been agreed at international level.

During the negotiations, several Member States has strongly argued that the application of the DST Directive must be time-limited by including a sunset clause with a specific expiry date in the text of the proposal. Other Member States do not favour simply picking an arbitrary date for terminating the DST Directive, and would instead prefer transitional provisions linked to the implementation of a global solution,

At the last Council meeting, the AT Presidency presented a working paper with a proposal for a sunset clause with a fixed expiry date for the DST Directive and a review clause calling for a Commission report based on progress made towards a global solution after a certain period. The possibility to have a review clause was suggested by the Commission services to link the application/termination of the DST Directive to the implementation of a global solution. The Council legal service said there were no legal issues with the suggested review clause, which provides flexibility without creating legal uncertainty, but questioned the need for such a provision. As pointed out by Council legal services, the sunset clause should ideally refer to a precise event (i.e. a specific expiry date). Therefore, the eventual adoption at OECD level of a global solution, or the eventual adoption of the Significant Digital Presence Directive proposal at EU level, may not provide enough legal certainty for a sunset clause to terminate the application of the DST. The AT Presidency believes that the precise date for the sunset clause is a political issue and should therefore be decided at Ministerial level.

Proposed Commission's position:

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5. Coexistence of the DST and other taxes of similar nature

Some Member States are concerned that the adoption of the DST Directive would not prevent other similar national taxes on the same services.

The coexistence of the DST with other current (or future) national taxes of similar nature will be discussed during the Working Party on the 12 November

The Commission is closely working on that with the Presidency and the Council legal service.

3.3. Prospects in Council

The AT Presidency continues to aim for a general approach by the end of the year, pending Plenary's vote in January 2019.

Following the generally positive Ministerial discussion at the Informal ECOFIN in Vienna of 7-8 September on the taxation of the digital economy, there is increasing political pressure to adopt the DST.

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4. DECLARATIONS TO BE MADE BY THE COMMISSION (AS SUCH OR JOINTLY)

n/a

5. RECOMMENDATION TO THE COMMISSION

It is suggested that the GRI recommends to the Commission to endorse the line set out in the present fiche.

6. OFFICIALS RESPONSIBLE

[REDACTED] TAXUD.D4, [REDACTED], TAXUD.D4, tel: [REDACTED]
[REDACTED], TAXUD.C1, [REDACTED]