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VIA ELECTRONIC FILING
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The Honorable Robert E. Lighthizer
The United States Trade Representative
The Office of the United States Trade Representative
600 17th Street, NW Washington, D.C. 20508

Re: Written Submission in Response to Initiation of Section 301 Investigations of Digital Services Taxes (USTR-2020-0022)

The Silicon Valley Tax Directors Group ("SVTDG")[1] is pleased to submit our comments in response to USTR's request for public comments[2] on the various taxes under consideration or adopted in Austria, Brazil, the Czech Republic, the European Union ("EU"), India, Indonesia, Italy, Spain, Turkey and the United Kingdom ("UK") (referred to as "DSTs" or the "Covered DSTs").[3] The SVTDG continues to support a multilateral process through the OECD's Inclusive Framework ("IF") as the appropriate means to reach an agreement on any modification to taxing rights and nexus concerning cross-border transactions.

[1] The SVTDG represents U.S. high technology companies with a significant presence in Silicon Valley that are dependent on R&D and worldwide sales to remain competitive. The SVTDG promotes sound, long-term tax policies that allow the U.S. high tech technology industry to continue to be innovative and successful in the global marketplace. SVTDG members are listed in Appendix 2 to this letter. The SVTDG previously has provided comments to USTR in connection with the French DST investigation.

[2] 85 FR 34709 (June 5, 2020) (referred to as the "Initiation Notice").

[3] Although several of the investigated taxes differ, to some extent, from the digital services taxes introduced by France and other European countries (e.g., the Indian Equalisation Levy, the Austrian Digital Advertising Tax), they all impose a tax on the remote supply of digital services. Accordingly, and consistent with the terminology used in the Initiation Notice, in this submission we refer to all of the investigated taxes as "DSTs" or "Covered DSTs", and we refer more broadly to all digital services tax and similar taxes on remote supplies of digital services as "DSTs".

Part I of this letter describes how DSTs continue to proliferate even after the USTR's Section 301 Investigation Report on France's Digital Services Tax,[4] and how policy justifications for new DSTs are evolving. Part II discusses several factors on which USTR relied in its French DST Report and how those factors also exist in the Covered DSTs, including the application of the U.S. tax treaty network to the Covered DSTs. Part III is a detailed analysis of each of the Covered DSTs, presenting those technical and practical details of the Covered DSTs that could support a determination by USTR in the Section 301 investigations that the Covered DSTs are unjustified measures, in particular in that they (i) discriminate against U.S. companies, (ii) are based on unreasonable tax policy, and (iii) unfairly restrict or unusually burden U.S. commerce.

We look forward to an opportunity to discuss our comments with you at your convenience.

Sincerely,

/s/ Robert F. Johnson

Robert F. Johnson
Co-Chair, Silicon Valley Tax Directors Group

[4] USTR, *Section 301 Investigation Report on France's Digital Services Tax* (Dec. 2, 2019) (hereinafter, the "French DST Report") available at https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf.

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PART I: Introduction

1. DSTs Continue to Proliferate since USTR's French DST Report

1.1 Noticeable Trends in the Covered DSTs

On December 2, 2019, USTR released its French DST Report concluding that the French DST "discriminates against U.S. companies, is inconsistent with prevailing principles of international tax policy, and is unusually burdensome for affected U.S. companies."[5] This determination, of course, was widely noted by governments then considering a DST of their own.[6] Notwithstanding that determination, several jurisdictions have chosen to proceed with proposing and implementing new DSTs, or substantially similar taxes directed at nonresident suppliers of digital services.

We perceive two clear trends in these taxes.

First, as more governments consider it acceptable to impose extraterritorial taxes on nonresident digital services suppliers, these taxes have become broader in scope. The first tax in this line of development inconsistent with established international tax principles was the original Equalisation Levy ("EL") enacted by India in 2016, which covered only the provision by nonresidents of digital advertising services to Indian customers. The first wave of European DSTs, including the European Commission's ("EC") 2018 proposed DST Directive,[7] expanded their scope to include businesses beyond digital advertising to include platform intermediaries and the sale or transfer of data, and brought within scope revenue earned from sales to advertising customers located outside the taxing country. More recent DSTs, like that of Turkey, further expanded its scope to cover supplies such as the direct sale of digital content. India's very recent expansion of its EL covers essentially any sale of goods or services provided digitally, and apparently even the supply of tangible goods or offline services if the contract for the supply of those goods or services is concluded or facilitated through internet communications / digital means. Each time a broader tax is announced or enacted, other governments see a potential model to emulate.

Second, rates for more recently proposed taxes have generally trended upwards. While the original 2018 EC DST was for a 3% DST, the recently enacted Turkish DST imposes a 7.5% tax and the first draft Czech Republic legislation provided for a 7% tax, recently reportedly reduced to 5%. All of these taxes remain based on gross revenue, not net income, so the actual effective tax rate on net income is exceedingly higher than the notional rate.

1.2 Other DSTs under Consideration

In addition to the French DST and the 10 other Covered DSTs identified in the Initiation Notice, several additional countries have proposed or enacted similar DST measures. We expect that additional countries will continue to pursue these taxes, especially if the OECD / Inclusive Framework does not reach a consensus on its Unified Approach work. We note below some recent proposals that are not

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[5] French DST Report, Executive Summary.

[6] Tim Bradshaw, *Countries vow to press ahead with digital taxes despite US threat*, Financial Times, available at https://www.ft.com/content/6529014c-169a-11ea-9ee4-11f260415385.

[7] *See* European Commission, *Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services*, (March 21, 2018), available at https://ec.europa.eu/taxation_customs/sites/taxation/files/proposal_common_system_digital_services_tax_2103 2018_en.pdf (hereinafter, "2018 EC DST").

included in the Covered DSTs, but have either recently been enacted or are currently under serious consideration:

(a) Belgian DST

On January 17, 2019, a member of the Belgium Parliament introduced a bill for a 3% DST. This proposal, which remained dormant for over a year, was reintroduced by another member of the Belgian Parliament and a new DST proposal was released on May 29, 2020. Several Belgian news outlets are reporting that a parliamentary majority is forming around this proposal. Although a final majority has not yet been confirmed within the Belgian Parliament, newspapers in Belgium are reporting that a Belgian DST could be enacted during 2020.[8] Parliament may treat the DST as an emergency measure to speed up the legislative process.

In general, the scope of covered services mirrors the 2018 EC DST. Accordingly, the discriminatory effect will be at least as severe as under the French DST, and probably even more so given the smaller size of the Belgian economy. Notably, the proposal as recently revised reduces the local revenue threshold from €25 million to €5 million, which will capture more foreign suppliers, while still excluding Belgian enterprises due to the high overall revenue threshold. While the proposal describes the DST as an indirect tax, the Belgian Council of State previously described the DST as a direct tax.

(b) Kenyan DST

The Kenyan DST recently entered into law, without amendments, and will come into effect on January 1, 2021. The tax imposes a 1.5% "digital service tax…payable by a person whose income from services is derived from or accrues in Kenya through a digital marketplace". This broad language makes its scope extremely unclear. Currently, there are no thresholds in the law, although draft regulations could further narrow the reach of the law, which we expect would have the effect of focusing the tax more on large digital services suppliers. Notably, the act allows Kenyan taxpayers to credit any DST they pay as an offset to their normal Kenyan corporate tax liability, which relieves double taxation for Kenyan residents, but not for nonresidents without a PE in Kenya.

(c) Others

The press has also reported that some countries, such as Latvia, Norway, and Slovenia have announced their intention to propose DSTs in the near term.[9] The African Tax Administration Forum also noted its intention to develop model DST rules for adoption by African countries.[10] Government officials have raised the possibility of DSTs in Poland and Canada, although there is no proposal to date.

2. Evolving Policy Justifications for New DSTs

The original policy justification for the French DST was to impose tax on those enterprises which were alleged to particularly benefit from commercializing user data. A number of articles have been

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[8] CHAMBRE DES REPRÉSENTANTS DE BELGIQUE, PROPOSITION DE LOI**,** *relative à la création d'une taxe provisoire (TSN) portant sur les produits générés par certaines activités des géants du numérique* (May 29, 2020).

[9] Elke Asen, *What European OECD Countries Are Doing About Digital Services Taxes,* TAXFOUNDATION.ORG, June 22, 2020; Hamza Ali, *Norway to Consider Digital Services Tax if OECD Talks Fail,* Bloomberg Law News (Jan. 13, 2020), available at https://taxfoundation.org/digital-tax-europe-2020/.

[10] African Tax Administration Forum, *Policy Brief: Domestic Resource Mobilisation Digital Services Taxation in Africa* (June 2020), available at https://events.ataftax.org/index.php?page=documents&func=view&document_id=61 (hereinafter, "ATAF Policy Brief").

published refuting this connection between raw data and commercial value. This allegation then was reframed as an assertion that the tax was desired to ensure that "digital giants" pay their "fair share" of taxes, allegedly reflecting value derived from users in the market jurisdictions.[11] As shown in the French DST Report, this policy justification resulted in *de facto* discrimination against U.S. digital services suppliers.[12]

Several of the taxes under investigation have scope definitions and revenue thresholds very similar to the French DST, for example Brazil, the Czech Republic, Italy, Spain, the UK and most likely any renewed EC proposal. The *de facto* discrimination thus will be at least equally true for those taxes as it was for the French tax since, as further demonstrated in Part III, the dual revenue thresholds will serve to either largely or entirely exclude local digital companies from the scope of the DST. In fact, as DSTs are introduced in countries such as the Czech Republic, which are less likely to have nurtured significant digital services suppliers, it is even less likely that any domestic suppliers will be subject to the tax, making the *de facto* discrimination even more obvious than in the French case.[13]

In recent months, we have seen a distinct increase in new policy justifications for these taxes. The principal new justification is that large digital services providers are thriving and profiting from the COVID-19 pandemic, and thus should be subject to additional taxation.[14]

The assertion that in-scope digital services providers are uniformly thriving in this pandemic is incorrect. Many of the in-scope platforms support the travel and hospitality industries. Those industries have been severely impacted, along with the platforms which support them. Online advertising demand has significantly weakened during this pandemic. To the extent that such statements refer to sales of digital content by the platforms themselves, we note that such suppliers are expressly excluded from the scope of most of the DSTs.

We consider that these new arguments are erroneous in their assumptions and are intended to divert scrutiny from the main purpose and effect of the DSTs. These additional arguments support our view

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[11] "Since September 2017, France is at the forefront of this battle for the Gafa [Google, Apple, Facebook, Amazon] to pay their taxes at the appropriate level." *Taxation of Gafa: Bruno Le Maire announces a future European directive*, LE JOURNAL DU DIMANCHE (March 3, 2018), available at https://www.lejdd.fr/politique/fiscalite-des-gafa-bruno-le-maire-annonce-une-directive-europeenne-a-venir-3589670.

[12] Gary Clyde Hufbauer and Zhiyao (Lucy) Lu, *The European Union's Proposed Digital Services Tax: A De Facto Tariff*, by the Peterson Institute for International Economics (June 2018), available at https://piie.com/system/files/documents/pb18-15.pdf ("Thresholds for applying the profits tax [i.e., the significant digital presence PE standard] are moderate and would potentially encompass many EU firms as well as U.S. and other foreign firms. By contrast, thresholds for applying the DST are very high and would largely embrace U.S. firms. De facto, if not de jure, the DST discriminates against the United States."); Martti Nieminen, *The Scope of the Commission's Digital Tax Proposals*, BULLETIN FOR INTERNATIONAL TAXATION (Sept. 12, 2018) (discussing the scope of the 2018 EC DST and significant digital presence directives and noting that, because the DST thresholds are so high, "half of the businesses that are anticipated to be liable to the DST under the proposed thresholds are expected to be US-based entities").

[13] *Id.*

[14] "Digital giants, no matter where they are headquartered, will emerge from the current crisis more powerful and more profitable."; "The pandemic has accelerated a fundamental transformation in consumption habits and increased the use of digital services, consequently reinforcing digital business models' dominant position and increasing their revenue at the expense of more traditional businesses." Recent letter from Rishi Sunak and finance ministers in France, Italy and Spain, as reported by BBC, *Sunak urges US to back digital services tax*, BBC NEWS (June 18, 2020), available at https://www.bbc.com/news/business-53099785.

that these taxes are intended to have a discriminatory impact on targeted, in-scope digital services providers, which principally are U.S. companies.

Further, we note that most groups large enough to qualify under the global revenue threshold of the DSTs have established affiliates in many jurisdictions around the world, all of which support the global business. To the extent a major digital service provider is managing to maintain profits during the pandemic, the group affiliates established outside the United States also will continue to be profitable and pay local taxes. For those groups which are in fact making consolidated losses, in many cases their transfer pricing policies with respect to their foreign affiliates will guarantee that those affiliates report profits and pay local taxes. In those latter cases, the net losses of the group will be borne by the country of residence, i.e. the United States for U.S. multinationals, even if the foreign affiliates report taxable profits.

The second additional justification is that due to government expenditures and the economic slowdown during the pandemic, government budgets require more revenue, thereby justifying an additional tax on nonresident digital services providers. Essentially, this justification is that these new taxes are needed to raise revenue to meet new domestic fiscal pressures. Since these taxes are imposed principally or exclusively on nonresident enterprises, they become politically expedient to enact and an effective means to bypass addressing difficult domestic tax and budget decisions.

Especially for the more recent DSTs, the official justifications for the new tax have strayed somewhat from the justification for the French DST that nexus for the tax is based on the acquisition and use of local resident user data by the nonresident digital services supplier. The fact that this argument has not found as much favor with some of the more recent policy justifications suggests to us that some of the governments are simply more transparent in basing the tax on the intent to tax the "digital giants". We continue to believe that the "user data" argument was more of a pretext to tax the targeted companies rather than a sound economic principle.

3. International Tax and Trade Policy Context

In all cases of DSTs along the French model, the governments are taking the position that these taxes are outside the scope of all of their international tax and trade treaty obligations. This requires that the governments defend the tax as a novel type of tax in order to avoid all existing international obligations. While the language of a particular tax or trade agreement might differ between agreements, this position normally requires establishing the following points simultaneously: (i) the tax is not an income tax in order to avoid in force income tax treaties; (ii) the tax is not a VAT to avoid VAT rules, such as in the EU on no duplication of domestic VATs; and (iii) the tax is not a tariff to avoid trade obligations (WTO/GATS).[15]

SVTDG members believe that this intentional engineering to create a tax outside the scope of all existing international obligations is a clear demonstration that the Covered DSTs are by design unfair and unreasonable.

In our view, there should be no possibility that taxes of this magnitude can be completely outside the agreed framework regulating international commerce as memorialized in the comprehensive network of U.S. tax and trade agreements. The assertion by governments that these taxes are not subject to any international agreement further demonstrates the discriminatory intent of these taxes, and it reflects a political choice to rush to impose taxes on in-scope providers without conducting the appropriate negotiations with the U.S. government. These attempts to operate outside the existing framework are

[15] In the EU, the Commission has competence for customs matters. Member states also have to ensure that the tax is not like a customs duty.

unreasonable and discriminatory in light of the fact that a very large part of the taxes to be imposed by these measures will fall on persons beyond the borders of the taxing jurisdictions. As just the most extreme example, the Indian E-Commerce EL by law cannot apply to any domestic person.

The proliferation of these unilateral actions is a direct challenge to the orderly allocation of taxation rights and double tax relief responsibilities bilaterally and multilaterally through agreed treaties. This corrosive effect is made worse by the fact that several of the countries with or proposing DSTs are among the world's most advanced economies. Once those countries take these actions, it validates similar actions by others, as we are now seeing in Latin America, Africa and Asia.[16]

4. Connection to OECD / IF Process

4.1 The Importance of the OECD / IF Process

In all cases, governments have chosen to proceed unilaterally with the Covered DSTs despite OECD statements that unilateral actions are harmful to the development of an international consensus.[17] We continue to believe that the work at the OECD, through the Inclusive Framework, provides the best (and perhaps only) path to a consensus resolution to the debate over the taxation of the digitalized economy. While we appreciate that progress towards a political agreement on that work may now be in a short pause, we hope and expect that the technical work will continue, with the full participation of U.S. Treasury, focused on an ultimate resolution that does not ring fence digital services providers for discriminatory taxation. We have been pleased to see bipartisan support in Congress for this view.[18]

We support the stated goal of the OECD / IF process, which is to reach agreement on a consensus basis for a net income tax based solution, with full double taxation relief, and a concomitant removal of all DSTs and other unilateral measures which have been introduced outside the agreed reforms of the OECD's Base Erosion and Profit Shifting project. We encourage all relevant elements of the U.S. government to engage with their foreign counterparts to achieve this goal. We support the many statements by OECD officials that unilateral actions such as the Covered DSTs run counter to the goals of developing a consensus based position at the OECD.

Reinforcing the desired goals of a net income based system with no DSTs is critical, as we have detected a weakening of the commitment to regard DSTs as a temporary measure, and to commit to their withdrawal once an international consensus is reached. In many cases, governments are hedging their statements of intent to withdraw DSTs once a consensus is reached. As the most recent example, the ATAF Policy Brief noted that while many countries that have introduced DSTs have stated that they

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[16] *See, e.g.*, ATAF Policy Brief (stating that there is a "significant risk" if African countries continue to wait for the OECD / IF solution as this would delay enacting and implementing legislation to ensure African countries obtain taxing rights on the "profits" of highly digitalized businesses and "cost African countries millions of dollars in tax with many such businesses seeing significant increases in their profits during the COVID-19 pandemic.").

[17] Terri Sprackland, *OECD Not in 'Turf War' With Commission, Gurría Says*, TAXNOTES (June 25, 2018), available at https://www.taxnotes.com/tax-notes-international/transparency/oecd-not-turf-war-commission-gurria-says/2018/06/25/2858q (in which OECD Secretary-General Angel Gurría said "[W]e just ask that the EU not create short-term measures…Please don't do anything short-term that will stop long-term solutions.").

[18] "Grassley, Wyden Weigh in on DST: In a show of bipartisan concern in Congress about the tax issue, the Republican chairman and top Democrat of the Senate Finance Committee urged 'countries to abandon plans for digital services taxes on U.S. businesses and to continue working toward an agreement on a more realistic timeline given the COVID-19 crisis'". Doug Palmer, *Digital Services Tax Dispute with the EU Heats Up*, POLITICO (June 19, 2020), available at https://www.politico.com/newsletters/morning-trade/2020/06/19/digital-services-tax-dispute-with-the-eu-heats-up-788664.

will repeal them if and when an international solution is achieved, "ATAF members will need to consider whether they will make a similar commitment."[19] As another example, in recent Parliamentary debates, the UK Government was challenged to include a review of the UK DST in 12 months from its effective date, but it declined to do so, indicating that the UK will retain its longer review cycle.

Accordingly, we are concerned that DSTs will become permanent taxes in many countries. As with the introduction of the first DST, a decision to not withdraw a DST will have a contagion effect among other countries with a DST.

4.2 Use of DSTs as Leverage over the United States

These tactics are also in display in the context of the OECD / IF continued work towards a resolution, in principle on a consensus basis. Some of the countries involved in the OECD process are matter-of-factly using their DSTs as attempted leverage over the U.S. to achieve agreement on a deal on their terms at the global level.

In response to Treasury Secretary Mnuchin's letter dated June 12, 2020 to the finance ministers of France, Bruno Le Maire, Italy, Roberto Gualtieri, Spain, María Jesús Montero, and the UK Chancellor of Exchequer, Rishi Sunak, calling for a pause in the OECD / IF consensus process and recommending that it be restarted later this year, the finance ministers of those countries issued the following statement:

> [W]e think it feasible to concretely deliver a solution to a 2020 timetable in line with the G20 mandate. Building on the outcomes of technical work already advanced at the OECD, we believe that a phased approach, initially focused on automated digital services, would considerably ease the task of achieving a consensus-based solution and make a political agreement within reach this year. **It would also pave the way for possible transitional solutions to be discussed with the United States, notably with respect to existing or upcoming national digital service taxes**.[20]

We believe that this message is quite transparent. Those countries with existing DSTs, or which are signaling that they may enact one in the near future, are using the offer of modifying their DSTs as leverage to induce the United States to come to a "consensus based solution". The SVTDG fully supports the continued negotiations at the OECD / IF level to reach a consensus, but it disapproves of unilateral actions that are inconsistent with and undermine established international tax treaty agreements and principles. In particular, we consider it inappropriate for governments in the middle of international negotiations to use DSTs to create facts on the ground to leverage other countries and change the course of those negotiations. This is yet another indication that the policy justifications for the tax are being largely overrun by political positions, supporting the conclusion that such taxes are unfair and inequitable.

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[19] ATAF Policy Brief (*supra,* note 10).

[20] Department of the Treasury, Washington D.C., letter dated June 12, 2020, from Steven T. Mnuchin to Minister of Finance of the French Republic, Bruno Le Maire, Minister of Finance of the Italian Republic, Roberto Gualtieri, Minister of Finance of Spain, María Jesús Montero, and the UK Chancellor of Exchequer, Rishi Sunak (emphasis added).

5. Determination of Action in Investigation of French DST

We note USTR's determination of action to be taken in line with USTR's determination that the French DST is unreasonable or discriminatory and burdens or restricts U.S. commerce. We further note USTR's further determination to suspend application of the additional duties for a period of up to 180 days.[21]

For clarity, we note that the suspension of application of the additional U.S. duties does not create an economic equivalence to France's suspension of collection of their DST. While the French government has stated that filing and payment deadlines for the 2020 year will be delayed, in the meantime the tax itself continues to accrue on the in-scope digital services providers with no interruption or delay. The French suspension, in essence, relates only to a filing deadline, and not to a tax liability.

In contrast, suspending the additional U.S. tariffs amounts to a delay in effective date of the liability, as presumably such taxes will not be collected on a retroactive basis after the expiration of 180 days.

Accordingly, in addition to this action, we encourage all responsible bodies of the U.S. government to continue their engagement with the relevant foreign governments to prevent the imposition of further DSTs and to secure the withdrawal of existing DSTs. As noted in this submission, the prompt elimination of all DSTs should be the stated goal, to eliminate these unreasonable and discriminatory taxes.

[21] USTR posted a notice to be published in the *Federal Register* on its website, Docket No. USTR-2019-0009, announcing USTR's determination to take action under its Section 301 investigation into the French DST in the form of imposing 25% duties on specified French products. Apparently as a parallel to the French suspension of the collection of the DST, USTR determined to suspend the application of the duties for a period of up to 180 days, until January 6, 2021.

PART II: Review of Relevant Factors as noted in USTR's French DST Report as Exhibited by the Covered DSTs

During an investigation under Section 301, USTR is to assess whether a particular national measure is (1) either (a) "unjustifiable" or (b) "unreasonable or discriminatory," and (2) "burdens or restricts" U.S. commerce. A measure is "unjustifiable" if it is "in violation of, or inconsistent with, the international legal rights of the United States," including rights to national or most-favored-nation treatment. A measure is "unreasonable" if it is "unfair and inequitable," even if it does not necessarily violate international legal rights of the United States. A measure is "discriminatory" if it "denies national or most-favored-nation treatment to United States goods, services, or investment."

In the French DST Report, USTR relied on the following factors in determining that the French DST is discriminatory, unfair, or unreasonable and burdensome on U.S. commerce: (1) the French DST discriminates against U.S. digital companies, as demonstrated through (a) statements by French officials showing the intent to target U.S. companies; (b) the defined scope which ring-fences those parts of the digital services economy in which U.S. companies are dominant; (c) the global and local revenue thresholds which had the effect of including large global enterprises but excluding local digital services suppliers, even if the local supplier had a significant presence in its market; and (d) the DST's relationship to national taxes that caused the cost of the DST to be disproportionately borne by U.S. digital companies; and (2) the French DST was unfair, unreasonable and burdensome on U.S. companies on the basis of: (a) its retroactivity; (b) its application to revenue rather than net income; and (c) its extraterritorial aspect, (a)-(c) being inconsistent with international tax principles.[22]

In this section, we provide comments on the unjustifiable, unreasonable and discriminatory burdens placed on U.S. commerce by the Covered DSTs. This section describes how the factors under (2) above—i.e., retroactivity, application to revenue rather than income, and extraterritorial aspects—would apply to the Covered DSTs. This section also analyzes the application of the U.S. tax treaty network to the Covered DSTs. In Part III, we provide a specific analysis of the technical details of each of the Covered DSTs which demonstrate the factors listed under (1) and (2) for each of the 10 Covered DSTs.

1. Targeting U.S. Companies

On Monday, July 6, the Wall Street Journal published this above-the-fold headline: "EU Targets U.S. Tech Giants".

The Journal reported a statement by Margrethe Vestager, Executive Vice-President for a Europe Fit for the Digital Age and Competition, European Commission, announcing a series of proposals that apparently includes the new EU-wide DST.[23] We believe that the Journal headline accurately reflects the intended targets of the new tax. We believe that the other Covered DSTs share the same discriminatory intention. We comment on how each of the Covered DSTs are discriminatory in nature, by intent and/or effect, in Part III under the headings "Policy Justifications".

2. Burden on U.S. Commerce

In general, the Covered DSTs will burden U.S. commerce and U.S. companies in the same way as described in the French DST Report. The Covered DSTs do differ in some cases in their scope of application. Those whose scope is closest to the narrow scope of the French DST, such as the Brazilian,

[22] French DST Report, Executive Summary.

[23] Valentina Pop & Sam Schechner, *EU Targets U.S. Tech Giants*, Wall Street Journal (July 6, 2020), 1.

Czech, Italian and Spanish DSTs, will impose a more direct and concentrated burden on U.S. commerce as those taxes can be expected to fall more disproportionally on U.S. enterprises. The same can be said for the UK DST, though its scope differs from other EU DSTs in that in-scope revenue is defined by reference to revenue derived by an enterprise which has adopted a particular business model (as opposed to defined by reference to a type of transaction).

As these taxes are all imposed in addition to any otherwise imposed value added or indirect tax, these Covered DSTs will represent additional costs borne by in-scope digital enterprises that are not borne by competitors which operate through traditional channels. As is the case with any tax imposed on gross revenue and not net income, the tax will suppress growth of targeted business. To the extent that significant local competitors are excluded from the tax due to the revenue thresholds, the Covered DSTs impose a direct competitive disadvantage for in-scope U.S. suppliers.

The tax will burden U.S. commerce in the same way as the imposition of any other nonproductive cost burdens a business. Business managers will seek to maintain expected margins despite the additional cost. In the likely event that most businesses will pass on the cost to the market, including by raising prices, the effect will be to decrease demand and therefore restrict economic activity. To the extent that a business is required to absorb the cost, the effect will be to deflect capital from other investments. In either event, the growth and profitability of U.S. businesses will suffer competitive harm compared to competitors which are not subject to this tax.

As affected U.S. businesses increase prices to cover the tax costs, smaller competitors not subject to the Covered DSTs will be able to undercut prices of the major U.S. companies. That action will distort competition on the merits between companies that are subject to the tax and those that are not. The result is decreased market opportunities for in-scope U.S. companies, depressing business growth opportunities for those suppliers.

We note that in January of 2020, French Finance Minister Bruno Le Maire confirmed that France would suspend collection of DST liabilities for 2020 revenue until December 2020.[24] In-scope taxpayers were required to pay taxes that accrued for 2019 sales. While a deferral of payment obligations is welcome, as noted in Part I, a delay in the collection of the DST does not mean that companies will not be taxed during that period; delaying a payment date does not stop an accrual of the liability. Assuming that both the U.S. and France end their respective "suspensions" in January, there will be stark difference in the consequences: U.S. digital services suppliers will be faced with a year's worth of accrued taxes, while the U.S. duties presumably will simply start on a prospective basis at that time.

3. Retroactivity and Unreasonable Implementation Time frames

The French DST Report concluded that "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, which will also affect their customers, including U.S. small businesses and consumers."[25] The French DST entered into force on July 24, 2019, but it applied with respect to revenue of a business as of January 1, 2019.[26]

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[24] Keith Bradsher, *France Says U.S. Talks Could Produce Agreement on Digital Taxes*, NEW YORK TIMES (Jan. 22, 2020), reporting on Bruno Le Maire's announcement in Davos, Switzerland, available at https://www.nytimes.com/2020/01/22/business/france-us-digital-tax.html.

[25] French DST Report, Executive Summary.

[26] Law n° 2015-759 (July 24, 2019).

Several of the Covered DSTs have been enacted without essential guidance on scope or compliance details, or have been enacted with exceeding short time periods between date of enactment and the effective date. For example, only a few days elapsed between the date the government introduced the Equalisation Levy expansion to the Indian Parliament, and the date it became law. In the case of Italy, the law has been in effect in principle since January 1, 2020, but there still are no implementation guidelines that describe the details of the legal and compliance obligations. Enacting a law that says tax must be paid, without providing details as to the scope of the legal obligation, or rushing legislation through the legislature with no advance note to the taxpayers affected, as a practical matter is no different than retroactive legislation. By the time a company can implement the changes in their systems and execute on its compliance obligations, the company is paying on a liability that began accruing in the past.

Enacting legislation without specifying essential details and an exceedingly short notice between date of enactment and effective date infringes on the fundamental tax principles of tax certainty and simplicity.[27] We had commented in our previous submission that the French DST retroactive application was extraordinary, "especially given the G20 Heads' of State recent commitment to global tax certainty in the Osaka Leaders' Declaration and the systems changes required for the intensive user location tracking and data storage that compliance and audit-readiness compels."[28]

It is useful to compare the hasty enactment of some of the Covered DSTs with the more thorough consultative process of the OECD. In response to its Proposed Unified Approach under Pillar One,[29] the OECD Secretariat describes receiving over 300 submissions and taking into account comments from over 500 representatives from governments, business, civil society and academia. In the recent IF 2020 Statement, the OECD / G20 repeated its commitment to work on concerns raised during this consultation period:

> Addressing these concerns and working on issues such as tax certainty, simplified compliance, dispute prevention and resolution, and elimination of double taxation, is essential… Nevertheless, many were supportive of [the Unified Approach] objectives and guiding principles, provided it would effectively prevent the proliferation of unilateral measures, avoid double taxation and excessive compliance burdens, and restore stability and certainty to the international tax system.[30]

The unrealistic time frame for companies to comply with novel taxes, taking into account the lack of consistency among the measures in their scope and compliance requirements, is a feature of several of the Covered DSTs. The lack of implementation guidelines allowing sufficient time before the effective date of the measure is also burdensome for affected companies, as observed, for example, in the Italian DST which has come into force without published guidelines. The effective date of the Italian DST is

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[27] The French Report cites to several sources, including OECD guidance, on the relevance of tax certainty and simplicity in designing sound tax policy.

[28] Silicon Valley Tax Directors Group, *Written Submission in Support of the Initiation of a Section 301 Investigation of France's Digital Services Tax (USTR-2019-0009)* (Aug. 18, 2019), 19 (internal citations omitted) (hereinafter, "Prior Submission").

[29] OECD Public consultation document, *Secretariat Proposal for a "Unified Approach" under Pillar One*, 9 October 2019 – 12 November 2019.

[30] OECD (2020), *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy – January 2020*, OECD/G20 INCLUSIVE FRAMEWORK ON BEPS, OECD, Paris, at Annex 1, para. 1.1(7), available at www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf (hereinafter, "IF 2020 Statement").

January 1, 2020 and the DST liability is expected to accrue from January 1, 2020, despite the lack of guidance as of the date of this letter. As described in Part III, the Indian E-Commerce EL passed into law with mere days before the effective date (April 1, 2020), and details on guidelines / scope still have not been issued, even though the first payment date was July 7, 2020, except for the payment and return form which was published four days before the due date on July 3, 2020. Although not retroactive in their application based on the date of enactment by the legislature, the Covered DSTs will be retroactive in effect to the extent the critical legal details are left to subsequent government determination.[31] This legal uncertainty places an undue burden on in-scope U.S. companies.

4. Taxation on Gross Revenue Rather than Net Income

All of the new taxes are imposed on gross revenue, and thus will impose the same burdens on in-scope suppliers as the French DST. In general, gross revenue based taxes are disfavored as an economically inefficient tax. Taxes based on gross revenue impose a far greater burden on unprofitable companies or companies with a low profit margin than would a net income tax. As the DST does not allow for the deduction of costs from gross revenues, even for profitable companies the DST is equivalent to an income tax with a far higher rate than its notional rate.

As a simple example, assume that an in-scope supplier with a consolidated operating margin of 10% is subject to a DST of 3%.[32] The effective tax rate on net income in that case is 30%, far higher than the U.S. corporate income tax rate. In the case of a digital services supplier with no personnel or assets in the taxing state, this represents a unilateral allocation of 100% of the tax base of the consolidated supplier enterprise to the taxing state, to be taxed at a rate higher than the U.S. corporate rate. The effective tax rate becomes even higher, of course, as countries tend to adopt higher tax rates, as is the case of Brazil with progressive rates up to 5%, the Czech Republic proposing a 7% rate (possibly to be reduced to 5%), and Turkey with a 7.5% rate.

The damaging effects of a gross-based tax without an input credit mechanism are exacerbated in cases where the taxes can cascade on more than one leg of a supply chain. The OECD warned Inclusive Framework participating countries that "[e]conomic double taxation could also arise through cascading effects where a certain supply of e-services is made to a person that incorporates those services into an onward supply that is itself subject to the tax."[33] Some of the Covered DSTs recognize this problem for intercompany transactions within affiliated groups and provide that the tax would apply only once.[34] None, however, protect against cascading taxes along a supply chain involving unrelated parties.

We expect that businesses will continue to face cash flow constraints following the pandemic and the global economic recession. For low margin companies or companies operating at a loss, a tax on revenue can have the effect of creating a cost that a cash stressed business may not be able to absorb. We have commented on these principles in our Prior Submission.[35] Of all the Covered DSTs, the UK DST is the only one that has any provision to reduce the tax for loss or low margin companies. The Brazilian DST introduces a new feature of progressive tax rates, but those progressive rates are still based on

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[31] We have analyzed this factor further under Part III for each of the Covered DSTs.

[32] CSI Market, *S&P 500 Profitability* (as of Q4 2018, average operating margin of S&P 500 was 10.31%), available at https://csimarket.com/Industry/industry_Profitability_Ratios.php?sp5.

[33] OECD, *Tax Challenges Arising from Digitalisation - Interim Report 2018*, (March 16, 2018), 179, (hereinafter the "Interim Report"), available at https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-interim-report-9789264293083-en.htm.

[34] The Turkish DST does not include this protection against cascading taxes.

[35] Prior Submission (*supra,* note 29).

gross revenue, so the progressive rates do not relieve the disproportionate burden on lower margin or loss businesses. There is no necessary correlation between gross revenue and profit; a large enterprise may fall under the highest rate bracket for the Brazilian DST, but still generate a loss, making the higher rate even more punitive.

As a matter of principle, a tax on revenue must be designed with important safeguards to ensure fairness (e.g. double taxation mitigation, dispute mechanisms). These safeguards are not present in any of the Covered DSTs. The OECD in its Interim Report cautioned countries against adopting taxes on revenue without important safeguards.

> Countries that are in favour of the introduction of interim measures recognise the need to take the following considerations into account: (i) be compliant with a country's international obligations; (ii) be temporary; (iii) be targeted; (iv) minimise over-taxation; (v) minimise impact on start-ups, business creation and small businesses more generally; and (vi) minimise cost and complexity.[36]

The unfairness of the Covered DSTs is even more pronounced when compared with gross-basis tax regimes, such as VAT or GST, which like the DST are levied by reference to the destination of the services being provided. These indirect taxes generally are collected through a staged process, and each business entity in the supply chain has its role in collecting and remitting the portion of the tax that corresponds to its value addition through its own production process. In that case, the burden falls on the final consumer, but the total tax at the point of final output is no more than the actual VAT / GST tax rate.

> This design feature gives to the VAT its essential character in domestic trade as an economically neutral tax. The full right to deduct input tax through the supply chain, except by the final consumer, ensures neutrality of the tax, whatever the nature of the profit, the structure of the distribution chain, and the means used for its delivery (e.g. retail stores, physical delivery, internet downloads).[37]

DSTs are also gross-basis taxes; however, by design, DSTs are narrowly levied on certain suppliers, with no possibility of an input credit. This means that the in-scope supplier either absorbs the DST as an additional cost, or increases prices in the market to recover the cost of the tax.

5. Double Taxation

As the French DST Report noted,[38] an environment with proliferating unilateral measures implemented without coordination among countries inevitably results in double or multiple taxation. For over a century, countries have negotiated tax treaties to mitigate the effects of double taxation and its inherent burden on trade and economic growth. In no case do any of the Covered DSTs provide means for double tax relief, except for a limited relief offered by the UK DST. In fact, in many cases the governments have pointedly noted that taxpayers will not be allowed to claim a credit for the DST in order to avoid double taxation.

We note that such statements can relate only to those countries' double tax relief mechanisms, as foreign governments cannot dictate double tax relief available under U.S. law. Even the UK example,

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[36] Interim Report, 180-181.

[37] OECD (2017), International VAT/GST Guidelines, OECD Publishing, Paris, Chapter 1, available at http://dx.doi.org/10.1787/9789264271401-en.

[38] French DST Report, 56.

which provides only limited relief for overlapping DSTs, has no intention of resolving double taxation with the residence country (i.e., U.S.). In our view, those statements indicate a lack of intention to negotiate with countries of residence for the major digital services suppliers in order to ensure that appropriate double tax relief is available for the unilateral allocation of the tax base of the supplier enterprise into the taxing state's jurisdiction. Those statements also probably reflect further efforts by the governments to avoid application of the relevant U.S. tax treaty, as all U.S. tax treaties endeavor to provide double tax relief for cross-border transactions.

In the IF 2020 Statement, the OECD / G20, in connection with the Inclusive Framework, emphasized the importance of mitigating double taxation as countries continue to address the tax challenges arising from the digitalization of the economy:

> As noted, the primary response to the tax challenges of the digitalisation of the economy is a new taxing right over a portion of residual profits allocable to market jurisdictions. This will be limited to large MNE groups in scope which meet a new nexus test in the market jurisdiction concerned…, and to the agreed quantum of profit represented by Amount A…. These parameters need to be designed in a way that is simple, **avoids double taxation** …, and can be designed to work alongside the ALP, including as represented by Amounts B and C….[39]

DSTs can create double taxation in two ways, which are not mutually exclusive, so they can both apply to a taxpayer on a single item of income.

First, double taxation will arise in every case of the Covered DSTs when the taxpayer is not entitled to a tax credit in its residence country for the DST. This feature occurs because the income subject to the DST will also be taxed under the corporate income tax regime of the supplier's residence country. Without a credit, that income inevitably is double taxed.

Second, the lack of coordination between the scope definitions among the Covered DSTs means that the same item of income may be subject to tax under more than one DST. For many of the Covered DSTs, the scope definition brings 100% of the revenue from platform intermediary transactions into scope if either participant transacting through an in-scope platform is located in the taxing country. Thus, it is possible that a transaction that involves users in two countries can be subject to DST on the entire income in both places. For example, if both Spain and France have implemented a DST, a sale by a French seller to a Spanish buyer through an intermediary platform could be subject to both the French and the Spanish DSTs. Similarly, if a Spanish traveler books accommodation in France through an online travel intermediary services provider, the revenue earned by the service provider on a single booking transaction could be subject to DST in both Spain and France. The potential for multiple DSTs on a single transaction compounds the competitive disadvantage suffered by a U.S. in-scope platform provider compared to its out-of-scope local country competitors.

6. Extraterritoriality and the Allocation of U.S. Tax Base to Taxing Jurisdictions

All of the Covered DSTs are imposed on an extraterritorial basis, i.e. imposed on revenue streams unconnected to a permanent establishment established in the taxing state, and thus are identical to the French DST in that regard.

International tax principles allocate the right to tax income to the state where value is created. In the case of a U.S. digital services provider, that value is created at the place where the enterprise deploys its personnel and assets. By imposing a tax on a unilateral and extraterritorial basis, unconnected with the

[39] IF 2020 Statement, para. 13 (emphasis added).

actual business activity conducted in the taxing state, countries are inappropriately taking part of the tax base created by the taxpayer enterprises from their states of residence and reallocating that tax base to the taxing state. For U.S. digital services providers, this is a unilateral reallocation of the U.S. tax base to the foreign country.

7. Undue Compliance Burden for a Temporary Tax

Responsible government officials in some cases have stated an intent to have the Covered DST be an interim measure, to be withdrawn once the OECD / IF complete their work.[40] However, in some more recent communications, we have detected some wavering on that point.[41] In all cases, the responsible officials have also expressed their preference and desire that an agreement be reached through the OECD / IF process.

We certainly hope and expect that all of the Covered DSTs will be withdrawn, or never implemented, in light of the pending agreement through the OECD / IF process. In that event, the implementation costs of a novel tax, to be in effect only for a short period of time, are uniquely burdensome. These taxes are novel, and taxpayers cannot comply simply through reports from their existing financial systems. New procedures and technological solutions must be designed, for example, to track the specific location of all users in the world who may be viewing advertisements served from a particular platform. Compliance with these rules will require substantial engineering time (and cost) to set up new systems requirements, apart from the time and work of many other business functions. Some of these taxes are unusually burdensome; the Turkish DST, for example, requires monthly reporting and payment. The burden of those design, implementation and compliance costs is magnified when the tax will be in place for only a short period of time.

8. Impact on U.S. Federal Income Tax Collections

The Covered DSTs will directly or indirectly reduce U.S. tax collections from U.S. enterprises which are in scope of the taxes. All of these taxes will be either creditable under section 903 of the Internal Revenue Code, which can reduce the taxpayer's U.S. federal income tax obligations dollar for dollar, or deductible for purposes of determining taxable income. Under the U.S. international tax system following changes enacted by the Tax Cuts and Jobs Act (TCJA), those costs will become currently deductible expenses regardless of whether the cost is borne by the U.S. parent or a foreign subsidiary. Accordingly, in every case, the payment of one of the Covered DSTs will reduce the U.S. federal income tax liability of an in-scope enterprise.

The annual cost to the U.S. Treasury will increase over time, as these taxes are designed to apply to growing sectors of the economy.[42] The sectors targeted by these taxes will expand at a higher rate than

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[40] France, Spain and UK officials have presented the DST as an interim measure to be replaced once a multilateral agreement is reached. *See, e.g.*, "…as indicated in the reports on digital economy issued by the OECD, setting up of this tax is conceived as a transitional measure until the entry into force of the new legislation aimed at incorporating the internationally agreed solution." Statement of Purpose of the official text of the 2019 Spanish DST Bill (Feb. 28, 2020).

[41] ATAF Policy Brief (*supra*, notes 10, 20); Even the U.K. has shown some equivocation. In 2019, the UK government stated that it was "committed to dis-applying the DST once an appropriate international solution is in place." HM Revenue & Customs, *Policy paper - Introduction of the new Digital Services Tax* (July 11, 2019), available at https://www.gov.uk/government/publications/introduction-of-the-new-digital-services-tax/introduction-of-the-new-digital-services-tax. We understand the "appropriate" qualifier to mean that the resolution has to be satisfactory to the UK, else it reserved the right to maintain its DST.

[42] Available tax revenue estimates from Austria and the UK confirm that increased collections expected over time.

the economy as a whole, as more enterprises adopt digitalized business models.[43] In particular, we expect that business models using intermediary platforms will expand substantially in the immediate future, as more enterprises create business models that take advantage of the efficiencies of the internet to connect sellers and buyers. As a result of the recent COVID-19 pandemic, companies will continue to digitize their business to be able to serve consumers and protect employees, while facing mobility restrictions. As intermediary platforms comprise one of the major categories of in-scope digital services, we expect that the DSTs extracted from that sector in particular will grow at a rate greater than the economy generally.

The annual cost also will increase as the scope of the taxes broaden. Further, as there are no normal international standards for the magnitude of this sort of tax, it becomes tempting for governments to propose very high rates. The tax rates of the Covered DSTs range from 2% to 7.5%. The spread of almost four times in these taxes shows that they are disconnected from sound principles of net income taxation.

This table provides the available annual revenue estimates prepared by governments in connection with the various Covered DSTs. We note that the majority of these amounts will be paid by U.S. multinationals, and as a result, directly or indirectly reduce U.S. tax collections. We have not attempted to test these revenue estimates for reasonableness.

	Country	Estimate (in Euros; in millions)[44]
1	Austria (Austrian DAT)	30
2	Brazil (CIDE-Digital)	None available
3	Czech Republic	195
4	EC Proposal	5,000
5	India (E-Commerce EL)	None available
6	Indonesia (ETT)	None available
7	Italy	708[45]
8	Spain	968

[43] *See, e.g.*, *Trends in the Information Technology sector*, available at https://www.brookings.edu/research/trends-in-the-information-technology-sector/.

[44] Notes: Austria - per Finance Minister's estimate. At least €15M subsidy earmarked to Austrian media companies; Czech Republic - estimate does not reflect possible rate reduction; The EC Proposal includes values across the EU; Other EU DSTs would be eliminated if a DST proposal is adopted; India - While the government had provided different estimates, none are reliable in light of recent changes to the legislation; Italy - FY2020-2021; estimate has been reduced from prior amounts; Spain - estimate has been reduced from prior amounts; Turkey - estimate reflects averaged and annualized estimate based on reported April-May collections; UK - FY2020-2021 - the UK government has included annualized amounts for six fiscal periods, showing an increase in amounts collected.

[45] *See Italy draft 2020 budget calls for unilateral digital services tax*, PwC (Nov. 2019), available at https://www.pwc.com/us/en/services/tax/library/insights/italy-draft-2020-budget-calls-for-unilateral-digital-services-ta.html.

9	Turkey	108
10	UK	310

Source: various

As noted above, many governments claim to support these taxes as a means to raise revenue to address their COVID-19 relief budgets. We see no reason that the U.S. Treasury should fund foreign budgets even for worthy causes, in light of the same or higher domestic budget needs in the United States. With the expected annual cost for U.S. companies expected to continue to increase over time, as more DSTs come into force, applicable rates and scope continue to expand, and the targeted sector continues to grow, the U.S. federal income tax collections would be significantly impacted. Any reduction to U.S. tax collections from its own multinationals means all other U.S. taxpayers are left to pick up the additional funding needs for the government, effectively creating a tax transfer from all U.S. taxpayers to foreign governments.

9. Discrimination and Trade Agreement Violations

For reasons outlined in the French DST Report, digital services taxes are discriminatory in both intent and effect. As with the French DST, most of the Covered DSTs have scope provisions designed to limit the effect on local service providers and include thresholds that exclude local services providers, as notably demonstrated by the DSTs of Brazil, Czech Republic, Italy, Spain, Turkey and the UK. For example, all of those DSTs tax digital advertising, but not other advertising where local companies are dominant. These same national DSTs impose a tax on a digital interface provider that does not itself own or provide the goods or services sold on the interface, but does not impose tax on analogous local e-commerce sellers where the provider of the interface provides the goods or services. Moreover, the turnover thresholds ensure that effectively only large, globally successful—i.e. American—companies are subject to the tax, even as locally dominant firms are excluded. For example, we expect that the Czech DST would not apply to the search service provider seznam.cz, a significant competitor of Google in the Czech market, on the basis that seznam.cz's global revenues do not meet €750 million threshold. While narrower in scope, the Austrian DAT targeting digital advertising discriminates through the application of the turnover thresholds that result in the taxes being concentrated on the globally successful American firms, and also channels revenues from those taxes to subsidize domestic print advertising platforms. As for the Indian measures, they are by definition discriminatory as they apply only to services imports. With respect to the Indonesian Electronic Transaction Tax ("ETT"), while the form of the tax has not been disclosed, we expect the ETT to be like the Indian measure with respect to its application to non-residents only.

Many of these national measures will infringe the countries' international trade agreement commitments. First, the EU and its member states made commitments under the World Trade Organization's General Agreement on Trade in Services (GATS) that apply to DSTs. The EU and member states committed to provide market access on a non-discriminatory basis to digital services, including cross-border data processing (CPC 843), data base (CPC 844), and advertising (CPC 871) services. Digital advertising, of course, is in scope of all of the DSTs, and depending on how the transmission of data category is applied to define the scope of DSTs, the other categories of digital services also could be impacted by the DSTs. Outside the EU, India committed to provide non-discriminatory market access for cross-border data processing (CPC 843) and data base (CPC 844) services, and Turkey committed to provide non-discriminatory market access for cross-border data processing (CPC 840) and advertising (CPC 871) services.[46]

[46] Brazil and Indonesia made very limited scheduled commitments under GATS.

Second, the DSTs violate the non-discrimination - national treatment and most-favored-nation - commitments in GATS. As with the French DST, the definition of the scope of services covered by the DSTs and the turnover thresholds provide less favorable treatment to services of the successful U.S. digital firms than "like" services provided by local companies. As noted above, the European and Turkish DSTs tax digital advertising services where U.S. companies are competitive, but not other forms of advertising where local businesses are most successful.[47] Similarly, these measures tax digital interfaces offering goods and services of others, a business model of successful U.S. firms, but do not tax digital interface providers that offer their own goods and services, the business model of many local firms, including in many cases major local retailers that compete directly with the digital platforms for e-commerce sales. The turnover thresholds in the European and Turkish DSTs reinforce the discrimination against U.S. firms by excluding even highly successful local firms that do not meet the global turnover threshold. Those countries which have modified their global thresholds to apply to only in-scope revenue, such as France, Brazil and Turkey, tighten the discriminatory effect by creating an exclusion for even very large local enterprises, if in-scope digital services are not their principal business.

As discriminatory as the European and Turkish measures are, India's discrimination against U.S. companies is even more manifest. While India committed to provide market access and non-discriminatory treatment for cross-border data processing and data base services, the 2020 E-Commerce EL would tax the cross-border provision of such services, while no similar tax is imposed on local services.

Third, none of the GATS exceptions would be available for the DSTs, as discussed at length in our submission regarding the French DST. Even if one could divine a legitimate purpose for the DSTs, the measures would not satisfy the "chapeau" language regarding arbitrary or unjustified discrimination and disguised restrictions. The European and Turkish DSTs target revenues from services predominantly provided by American companies (e.g. online advertising, digital interfaces), and the operation of the revenue thresholds further concentrate the impact on American providers, as discussed above. Thus, while facially neutral, "the design, the architecture, and the revealing structure" of the European and Turkish DSTs indicate that they are "arbitrary or unjustified restriction[s]" or "disguised restriction[s]" and hence violate the non-discrimination principles of GATS. In the case of the Indian E-Commerce EL, there is not even a pretense of even-handedness -- the measure applies exclusively to non-resident suppliers, and is hence an arbitrary or unjustified discrimination.

USTR is presently negotiating free trade agreements (FTAs) with Kenya and the United Kingdom. U.S. FTAs ordinarily include commitments on trade in services going beyond GATS in ensuring market access and non-discriminatory treatment for U.S. businesses and workers. While those agreements do not yet exist, the UK DST and the newly enacted Kenyan DST would be inconsistent with the nondiscriminatory market access principles expected in U.S. FTAs.

10. Relationship between Section 301 Criteria and U.S. Tax Treaty Analysis

The Covered DSTs generally deviate from principles set out in U.S. tax treaties and trade agreements. These deviations are relevant factors in USTR's assessment of whether a foreign government's measure is "unreasonable or discriminatory" under Section 301. Given that all of the relevant foreign

[47] The Austrian DAT is somewhat different in that it also taxes domestic advertisers. In that case, the discrimination is more in the revenue thresholds which effectively define the nonresident advertisers subject to the tax as principally U.S. companies.

governments have expressly engineered the covered DSTs to fall outside of their tax and trade treaty obligations, they have not offered arguments why the U.S. tax treaties should not apply. Even if the application of U.S. tax treaties is uncertain, we note that this uncertainty does not impede or limit USTR's domestic law authority under Section 301 to reach a determination that the Covered DSTs are unreasonable or discriminatory.

Nevertheless, for completeness, we describe below the analysis which would apply to determine whether the Covered DSTs should be precluded under the U.S. tax treaties with the relevant countries.

10.1 DSTs as "Covered Taxes" under U.S. Tax Treaties

Tax treaties define the taxing rights of the two Contracting States when a resident of one State derives certain categories of income from sources in the other State. In the case of business profits, the typical rule is that one State may not tax the business profits of a resident of the other State unless the taxpayer has a "permanent establishment" or "PE" (generally defined as a fixed place of business, which requires some physical presence or dependent person activity) in the first State and the profits are attributable to that permanent establishment.[48] DSTs are all designed to be imposed on the normal business income of the affected taxpayers, so that there is no doubt that the relevant income constitutes "business profits" of the taxpayer. Thus, if a DST is covered by a relevant tax treaty, that treaty would prevent imposition of the DST on the revenues of taxpayers resident in the other Contracting State who do not have a PE in the Contracting State imposing the DST.

All U.S. tax treaties provide a definition of "taxes covered", i.e. those taxes to which treaty obligations apply. United States tax treaties generally are based on the United States Model Income Tax Convention (the "U.S. Model") and the OECD's Model Tax Convention (the "OECD Model" or "MTC"), both of which contain a definition of covered taxes.[49] Many U.S. treaties include language based on Articles 2(1) and 2(2) of the U.S. Model and MTC, which provide a generic definition of covered "taxes on income" as meaning "all taxes imposed on total income, or on elements of income". Other U.S. treaties have language based only on Articles 2(3) and 2(4) of the U.S. Model and MTC, which define covered "taxes on income" by reference to specifically identified existing taxes in each Contracting State, as well as "any identical or substantially similar taxes that are imposed after the date of signature of this Convention in addition to, or in place of, the existing taxes".

Officials in jurisdictions that have enacted or are seriously considering enacting a DST have asserted that their respective DSTs fall outside the relevant treaty definition of a "covered tax" and, thereby, their obligations under the relevant tax treaty with the United States do not apply. In most cases, the explanation is that as the tax is on gross revenue, not net income, the tax is outside the scope of the treaty. The claim that gross-based taxes on revenue are *per se* outside the scope of income tax treaties is plainly incorrect; gross-based taxes on many income items such as dividends, interest, royalties, and fees for technical services are universally regarded as within the scope of treaties.

For the reasons described in Appendix 3, we believe that the plain language of the treaty text and a detailed analysis of historic OECD materials show that DSTs in many cases should be treated as "covered taxes" and thus within the scope of many tax treaties. In particular, we believe that the treaty text

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[48] *See, e.g.,* U.S.-France Tax Treaty, Article 7 (Business Profits).

[49] U.S. Treas. (2016), *United States Model Income Tax Convention*; OECD (2017), *Model Tax on Income and on Capital: Condensed Version 2017*, OECD Publishing.

existing in the various treaties with the Covered DST countries and OECD supporting materials lead to the following conclusions:

- DSTs should be viewed as covered taxes under any treaty that conforms to the U.S. and OECD Model Articles 2(1) and 2(2). This conclusion is supported by the treaty text, the OECD Model Commentary, historic OECD materials, and other interpretive sources.

- DSTs might be covered taxes under treaties that only contain provisions conforming to U.S. Model and OECD Model Articles 2(3) and 2(4). The coverage of DSTs under these provisions would likely depend upon the nature of the DSTs and their similarity to existing income taxes in the relevant jurisdiction.

10.2 Nondiscrimination Tax Treaty Articles

A separate issue under tax treaties is whether DSTs conflict with the Nondiscrimination Articles present in many treaties. Most U.S. tax treaties contain language based on Article 24(1) of the U.S. Model and OECD Model, which prohibits a Contracting State from subjecting nationals of the other Contracting State to more burdensome taxation than it imposes on its own nationals in the same circumstances. In most cases, tax treaty Nondiscrimination Articles cover taxes of all kinds, without regard to whether they are otherwise "covered taxes" under the treaty. The national treatment language also generally treats a company incorporated in a Contracting State as a "national" of that State. The national treatment protection under the Nondiscrimination Article of tax treaties is similar in principle to the corresponding national treatment protection in international trade law, but the two concepts are not necessarily identical. Whether or not a viable claim of discrimination exists under a provision based on MTC Article 24(1) could depend on the design of the particular DST and its impact on U.S. companies versus companies incorporated in the treaty jurisdiction (i.e. on whether the DST's features amount to disguised discrimination based on nationality, rather than having a legitimate basis in tax policy).

10.3 Interaction between Tax Treaty and Trade Agreement Nondiscrimination Obligations

Of the countries that currently have enacted or are considering enacting the Covered DSTs, some of these countries' tax treaties provide that, if a tax is within scope of the treaty, then the nondiscrimination provision of the treaty applies exclusively to that tax. Where such exclusive provisions in tax treaties apply, the nondiscrimination obligations of those treaties apply to the exclusion of international trade obligations under the WTO's General Agreement on Trade in Services.

In other words, depending on the scope of the relevant tax treaty's Nondiscrimination Article in such countries, either the tax treaty nondiscrimination obligations apply, or the international trade law nondiscrimination obligations apply. We do not believe that there should be a case where neither applies to a significant new levy such as the Covered DSTs. In any event, neither the international tax nor trade agreements serve as an impediment to USTR's domestic law authority under Section 301 to determine whether a foreign government's measure is "unreasonable or discriminatory" under Section 301, and deviations from the principles set out in tax treaties and trade agreements may well inform that Section 301 analysis by USTR.

PART III: Analysis of Each of the Covered DSTs

1. Austrian Digital Ad Tax ("Austrian DAT")

1.1 Introduction

The Austrian DAT extends an existing domestic print-media, TV, radio and billboard advertising tax to digital advertising. Under the legacy advertisement tax act, any advertisement that is published on TV, radio or other traditional media that is rendered in Austria for consideration is subject to the tax. The taxpayer is the advertiser. If the advertiser does not have a taxable presence in Austria, the domestic party who ordered the advertisement is liable for the tax, which is usually the advertising agency. If neither party is resident in Austria, the domestic party in whose interest the advertisement was carried out is liable for the tax, which is usually the domestic importer or distributer. Based on guidance issued by the Ministry of Finance, the term "service provider" is defined as the publishing house, the broadcasting company and the persons that offer space for advertisement (i.e. owner of a billboard). TV and/or radio advertisements broadcasted by foreign broadcast companies and that were not adapted to the Austrian market but shown unaltered are not subject to the Austrian advertisement tax. However, if those foreign broadcasting companies prepare an Austria-specific advertisement, the tax is triggered. Similar rules apply to foreign newspapers and magazines distributed in Austria. If these print products contain Austria-specific supplements or advertisements, the tax is triggered. Cross-border advertisements only trigger tax on the amount that is attributable to the Austrian market. Advertising services that are predominantly intended for foreign countries (more than 75%) are not subject to the advertising tax, even if an advertising effect is also achieved in Austria. Also, exemptions exist for advertisements placed for charitable purposes.

The DAT was promulgated and effective as of January 1, 2020, with a first tax payment due March 15, 2020. Austria was an early actor in the EU, contributing to the regional contagion of unilateral taxes.

A notable and unique characteristic of the Austrian DAT compared to the other Covered DSTs is that €15 million of tax revenues raised from the DAT are earmarked annually to assist the "digital transformation process" of Austrian media companies by way of a digitalization fund. We provide more information on this digitalization fund under 1.3, Policy Justifications, below.

1.2 Technical Details

Please refer to Appendix 1 for an unofficial translation or official version of the legislative text and any available implementing guidelines, as described therein.

The Austrian DAT imposes a 5% tax on gross revenues from internet advertising that is received on a user's device with an Austrian IP address, the content and design of which are targeting (also) Austrian users, and applies to companies with overall revenues of €750 or more worldwide and revenues derived from online advertisement services in Austria in the sense of the DAT of €25 million or more. The taxpayer is the party that renders the online advertisement. Online advertisement service providers that are not resident and do not have a permanent establishment in the EU or the EEA are required to appoint a fiscal representative. However, there is no default liability of any other party to the transaction under DAT like in the legacy advertisement tax act. Currently, no guidance is available except for administrative guidance concerning the tax filing process, and therefore, no exemptions exist for advertisements placed for charitable purposes. It is also not entirely clear which amount of the service fee is subject to the Austrian tax, if the advertisement is directed at Austrian and other consumers, for example in Germany.

As noted by the French DST Report, online advertising is a large and growing market that has been, and continues to be, dominated by U.S. companies. Given that there is a domestic Austrian tax already in place on ads placed in print and other traditional media also levied at 5%, scope-focused arguments for discrimination regarding the Austrian DAT are not as strong as with the French DST. However, the revenue thresholds support a discrimination argument given that local Austrian firms selling digital advertising, which are smaller, will likely be excluded from the scope of the DAT.

The DAT's global revenue threshold of €750 million is based on global revenue rather than in-scope revenue, following the original proposed EU DST Directive rather than the French DST. The local revenue threshold of €25 million derived from online advertisement in Austria mirrors that of the French DST. Notably, the local threshold of €25 million is very high for the relative population size of Austria. Similar to the French DST, the Austrian DAT revenue thresholds are discriminatory in their effect, as they are designed to capture large global digital advertising service providers while excluding smaller local competitors, even if such competitors have a significant local market presence.

1.3 Policy Justifications

Statements by Austrian officials responsible for advancing the Austrian DST show that the measure deliberately targets U.S. digital companies. For example:

- On December 29, 2018, Austrian Chancellor, Sebastian Kurz, said in a statement: "We will take a national step. We will introduce a digital tax in Austria… The aim is clear: taxation of companies that make large profits online but barely pay taxes—such as Facebook and Amazon.";
- On October 10, 2019, as recorded in the verbatim protocols of the Federal Council (Upper House / Second Chamber of Austrian Parliament), Member of the Federal Council Elisabeth Mattersberger (ÖVP) said: "[…] Further in agenda item 6 the resolution is taken to levy internet giants like Facebook. Google, or Amazon in the future with a 5% tax on online advertisement. - Presumably, nobody can have anything against this. […]";
- Also on October 10, 2019, as recorded in the verbatim protocols of the Federal Council (Upper House / Second Chamber of Austrian Parliament, Member of the Federal Council Mag. Dr. Doris Berger-Grabner (ÖVP):

  Dear colleagues, even if colleague Schennach would like to spare the digital internet giants, it is these giants from Silicon Valley that only pay 0.8% corporate income tax. No tax is paid on their revenue derived from online advertisement. My esteemed colleagues, I tell you where this leads: to a competitive disadvantage for our companies, for our domestic companies, as traditional companies pay on average 23% tax on their profits, the digital economy 8-9%. We know what Google, Apple, Facebook and Co pay. […] To summarize: One thing is clear: with the 5% Digital Tax, Austria leads the way in favor of more fairness in the internet. A tax system for the 21st century has to build on what is of value today and that is data. Thank you.
- On April 3, 2019, the former Media Minister and current Finance Minister Gernot Blümel (ÖVP) posted the following in his Instagram Story: "That is why we are introducing a digital tax on online advertising. Facebook, Google and Co. must also comply with a fair competition".

The protectionist intent of the Austrian DAT is directly evidenced by the annual allocation of DAT revenues to subsidize digitalization of Austrian media companies. We expect that the subsidized Austrian media companies will be direct competitors of many of the U.S. digital services suppliers which will pay the tax. It is not presently clear how the €15 million of annual subsidy will be used to support the digital transformation of Austrian media companies. The Federal Chancellery is now planning to introduce a law to regulate the distribution of online ad tax revenues. The draft has to be approved by the EU Commission (state aid) and is expected to be passed by parliament in autumn 2020. The first

distribution of the funds is planned for late 2020/ early 2021. Depending on the specific use of the dedicated funds, the transfer of tax revenues to Austria media companies could be an actionable subsidy under the WTO; in any event, the earmarking adds to the protectionist effect of the DAT's scope and thresholds (similar to Brazil - see below).

The explanatory remarks to § 7 and § 8 of the DAT describe this diversion of funds as follows (unofficial translation):

> Of the additional funds generated by the digital tax an amount of at least EUR 15 million shall be used for the digital transformation process of Austrian media companies. Specifically the related expansion of digital offerings as well as their consistent future development to meet the continuously changing user behavior shall be advanced through these means. Especially because of the market power of the internet giants, this transformation process cannot be achieved through commercial business models alone. To strengthen the Austrian media place and to secure the domestic identity for the future, this measure shall provide the sufficient funds based on the principle "Money for Change".

Statements made by Austrian officials and government publications regarding the DAT support the protectionist intent of the subsidy and mirror the explanatory remarks. For example (unofficial translations):

- On April 3, 2019, in a report issued to the Council of Ministers s and as also reported by the Austrian Press Agency (APA), then Minister of Finance Hartwig Loeger, said:

  Domestic and traditional media are facing big challenges due to the market power of those internet giants, which cannot be met through commercial business models alone. To strengthen the Austrian media place and to secure the domestic identity for the future, a digitalization fund will be established. With this, we will support the digital transformation process of Austrian media companies.

1.4 Relevant Attributes

(a) Extraterritoriality and Taxation on Revenue not Income

The Austrian DAT has other problematic aspects that mirror the French DST, the analysis of which is very similar to the analysis in the French DST Report. Namely, DAT's extraterritoriality is inconsistent with international tax principles and unusually burdensome for U.S. affected companies in the same way as the French DST. Another point of similarity is that DAT's application to gross revenue rather than net income is inconsistent with international tax principles and unusually burdensome for U.S. affected companies in the same way as the French DST.

We believe that USTR's analysis on both of these points as expressed in the French DST Report apply with equal strength to the Austrian DAT.

2. Brazil ("CIDE-Digital")

2.1 Introduction

Congressman João Maia introduced Bill of Law no. 2,358/2020, with the goal of creating a progressive tax on gross revenue resulting from certain digital services provided by large technology companies, domiciled in Brazil or abroad.

CIDE-Digital has not yet gained prominence within the Brazilian legislative Chambers and, according to reports in Brazil, Congressman João Maia has been one of the few voices in support of the tax. Currently, there has been no other manifestation by fellow members of Congress in support of the bill.

In addition to the CIDE-Digital, a Brazilian Senator, Zenaide Maia (Mr. Maia's sister), also introduced a proposal to increase COFINS (turnover taxes) for companies that "utilize" digital platforms.[50] Similarly, it is not clear whether this proposal has support from Congress. The SVTDG also understands that in the context of the broad Brazilian tax reform under analysis of the Joint Special Committee in Congress there are additional proposals regarding the taxation of digital services.[51]

As Brazil continues to grapple with the economic fall-out from the coronavirus pandemic, and with a domestic political crisis, there is no clear indication on the trajectory of these proposals.

2.2 Technical Details

Please refer to Appendix 1 for an unofficial translation or official version of the legislative text and any available implementing guidelines, as described therein.

"CIDE", the acronym for "Contribution in the Intervention the Economic Domain", represents a category of taxes that can be imposed by the Brazilian Federal Government, with or without a fiscal purpose, to regulate a specific industry or economic sector. The Federal Government must invest the corresponding tax revenues raised from CIDE in correcting the identified distortion that served as justification for the creation of the tax. The creation of a CIDE must meet an economic goal broader than simply earning tax revenues. The Brazilian Constitution states that the Federal Government may impose social contributions, contributions to intervene in the economic domain or contributions in favor of a specific economic or professional category.[52] All such contributions cannot be applied on exports, but may be levied on imports, and their rates may be *ad valorem* or fixed.

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[50] Bill of Law 131/2020, Amending Law No. 10.833 of Dec. 29, 2003, available at https://legis.senado.leg.br/sdleggetter/documento?dm=8114176&ts=1591191611541&disposition=inline.

[51] At least three amendments to the broad tax reform were presented regarding the taxation of digital services: the Amendment 5, which determines that financial and digital services can only be taxed by the Federal Government; the Amendment 11, which allows for the creation of a digital services tax; and the Amendment 117, which determines that all goods and services provided digitally are part of the ICMS levy (a value added tax in Brazil). Amendment 5 to Constitutional Amendment 45/2019, available at https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1792409&filename=EMC+5/2019+PEC04519+%3D%3E+PEC+45/2019; Amendment 11 to Constitutional Amendment 45/2019, available at https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1794524&filename=EMC+11/2019+PEC04519+%3D%3E+PEC+45/2019; Amendment 117 to Constitutional Amendment 45/2019, available at https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1807974&filename=EMC+117/2019+PEC04519+%3D%3E+PEC+45/2019.

[52] Brazilian Constitution, Section 149 (raising COFINS, Contribution for Social Security Financing, a federal social contribution levied on the gross revenue of businesses in general, from 7.6% to 10.6% specifically for "large

There are different types of CIDE already in place in Brazil (e.g. CIDE fuels).[53] Foreign companies are familiar with a CIDE that is imposed on remittances abroad for the importation of technical services (known as "CIDE Royalties"). The CIDE Royalties is the obligation of the Brazilian taxpayer, who must collect the tax upon certain remittances to a nonresident.

Scholars have debated the creation of such CIDEs noting that the various CIDEs are not effective in reaching their stated goals and that funds are not used appropriately. These commentators observe that these types of taxes currently lack a connection between the funds raised and their use, and serve merely as additional tax revenue raisers. Scholars point out that there should be a clear and logical relation between the taxpayers and the corresponding economic sector that is being fostered. In the case of CIDE Royalties, for instance, one of the major criticisms is that the purpose of the tax - to stimulate Brazilian technological development, through scientific and cooperative technological research programs among universities, research centers and the private sector - is very vague. Further, in the case of CIDE Royalties, the effects of taxing importers of technology are to discourage such importation and to use funds received to reinvest in fostering the development of local technology.

The proposed CIDE Digital bill of law does not evidence nor justifies why the rendering of in-scope services requires the intervention of the federal government, nor does it detail the scope or purpose of such intervention. CIDE-Digital as proposed consists of a new type of CIDE. Although it is also called CIDE, the operative provisions of CIDE Royalties are not applicable to the CIDE-Digital. The taxpayer is extended to include both Brazilian and nonresident companies.

The scope of the CIDE-Digital is similar to the French DST, although the current bill does not provide for any exemptions from the in-scope services. In-scope services include (i) targeted advertising to users located in Brazil; (ii) digital platforms that connect users with the objective of selling goods or providing services, provided that one of the users is located in Brazil, and (iii) transmission of user data with respect to users located in Brazil.[54] USTR concluded that the French DST targeted categories of services where U.S. companies are dominant, to the exclusion of successful French and European companies.[55]

By contrast to other DSTs, the CIDE-Digital applies on a progressive basis, and rates are determined as follows: 1% on gross revenue up to BRL 150M (approximately €25M); 3% on gross revenue exceeding BRL 150M up to BRL 300M (approximately €50M); and 5% on gross revenue exceeding BRL 300M. Gross revenue is based on in-scope revenue from the services identified above in (i)-(iii) to, or involving, user(s) located in Brazil. The tax would apply to companies with in-scope worldwide revenues of the economic group exceeding the equivalent of BRL 3B (approximately €500M) during the preceding calendar year, and revenues exceeding BRL 100M (approximately €17M) in Brazil. A user is deemed to be located in Brazil if the user can access the digital platform through a device physically located in Brazil, as determined by the corresponding IP address.[56] In case the revenue includes users located in other jurisdictions, the revenue attributable to Brazil (which will be the tax basis for CIDE digital) will be proportionate to the number of users located in Brazil vs. worldwide users.

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companies that adopt digital platforms as a business model.") Mrs. Maia also quotes the discussions at the OECD level and the fact that France and Spain already have similar tax provisions.

[53] Law 10,336/01, taxpayer is the legal entity that imports and/or sells fuels.

[54] Brazil Bill of Law no. 2,358/2020 (May 4, 2020), Art. 3.

[55] French DST Report, 35.

[56] Brazil Bill of Law no. 2,358/2020 (May 4, 2020), Art. 3.

Compared to the French DST, the CIDE-Digital local threshold is lower (approximately €500M worldwide, and €17M Brazil). As with the French DST, the CIDE-Digital thresholds have the effect of taxing large U.S. companies. Due to the large thresholds, the result, as further illustrated in the policy justification of the bill, is that Brazilian companies will likely be excluded. We are not aware of any Brazilian companies that would meet these thresholds. Further, the threshold applies similarly to the French threshold and focuses on in-scope digital services revenue, and not all revenue. This has the effect of further limiting the group of companies that would be subject to the measure, as the global threshold would have the effect of excluding groups with large global revenue but smaller digital services businesses.

The proposed bill lacks several technical details, which would likely be included in normative rules in case the bill becomes law.

2.3 Policy Justifications

The proposed CIDE-Digital is modeled on the "proposal from the European Commission, and implemented by France and Italy."[57] The bill refers to several of the policy justifications offered by these countries as reasons for the tax. By virtue of its direct purported relationship to the French DST and the 2018 EC DST, and various of its structural attributes discussed in this section, the CIDE-Digital also discriminates against U.S. companies.

The CIDE-Digital advances as main reasons for the measure the historical ability of large technology companies to escape taxation in countries in which they operate without physical presence, the lack of an agreement at the OECD level on a global framework to address challenges impacting the taxation of the digital sector, and the proliferation of DSTs currently announced, proposed or implemented mainly by EU countries. The Bill is a direct product of the proliferation of the DSTs around the world, expressly noting that "despite the continuing negotiations for a global agreement within the OECD, as of January 2020, about half of European countries had already announced, proposed or implemented some DST."[58] It goes on to conclude that "we think that Brazil cannot be left out of that movement."[59]

The justification portion of the proposed Bill also includes a statement indicating a protectionist intent to target large offshore entities and is reminiscent of several statements made by French official during deliberations around the French DST:

> CIDE-Digital will focus only on technologies that are big on a national and international scale. There's no point to apply it to a technology company that only operates in Brazil, even if they are large, since it will not be able to transfer the profit to branches abroad. This would only discourage the emergence of national startups.[60]

Further, similar to the Austrian DAT, all of the funds collected from the CIDE-Digital, most likely from U.S. companies, will be earmarked to subsidize the Brazilian fund for technological development, which promotes technological innovation in Brazil.

> The collection of CIDE-Digital will go to the Fund National Scientific and Technological Development (FNDCT), which is the subject of Law No. 11,540, of November 12, 2007, to finance

[57] Brazil Bill of Law no. 2,358/2020, Justification for the Bill.

[58] *Id*.

[59] *Id*.

[60] *Id*.

> innovation and scientific and technological development in the country, with a view to promoting economic and social development of our Nation.[61]

As reported by the Brazilian press, Congressman João Maia explained the purpose of the CIDE-Digital:

> They [referring to technology companies] have our information in databases, we pay daily for ads or subscriptions, they put multi-million dollar company ads in our news feed, and they simply take everything they collect from Brazilian consumers to the United States, or tax havens. They must pay taxes in Brazil because they are earning money on our consumers. These taxes must be reinvested in improvements for Brazil".[62]

Congressman João Maia posted on his Facebook official account his reactions to the United States role in the OECD negotiations process (#cidedigital):

> The United States asks for a pause in the negotiations at the OECD level for the conclusion of an international agreement that would make American Internet companies pay taxes on digital services from their operations in each country in which they operate. At the same time, they are opening an investigation against Brazil, France, Italy, the United Kingdom and several other countries, on the basis of violations according to section 301 of the American Trade Law of 1974. Investigations against Brazil are motivated by PL 2358/2020, which I recently presented to the Brazilian Congress, creating a tax on revenue of global internet companies in Brazil - CIDE-Digital. These companies together earn billions annually in our country, but because they are companies with global operations, they can declare a large part of their profits in the U.S. or in tax havens, thus greatly reducing the payment of taxes in the countries in which they operate, including Brazil. The European Union threatens to tax these companies across the European continent if the United States withdraws from OECD negotiations. Therefore, we are dealing with justice, respect and rights in Brazil.[63]

Another posts reads:

> We want to draw everyone's attention to the fiscal injustice that occurs in Brazil, especially when it comes to large companies that profit in our country and send their taxes abroad! This is not right! And we fight to correct such an injustice! Our proposal made noise, reaching the international media! TP News (international specialized press) published an article on our CIDE-Digital.[64]

2.4 Relevant Attributes

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[61] *Id*.

[62] João Maia, quote from undated interview, as reported by Agorarn in "Projeto de deputado do RN faz Trump questionar Brasil sobre taxação de serviço digital" (June 4, 2020), available at https://agorarn.com.br/politica/projeto-de-deputado-do-rn-faz-trump-questionar-brasil-sobre-taxacao-de-servico-digital/.

[63] João Maia, Facebook post on June 19, 2020, available at https://www.facebook.com/depjoaomaia/photos/a.365616290603312/905039313327671/.

[64] João Maia, Facebook post on May 21, 2020, available at <https://www.facebook.com/depjoaomaia/photos/pcb.884152858749650/884152472083022.

(a) Extraterritoriality and Revenue not Income

Like the French DST, the CIDE-Digital application to revenue rather than income and its extraterritoriality are inconsistent with international tax principles and unusually burdensome for U.S. affected companies.

Although the CIDE-Digital adopts a tax model with progressive tax rates that could soften the burden for low margin profit or no profit companies, because the DST applies to gross revenue and not net income, this progressiveness does not eliminate the impact on lower margin or loss businesses. Since revenue has no necessary correlation to profit, a high revenue supplier may be subject to the tax at the highest rate, and still be recognizing losses, making the tax even more punitive.

(b) Relationship to other taxes

The incidence of the CIDE-Digital will have a significant cost for U.S. companies that in some cases are already being taxed in Brazil on their supplies of in-scope services. The importation of services into Brazil is currently subject to a 15% withholding tax (WHT), a 10% CIDE-Royalties, a 9.25% PIS/COFINS on imports, municipal services tax (ISS) at rates that vary between 2% and 5%, and a 0.38% financial transaction tax (IOF). The WHT is withheld and remitted by the "importer" of the services (i.e. a Brazilian company). The CIDE-Royalties is also due by Brazilian companies 1) on payments for technical assistance, administrative assistance and alike, or 2) on payment, credit or remittance of royalties to foreign residents. The Brazilian CIDE-Digital, as proposed, could apply in in addition to all of the foregoing taxes.

Even though the CIDE-Royalties and CIDE-Digital do not have the same taxpayers nor same triggering events, some degree of overlap between the taxes is expected when it comes to a Brazilian entity importing services from a foreign large technology company that has in scope services. In addition to the WHT on such payments (i.e. the 15% tax borne by the foreign company in most of the cases), the large company may also be subject to the CIDE-Digital (up to 5% on gross revenue exceeding €50M) on the same income that was subject to CIDE-Royalties. PIS, COFINS and ISS would also apply on the import of services.

(c) Administrative Burden

The CIDE-Digital lacks several important technical points, including for example, harmonization with other taxes in Brazil. Without such details, it is hard to predict the complete impact of this measure. To the extent impacted companies have in scope revenue exceeding €50M, the tax imposes higher tax rates on the incremental gross revenue up to 5%, resulting in a disproportionate impact to large U.S. companies.

3. Czech Republic ("Czech DST")

3.1 Introduction

The original Czech DST proposed legislation contained a 7% tax rate on gross revenue derived from covered services. The DST has been under consideration for over a year and its original text has undergone several amendments.

The Ministry of Finance submitted its finalized proposal on September 5, 2019, which was approved by the Czech Government on November 18, 2019. The DST will be effective 15 days after the publication of the legislation (the original goal was for the DST to be effective on July 2020), but the Ministry of Finance recently announced that it is delaying the proposed effective date until 2021, in anticipation that leaders will reach consensus at the global level by then. Delaying the proposed effective date would allow the Government the time needed to complete the legislative approval process in light of more pressing matters related to the coronavirus. We understand that legislative consideration has been pushed back to September 15, 2020.

The Czech Finance Minister, Alena Schillerová, has also indicated that the final legislation would lower the rate to 5% from the 7% currently proposed. The government has already agreed to the lower rate and it is likely that Parliament will also agree with the lower rate. At least one article suggested that the reduction of the DST rate is a result of the ongoing USTR investigation into DSTs, although we could not verify this report.[65]

3.2 Technical Details

Please refer to Appendix 1 for an unofficial translation or official version of the legislative text and any available implementing guidelines, as described therein.

The scope of the proposed Czech DST is similar to the French DST and European proposal, although the scope has been incrementally expanded overtime.

The scope of the DST covers:

(1) The provision of targeted advertising services. Targeted advertisements are advertisements that are connected to access of a user to a digital interface and that are placed on this digital interface based on the user data the taxpayer collects. Services that directly supplement the provision of targeted advertising services are also subject to the DST. This could be designed to capture related services such as marketing and advertising optimization consultation services, which generally are not subject to most DSTs;

(2) The provision of digital interfaces, defined in the legislation as the facilitation of the use of the digital interface to facilitate transactions between users or facilitation of the use of the functionality of the interface;

(3) Provision of consumer data acquired from the activities of the digital interface.

Legislators also included a similar extension of the application of the DST with respect to the parties involved in the transaction. The current text states: "The consideration for the purposes of the tax on the selected digital services is the monetary amount or the value of the non-monetary benefit to be or are provided in connection with the subject of the tax, **no matter who should provide it or who**

[65] https://www.lupa.cz/aktuality/usa-pripravuji-vysetrovani-cr-kvuli-digitalni-dani/.

https://www.irozhlas.cz/zpravy-domov/vlada-koalice-rada-digitalni-dan-schvaleni-uprava-pet-procent_2006101528_tzr.

provided it" (informal translation). The effect of this clause is to clarify that a payment by, say, a U.S. person to a U.S. company for a DST in-scope service, when the service relates to a Czech user(s), will be subject to the DST. Further, the legislation expressly provides that the tax is due even if no monetary consideration is exchanged. In that case, the base of the tax is the value of the non-monetary consideration exchanged. In the case of non-monetary consideration, the tax is due on the day the amount of consideration for the provision of the taxable service becomes known to the taxpayer.

The express inclusion of non-monetary consideration in the tax base is a clear expansion beyond the French DST. Depending on how this is interpreted, this provision may create significant compliance challenges in a digital economy which includes many informal exchanges of information without monetary consideration.

The Czech DST exempts intra-group activities, consistent with other DSTs. [66]

The Czech DST has three general thresholds: (1) a worldwide revenue threshold of €750 million; (2) a local revenue threshold of CZK 100 million (approximately €3.8 million) from in-scope services; and (3) where the following ratio exceeds 10%: the total amount of revenue derived from taxable supplies to customers in individual EU member states, contractual states of the Agreement on European Economic Area or Swiss Confederation ("relevant European States") divided by the total amount of its revenues from those relevant European States. In other words, the third threshold excludes taxpayers that derive 10% or less of their revenue in relevant European States from in-scope services.

Although the local revenue threshold is lower when compared to the French DST, which would presumably allow for more large Czech companies to fall within scope of the tax, the most recent legislative proposal increased the local revenue threshold from CZK 50 million to CZK 100 million. SVTDG members infer that this threshold was increased to cause certain Czech companies, e.g. Skoda (an automobile manufacturer, part of the Volkswagen group), to fall outside under the DST legislation. We note that Skoda is one of the Czech Republic's largest enterprises, and like other automobile manufacturers, incorporates in their automobiles features that involve the tracking and transmission of user data. The Notes to the Czech DST legislation state that the 10% revenue threshold was introduced in order to exclude the companies that provide digital services only marginally, e.g. automotive industry. SVTDG Members believe that this amendment was expressly intended to exclude local enterprises such as Skoda, while retaining in scope nonresident digital services providers. It is also important to note that a local search service provider, seznam.cz, a significant local competitor of Google in the Czech market, likely will be excluded from the DST due to the global revenue threshold.

The DST is calculated separately on three different partial tax bases, one for each of the three categories of in-scope services. The legislation sets additional thresholds for every category. For revenue derived from the provision of user data, the DST does not apply to that particular revenue stream if it does not exceeds CZK 5 million. The same is true for targeted advertising campaign services, but not for digital interface services. For digital interface service, the additional threshold is set in form of 200,000 users. For example, if a non-resident company has the following revenue streams:

i. Revenue from the provision of a digital interface: €1 billion worldwide, CZK 100 million allocable to the Czech Republic.

ii. Revenue from user data in the Czech Republic: 0 outside the Czech Republic and CZK 4 million in the Czech Republic.

[66] DSTs other than the Turkish DST.

iii. Revenue from targeted advertising campaign in the Czech Republic: 0 outside the Czech Republic and CZK 6 million in the Czech Republic.

The CZK 100 million derived from the provision of a digital interface to Czech users should be subject to the DST, provided that the digital interface has more than 200,000 registered users. However, because the revenue derived from the provision of user data is less than CZK 5 million each, that revenue is not subject to the DST. On the other hand, because the revenue derived from targeted advertising campaign services exceeds the CZK 5 million threshold, the CZK 6 million should be subject to the DST.

3.3 Policy Justifications

The considerably higher tax rate of 7% (possibly reduced to 5%) supports a trend among countries enlarging the scope of the DST or adopting higher tax rates. As the initial rate is more than double the French DST rate, its impact on U.S. companies is likely to higher than the other DSTs, relative to the size of the country's economy. For DSTs with higher tax rates on gross revenue, as it is the case of the Czech and Turkish DSTs, the principal purpose to tax nonresident suppliers becomes more apparent.

The Ministry of Finance, when introducing the DST in April 2019, stated that the DST should focus on the most important global players and address the imbalance between companies operating on the basis of traditional business models and companies operating under completely new business models as part of the digital economy.[67]

The Finance Minister, Alena Schillerová, noted on September 17, 2019 that the DST had been proposed to achieve tax fairness and also to encourage cooperation at the global level.

- "The current tax rules are written in such a way that the company pays taxes in the country where it has a 'stone' establishment. However, the Internet knows no boundaries and we normally use the services of foreign companies. But even though these companies run their business in the Czech Republic and have large profits there, taxes do not apply to a corresponding extent, because they are simply not physically present here. And that's not right."[68]

- One article confirms the Prime Minister's support for the Czech DST, noting: "Digital tax, certainly yes. I also supported this at the European Council, because the multinational companies that do business in our country do not pay enough taxes".[69]

- The Finance Minister commented on Twitter on April 14, 2019: "We bring our own solution for big companies that generate profits in our country, but are paying almost no taxes. We want to use the digital tax for Google or Facebook as an 'equalizer' until the OECD or EU finds a solution".[70]

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[67] https://www.mfcr.cz/cs/aktualne/tiskove-zpravy/2019/ceska-republika-zavede-digitalni-dan-ve-35090.

[68] https://www.mfcr.cz/cs/aktualne/v-mediich/2019/proc-digitalni-dan-jde-o-spravedlnost-36123.

[69] https://www.e15.cz/domaci/babis-zvlastni-dan-pro-facebook-apple-ci-google-urcite-ano-podporil-jsem-ji-i-na-evropske-rade-1356616.

https://www.byznysnoviny.cz/2019/02/25/premier-andrej-babis-egypta-podporil-digitalni-dan-zdaneni-googlu-facebooku/.

[70] https://twitter.com/alenaschillerov/status/1117414640231899136.

- Mrs. Schillerová posted a similar comment on Facebook on July 4, 2019: "What is not fair? That the big internet companies are not paying taxes in our country that would correspond to their profits from the Czech economy, while the other entrepreneurs are paying the taxes. In order to remove this injustice, we introduced the digital tax legislation proposal."[71]

3.4 Relevant Attributes

(a) Extraterritoriality and Revenue not Income

Like the French DST and all of the other Covered DSTs, the Czech DST's application to revenue rather than income and its extraterritoriality are inconsistent with international tax principles and unusually burdensome for affected U.S. companies.

(b) Relationship to other taxes

Currently, the Czech DST does not include a mechanism for a deduction against corporate income tax for any DST paid. Nevertheless, we expect that the DST may be treated as tax deductible cost for those companies that have some presence in the Czech Republic and file corporate income tax returns in the Czech Republic.

(c) Administrative Burden

The Czech DST determines the location of users on the basis of the IP address of the technical equipment by which the user accesses the taxable digital service. If the taxpayer is not able to obtain the IP address of the user, we understand the taxpayer should look to the domicile of the user to determine whether or not they are a "Czech user" within the meaning of the draft legislation. Taxpayers are expected to implement such measures or systems to determine the IP addresses of its users, particularly if they do not, as a matter of course, collect user data regarding domicile (potentially forcing some companies to collect more user data).

Further, the portions of the draft legislation concerning the provision of multilateral digital interface services interacts with the definition of Czech user in ways that the Ministry of Finance likely did not intend. If a taxable person provides multilateral digital interface services in the Czech Republic and that interface has over 200,000 registered users, the service is a DST-taxable service. A multilateral digital interface service of enabling access to the multilateral digital interface is made in the Czech Republic if the user has a user account set up on the interface and at the moment of opening this account, the user was a Czech user. This means that a person who is not a resident or citizen of the Czech Republic could travel to the Czech Republic, set up an account on a digital interface using a device with an Czech IP address, return to their country of origin, and continue using that account to access the digital interface services. Those services may be taxable services under the draft legislation's current wording. It also appears that the reverse should apply—if the user registered for their account using a device with a non-Czech IP address and they are not otherwise a Czech user, then digital interfaces services provided to that customer should not qualify as taxable services even if the customer takes delivery of those services in the Czech Republic.

Transactions involving users in other DST states without an exclusion for users in other states that are part of the same transaction create risks of even higher incidences of double taxation.

[71] https://www.facebook.com/SchillerovaAlena/posts/676362832836999.

Determination of user location is similar under French and Czech DST measures, except for an explicit alternative to locate a user if the IP address is not available in the Czech Republic based on the physical residence of the user.

As smaller jurisdictions implement DSTs, compliance costs increase disproportionately if rules are not harmonized.

4. European Commission Proposal for a Council Directive on a Tax on Revenues from Certain Digital Services ("2018 EC DST")

4.1 Introduction

On May 27, 2020, the EC released its proposals for Europe's economic recovery in the wake of COVID-19, which include references to a "digital tax applied on companies with a turnover above €750 million" ("EU Proposal").[72] The technical details of the EU Proposal have not been published at this point, thus it is not clear whether it will be more like a DST or like a significant digital presence PE ("SDP PE"), but given that it would not seem possible to impose an SDP PE without treaty changes or an even more dramatic treaty override, we provide comments on the 2018 EC DST proposal.[73] The 2018 EC DST served as a template for various of the national DSTs that USTR has and is now investigating, namely the Czech DST, the French DST, the Italian DST, the Spanish DST and the Turkish DST.

The 2018 EC DST was first advanced in March 2018 as part of an EC package focusing on "taxing digital," made up of an interim proposal (the 2018 EC DST) and a proposed long-term solution (the "significant digital presence" or "SDP Proposal").

The SDP Proposal sought to lay out rules for establishing income tax nexus for digital businesses operating across borders through a non-physical commercial presence (an SDP permanent establishment, or "SDP PE").[74] The SDP Proposal also sought to set out new rules for attributing profit to a virtual PE that "should better capture the value creation of digital business models which highly rely on intangible assets."[75] Since the SDP Proposal was openly acknowledged as an income tax, its implementation would require amendments to bilateral tax treaties and the assent of treaty partners such as the U.S. Accordingly, the EC sought to design a substitute measure that, per the explicit instructions of the ECOFIN Council conclusions from December 5, 2017, would "remain outside the scope of double tax conventions." As the EC Impact Assessment notes, "although a tax on profits may be theoretically more efficient [than a tax on revenue], it does not present a realistic option for an interim solution, largely due to its interference with double tax conventions."[76]

The 2018 EC DST proposal failed to be adopted in Spring 2019, as the EC requires unanimity among EU Members when voting on tax matters and several EU Member States opposed. Of note, the EC has

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[72] European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Region: The EU budget powering the recovery plan for Europe* (May 27, 2020), available at https://eur-lex.europa.eu/resource.html?uri=cellar:4524c01c-a0e6-11ea-9d2d-01aa75ed71a1.0003.02/DOC_1&format=PDF.

[73] *Supra,* note 7.

[74] European Commission, *Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence* (March 21, 2018), 2, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/proposal_significant_digital_presence_21032018_en.pdf (hereinafter, "SDP Proposal").

[75] SDP Proposal, 2.

[76] European Commission, *Commission Staff Working Document Impact Assessment (Accompanying the document Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence and Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services)* (Mar. 21, 2018), 56, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/fair_taxation_digital_economy_ia_21032018.pdf (hereinafter, "EC Impact Assessment").

reportedly been working on a proposal to eliminate this unanimity requirement by allowing a supermajority to adopt EU-wide taxes.[77] This effort has been ongoing since the 2018 EC DST proposal was defeated.

The March version of the 2018 EC DST and the EC Staff Impact Assessment are available online.[78] For the most recent draft of the 2018 EC DST's proposed legislative text of which we are aware, updated in November 2018,[79] please see Appendix 1.

4.2 Technical Details

We describe here the details of the 2018 EC DST, on the basis that a further EU Proposal is likely to contain some of these elements together with some elements from the OECD negotiations. We also suggest that the clear evidence of discrimination and unreasonable impact on U.S. commerce which are described below with reference to the 2018 EC DST can be applied to all of the other Covered DSTs. Many of the Covered DSTs are based directly on the 2018 EC DST, such as those of Italy and Spain. Others may not have the exact same technical scope, but they all share the legislative intent to impose a separate and ring-fenced tax on gross revenue of nonresident digital services suppliers. Furthermore, some of the discredited justifications for the 2018 EC DST contained in the EC Impact Assessment, in particular that the large digital services suppliers have lower effective tax rates than other high technology companies, have persisted as popular political rhetoric in many countries.[80] Because of the influence that the 2018 EC DST has had on the proliferation of DSTs across the world, we provide a more detailed analysis of that measure than we provide for the other Covered DSTs.

The EC proposed in 2018 a "fair taxation of the digital economy package," comprising two proposals to tax the digital revenue of companies. The first one was a proposal for a Council Directive on a reform of corporate tax rules to include significant digital presence (i.e. the 2018 EC DST). The second proposal was a short-term solution delivered by a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services (i.e. the SDP Proposal).

The 2018 EC DST was a 3% gross revenue tax applied to revenues from in-scope digital services, and would apply to companies with total annual worldwide revenues exceeding €750 million and EU revenues derived from the identified taxable digital services exceeding €50 million. In-scope digital services are: the provision of advertising services; platform intermediation services; and the sale of data collected from or generated by users. Specifically, the 2018 EC DST proposal states in Article 3 that the

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[77] European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council towards a more efficient and democratic decision making in EU tax policy* (Jan, 15, 2019), available at https://ec.europa.eu/taxation_customs/sites/taxation/files/15_01_2019_communication_towards_a_more_efficient_democratic_decision_making_eu_tax_policy_en.pdf; European Commission*, Commission launches debate on gradual transition to more efficient and democratic decision-making in EU tax policy*, Press Release (Jan. 15, 2019), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_225; *see also*, European Commission, *Decision making on EU Tax Policy*, https://ec.europa.eu/taxation_customs/taxation/decision-making-eu-tax-policy_en.

[78] 2018 EC DST; EC Impact Assessment.

[79] *Working Paper 13879/2018 INIT: Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services – Art. 25* (Nov. 14, 2018).

[80] *Supra,* notes 64, 71.

revenues resulting from the provision of each of the following services by an entity shall qualify as 'taxable revenues' for the purposes of the Directive: [81]

(a) the placing on a digital interface[82] 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.[83]

Since the 2018 EC DST was advanced in March 2018, academics, observers, and commentators have agreed that it would be disproportionately borne by U.S. multinational enterprises, and that this consequence was an intended feature.[84] Some commentators have noted that the revenue thresholds appear cherry-picked to single out U.S. multinationals: "The two thresholds concentrate the DST on U.S. digital firms . . . [d]iscrimination against the United States could not be more blatant."[85] Others pointed out how the DST's inherent arbitrariness belies any claim that the DST does not discriminate against United States companies.[86] The 2018 EC DST definition of taxable revenues demonstrates this expected disproportionate impact, as the covered categories specifically track business models for which U.S. companies are the leading examples, namely digital advertising, digital platforms and marketplaces to sell goods and services, and transmission of users' data to other users.[87]

The EC's Impact Assessment shows that the staff was worried that the tax could be seen as constituting national discrimination. The EC's Impact Assessment noted that if the tax fell entirely on non-EU

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[81] 2018 EC DST, 24.

[82] Digital interface means: "any software, including a website or a part thereof and applications, including mobile applications, accessible by users". 2018 EC DST, 24 (Article 2, para. 3).

[83] 2018 EC DST, 25 (stating "[t]his point shall not include the transmission of data by a trading venue, systematic internaliser or regulated crowdfunding service provider").

[84] "European Commission Proposals for Directives regarding fair taxation of the digital economy ("Digital Tax Package")," PwC (May 16, 2018), available at https://www.pwc.com/gx/en/about/assets/reponse-ec-proposals-digital-tax-package.pdf.

[85] Gary Clyde Hufbauer and Zhiyao (Lucy) Lu, "The European Union's Proposed Digital Services Tax: A De Facto Tariff," by the Peterson Institute for International Economics (June 2018), available at https://piie.com/system/files/documents/pb18-15.pdf ("Thresholds for applying the profits tax [i.e., the significant digital presence PE standard,] are moderate and would potentially encompass many EU firms as well as US and other foreign firms. By contrast, thresholds for applying the DST are very high and would largely embrace US firms. De facto, if not de jure, the DST discriminates against the United States."); Martti Nieminen, *The Scope of the Commission's Digital Tax Proposals*, BULLETIN FOR INTERNATIONAL TAXATION, (Sept. 12, 2018) (discussing the scope of the EC's proposed DST and significant digital presence directives and noting that, because the DST thresholds are so high, "half of the businesses that are anticipated to be liable to the DST under the proposed thresholds are expected to be US-based entities.") .

[86] Hosuk Lee-Makiyama, *The Cost of Fiscal Unilateralism: Potential Retaliation Against the EU Digital Services Tax (DST)*, ECIPE Occasional Paper, 5 (May 2018).

[87] Gary Clyde Hufbauer and Zhiyao (Lucy) Lu, "The European Union's Proposed Digital Services Tax: A De Facto Tariff," by the Peterson Institute for International Economics (June 2018), available at https://piie.com/system/files/documents/pb18-15.pdf.

companies, it would be impossible to defend against claims of discrimination.[88] In setting the revenue thresholds for the proposed tax, the staff tried to set the thresholds at a point designed to ring-fence the targeted companies, yet allow arguments that a sufficient number of non-U.S. companies would be subject to the tax so as to defend against discrimination challenges. Towards that goal, the EC's Impact Assessment expresses the calculation that a "specific revenue threshold within the range of EUR 10-50 million" should withstand a legal challenge that the tax was discriminatory, but going "above EUR 50 million could risk de-facto discrimination."[89] It is telling that the EC's Impact Assessment chose exactly €50 million as the threshold; the number that most narrowly focuses the tax on the global (U.S.) companies, and is right at the edge of the zone the staff itself acknowledged created discrimination risk for the tax.

4.3 Policy Justifications

The 2018 EC DST and SDP PE proposals rest on the proposition that "the input obtained by a business from users … actually constitutes the creation of value for the company."[90] The Proposal posits that this requires a new taxation right because: (i) current tax rules do not create jurisdiction to tax based on this value creation theory; and (ii) even if a permanent establishment ("PE") is found and tax jurisdiction exists over an enterprise with such a business model, the value created by user participation is not taken into account when profits are allocated to the PE and taxed.[91]

The stated justification for the Proposal is that there is a gap between the place where profits are taxed and the place where value is created. The proposed Directive materials themselves and the EC's Impact Assessment don't try to justify the conclusion that value is created at the point of user engagement (and much less that *the enterprise* creates value at the user location). Since it could be argued that this value hypothesis could equally apply in the case of any remote sale, this theory simply asserts that some destination market element should be regarded as part of the value creation activity. That theory, on its face, would apply to any enterprise selling goods or services into a market. The 2018 EC DST and SDP proposals justify a ring fence for digital services, and not for any other sector, on the basis that such businesses are "responsible for the greatest difference between where profits are taxed and where value is created."[92]

The unstated policy justification is that the current international tax framework under-taxes large multinational digital services providers, which is inaccurate. The statement that digital services providers are undertaxed can be traced to the EC's Impact Assessment regarding its proposal for a directive to tax digital economy businesses.[93] The EC's Impact Assessment states that enterprises with a "digital business model" pay an effective tax rate of 9.5% compared with 23.2% for traditional business models. The EC staff based their analysis on academic work published by the Zentrum für Europäische Wirtschaftsforschung GmbH ("ZEW").[94] Remarkably, Professor Dr. Christoph Spengel, the first-named

[88] EC Impact Assessment, 69.

[89] *Id*.

[90] 2018 EC DST, 2.

[91] *Id*.

[92] 2018 EC DST, 2, 7.

[93] EC Impact Assessment, 137.

[94] EC Impact Assessment, 18

author on the studies used, promptly and publicly disavowed the EC's interpretation of his research.[95] Particularly, Professor Dr. Spengel stated that "it is not correct to state that the digital sector is undertaxed".[96] We note that even the EC's Impact Assessment shows that the average effective tax rate of digital companies operating only domestically was *lower* than that of multinational groups.[97] Independent academics have taken a close look at the "undertaxed" assertion. These researchers have concluded, after a careful comparison of the reported financial statements of businesses with highly digitalized business models to those with relatively more traditional businesses that the average corporate tax rates of enterprises with highly digitalized business models do not differ substantially from those of more traditional enterprises.[98]

Accordingly, the EC endeavored to draw this justification narrowly so as to not base nexus on a pure market based theory. In that way, digital services can be placed within the ring fence based on user engagement, but other businesses engaged in remote selling, including digital goods and services, will remain outside the scope (e.g. not car manufacturers, equity crowdfunding (popular in the EU)[99], etc.).

Remarkably, a working paper circulated among the EC working group developing the DST proposal expressly named U.S. companies as the targeted taxpayers. In particular, that document identified revenues from two classes of services that would be included within the scope of the DST using several large U.S. multinational companies as examples of affected taxpayers: "[1] services supplied for consideration consisting in the valorization of user data, by means of making available advertisement space (e.g., Facebook, Google Adwords, Twitter, Instagram…) [2] services supplied for consideration consisting in the making available of digital platforms/marketplaces to users (i.e., 'intermediation services'), and where such users supply goods and/or services directly between themselves (e.g., Airbnb, Uber)."[100]

The European Parliament's Committee on Economic and Monetary Affairs ("ECON") issued a report on the EC's proposed DST directive that recommends a number of amendments. ECON recommended that the EC set the DST rate by first estimating the profit margins of large multinational groups. The Committee concludes that the DST rate should be 5% on gross revenue, not 3%. ECON explicitly referenced certain high-profile U.S. companies when justifying the increased DST rate.

- Referring to the EC's Impact Assessment, ECON stated, "large multinational groups with a digital business model, using tax [sic] aggressive tax planning, are not paying any corporate income taxes. The average corporate income tax rate in the EU is 21.3% in 2018, which should therefore be the target for the implied rate of profits of the EU-wide DST. When it comes to the

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[95] Jack Schickler, *EU Study's Author Doubts Digital Transactions Undertaxed*, Law360, (March 6, 2018), available at https://www.law360.com/articles/1019073/eu-study-s-author-doubts-digital-transactions-undertaxed. PwC also has posted publicly that the cited study "does not support conclusions that the digital sector is undertaxed".

[96] *Id.*

[97] EC Impact Assessment, 18.

[98] Dr. Matthias Bauer, *Digital Companies and Their Fair Share of Taxes: Myths and Misconceptions*, European Centre for International Political Economy, ECIPE Occasional Paper (March 2018); *see also* Dr. Matthias Bauer, *Corporate Tax Out of Control: EU Tax Protectionism and the Digital Services Tax*, European Centre for International Political Economy, ECIPE Occasional Paper (February 2019), available at https://ecipe.org/wp-content/uploads/2019/02/Corporate-Tax-Out-of-Control.pdfl

[99] European Parliament, "*Crowdfunding in Europe: Introduction and state of play*" (January 2017), 1 (http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595882/EPRS_BRI(2017)595882_EN.pdf).

[100] Included in attached materials.

profit margin it is clear from the data available for public traded companies that large multinational groups with a digital business model tend to have a high profit margin. For example Google and Facebook, have a profit margin of up to 40%. When setting the rate of the DST, the assumed profit margin of 15% taken by the European commission is too conservative. An assumed profit margin of 25% for large digital firms is more in line with reality. When applying these two metrics to the DST, we arrive to a rate of 5% on digital turnover in order to tax the implied profits with a 20% tax rate. (5/25 = 20%)."[101]

Mr. Pierre Moscovici, at that time the European Commissioner for Economic Affairs, normally was cautious to avoid referring to the target companies by name, but he also has made more explicit comments.

- Mr. Moscovici gave a speech before the European Parliament Tax Special Committee during which he claimed that digitalized businesses have nowhere taxed income and that these businesses "are hardly subject to tax in the EU." This was understood to refer generally (and perhaps specifically) to certain Silicon Valley companies. Moscovici was challenged in this statement in the Q&A portion by German MP Wolf Klinz who pointed out that the author of the study to which Mr. Moscovici referred had disavowed the Commission's use of his work. Mr. Moscovici dissembled on the topic and stated that ultimately the EU needed to express its political will.[102]
- Mr. Klinz has formally asked the European Commission whether highly digitalized firms in fact pay lower effective tax rates than other less digitalized firms.[103] In this question, Mr. Klinz pointed out that the study upon which Mr. Moscovici, Mr. Le Maire, and others rely when claiming that highly digitalized enterprises pay drastically lower effective tax rates was inaccurate and based on mere estimates, rather than real observed data. Furthermore, Mr. Klinz formally raised the fact that Prof. Dr. Christoph Spengel, the lead author of the study, has distanced himself from the EC's DST proposal saying that it is simply not true that digital companies pay less in tax than traditional businesses and that a DST would place an unnecessary burden on highly digitalized companies.[104] The fact that Mr. Moscovici and others continue to press the claim that digitalized companies continue to pay lower effective tax rates in the face of empirical evidence to the opposite betrays their claims that the DST proposal is not politically motivated.
- When reporting on an interview that Mr. Moscovici had with France's Radio J, a news article explained: "[Moscovici] said the new rules would apply to giants like Google, Apple, Facebook and Amazon — together known as GAFA — as well as services like AirBnB and Booking.com.

[101] Paul Tang, *Draft Report: on the proposal for a Council directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services*, EUROPEAN PARLIAMENT (Sept. 21, 2018), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARL%2BPE-627.911%2B01%2BDOC%2BPDF%2BV0%2F%2FEN.

[102] *See* http://www.europarl.europa.eu/ep-live/en/committees/video?event=20181127-1500-COMMITTEE-TAX3.

[103] *See* http://www.europarl.europa.eu/doceo/document/E-8-2018-005509_EN.pdf.

[104] *See* http://www.europarl.europa.eu/doceo/document/E-8-2018-005509_EN.pdf.

'When you rent a room on Booking, it generates considerable revenue for a company which we don't really know where it's located, and which pays very little in taxes,' he said."[105]

The EC has justified the revenue thresholds for the DST on the basis of protecting local EU start-ups from taxation.

- In the revised draft of the 2018 EC DST dated November 23, 2018, the EC justifies the lower, €50 million threshold on the basis of providing a favorable environment for EU start-ups: "it is important for the EU to provide a favourable environment for R&D activities and innovation, in particular for start-ups in the fast-growing digital sector. Thus additional taxes for such companies should be avoided. The threshold should safeguard businesses operating in the traditional economy that are in the process of becoming more digitalised."[106]

The intended focus on U.S. companies also was shown as the EC agreed under pressure from EU groups to narrow the scope to exclude important EU constituencies. Germany has been reluctant to tax any form of revenues generated from the sale of user data because of the large amount of data its car industry collects.[107] In the revised draft of the 2018 EC DST dated November 23, 2018, the EC revised the initially proposed March 2018 DST Directive to make it clear that data which has been generated from sensors or other means and collected digitally "without users' activities in digital interfaces should not be covered by the Directive."[108] Similarly, the 2018 EC DST proposal was refined to carve out Europe's financial services companies. In the revised draft of the 2018 EC DST dated November 23, 2018, the EC explicitly stated that the "provision of regulated services by regulated financial entities should not fall within the scope of DST."[109]

4.4 Relevant Attributes

(a) Extraterritoriality and Revenue not Income

Certain problematic aspects of the French DST, namely extraterritoriality and application to revenue rather than income, which are inconsistent with international tax principles and unusually burdensome for U.S. affected companies, originated in the 2018 EC DST. Thus, we believe that USTR's analysis on both of these points as expressed in the French DST Report apply with equal strength to the 2018 EC DST.

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[105] *EU brewing up 'electroshock' tax plan in March to get internet titans to pay where they earn profits*, THE JAPAN TIMES (Feb. 5, 2018), available at https://www.japantimes.co.jp/news/2018/02/05/business/eu-brewing-electroshock-tax-plan-march-get-internet-titans-pay-earn-profits/#.XC1TZ1VKipo.

[106] 2018 EC DST, para. 18, included in attached materials.

[107] Elodie Lamer, *France and Germany to Propose Revamped Digital Tax, FTT*, TAXNOTES (Dec. 4, 2018) available at https://www.taxnotes.com/worldwide-tax-daily/digital-economy/france-and-germany-propose-revamped-digital-tax-ftt/2018/12/04/28n92.

[108] 2018 EC DST, para. 17, included in attached materials.

[109] 2018 EC DST, para. 18, included in attached materials.

5. India's 2016 Advertising Equalisation Levy ("Advertising EL")

5.1 Introduction

India proposed its Advertising EL in its Finance Bill, 2016, and it was adopted effective as of June 1, 2016 under Chapter VIII of the Finance Act, 2016. It is particularly notable that the Advertising EL was enacted as part of the Finance Act, not integrated into the India Income Tax Act ("ITA") because the U.S. - India Tax Treaty defines covered taxes by reference to the ITA rather than by some more general definition (e.g. taxes on income or elements of income, as the U.S.- France Tax Treaty defines covered taxes). The Advertising EL was the first unilateral ring-fencing gross revenue tax designed to target nonresident revenues from advertising, and set the precedent for the novel assertion that gross revenue taxes were not precluded by bilateral tax treaties.

5.2 Technical Details

Please refer to Appendix 1 for an unofficial translation or official version of the legislative text and any available implementing guidelines, as described therein.

The Advertising EL imposes a 6% tax on the amount of gross consideration received by nonresidents for online advertisements and related services provided to an Indian resident carrying on a business, or an Indian PE of a nonresident entity. The Advertising EL is applicable only to consideration exceeding INR100,000 per annum, and the purchaser of the covered services is responsible to withhold and remit the tax.

We understand that the 6% rate of the Advertising EL was chosen as a proxy to reflect the normal Indian corporate income tax rate as applied to that portion of the assumed operating margins of nonresident providers deemed allocable to Indian sources.

Similar to the Austrian DAT above, we observe that the India Advertising EL targeting digital advertising results in de-facto targeting of U.S. companies by virtue of its focus on the digital advertising market, which as noted by the French DST Report, is a large and growing market that has been, and continues to be, dominated by U.S. companies. This targeting is drawn even more narrowly than the Austrian DAT, however, since the Advertising EL applies to only supplies of services by nonresidents.

5.3 Policy Justifications

The policy justifications for the Advertising EL were advanced in a February 2016 Report by the Indian Committee on Taxation of E-Commerce ("Committee Report") as well as other government statements, which indicate a protectionist intent, and an active desire to avoid the application of bilateral tax treaties to the measure.

The principal policy justification expressed by the Committee Report is that the Advertising EL is meant to address a purported "unfair advantage" that the Committee believes nonresident enterprises enjoy over Indian resident enterprises. The Committee Report, however, does not clarify how remote sales models create an "unfair advantage". As a point of comparison, the Indian software outsourcing industry follows essentially the same business model as digital services providers. Indian software development outsourcing enterprises deploy significant premises, equipment and personnel in India. Their markets are primarily outside of India. In fact, this industry has been one of the principal beneficiaries of the enhanced communications of the internet, as this industry is able to create value in India while still accessing foreign markets through internet communications. The fact that Indian software outsourcing providers are able to provide services to customers anywhere in the world has never been used as a justification for other jurisdictions to impose an equalization levy on payments made to Indian software outsourcing providers. It is difficult as a matter of tax policy to justify disparate

treatment for digital advertising service providers just because many providers in that sector are not Indian companies.

The Committee Report specifically refers to imposing a burden on nonresident companies that is an income-tax equivalent, but that may apply in spite of bilateral income tax treaties, saying (emphasis added:

- "10.1 Objective of Equalisation Levy
- 125. Equalisation Levy is intended to be a tax imposed in accordance with the conclusions of the BEPS Report on Action 1 that has been endorsed by G-20 and OECD, **on payments made for digital services to foreign beneficial owners, who enjoy an unfair advantage over their Indian competitors providing similar services by digital or more traditional means, with the objective for equalizing their tax burden with other businesses that are subjected to income-tax in India, without disturbing the existing tax treaties.** Another objective of Equalisation Levy is to provide greater clarity, certainty and predictability in respect of characterization of payments for digital services and consequent tax liabilities, to all stakeholders, so as to minimize costs of compliance and administration and minimize tax disputes in these matters. The target transactions would be those conducted primarily through digital or telecommunication networks, heavily relying upon latest telecommunication technology, and thereby avoiding the need of a physical presence in India, **i.e. transactions which lead to profits that are not appropriately taxed in India because of the limitations of the existing international taxation rules…**"

The policy intent to impose a direct tax on nonresidents despite the lack of nexus/ taxing rights under existing treaties was echoed by the Memorandum explaining the provisions of Finance Bill 2016, saying (emphasis added):

- "With the expansion of information and communication technology, the supply and procurement of digital goods and services have undergone exponential expansion everywhere, including India. The digital economy is growing at ten per cent per year, significantly faster than the global economy as a whole.

  Currently in the digital domain, business may be conducted without regard to national boundaries and may dissolve the link between an income-producing activity and a specific location. From a certain perspective, business in the digital domain doesn't seem to occur in any physical location but instead takes place in the nebulous world of "cyberspace." Persons carrying on business in the digital domain could be located anywhere in the world. Entrepreneurs across the world have been quick to evolve their business to take advantage of these changes. **It has also made it possible for the businesses to conduct themselves in ways that did not exist earlier, and given rise to new business models that rely more on digital and telecommunication network, do not require physical presence, and derives substantial value from data collected and transmitted from such networks.**

  These new business models have created new tax challenges. The typical direct tax issues relating to e-commerce are the difficulties of characterizing the nature of payment and establishing a nexus or link between a taxable transaction, activity and a taxing jurisdiction, the difficulty of locating the transaction, activity and identifying the taxpayer for income tax purposes. **The digital business fundamentally challenges physical presence-based permanent establishment rules. If permanent establishment (PE) principles are to remain effective in the new economy, the fundamental PE components developed for the old economy i.e. place of business, location, and permanency must be reconciled with the new digital reality…"**

Comments by the Finance Minister of India in the Budget Speech while introducing Finance Bill 2016 in the Parliament indicate that the Advertising EL was intended to tap into income of nonresident

companies in a form that would avoid the application of bilateral tax agreements, saying (emphasis added): "**In order to tap tax on income accruing to foreign e-commerce companies from India**, it is proposed that a person making payment to a non-resident, who does not have a permanent establishment, exceeding in aggregate Rs. 1 lakh in a year, as consideration for online advertisement, will withhold tax at 6% of gross amount paid, as Equalisation levy."

5.4 Relevant Attributes

(a) Extraterritoriality and Revenue not Income

The Indian Advertising EL's extraterritoriality is inconsistent with international tax principles and unusually burdensome for U.S. affected companies in the same way as the French DST. Another point of similarity is that the Advertising EL's application to revenue rather than income is inconsistent with international tax principles and unusually burdensome for U.S. affected companies in the same way as the French DST. We believe that USTR's analysis on both of these points as expressed in the French DST Report apply with equal strength to the Indian Advertising EL. As the first in time unilateral gross based revenue tax targeting digital advertising services, we believe the Indian Advertising EL set an extremely troubling precedent of unilaterally apportioning additional taxing rights to one's own state in a manner inconsistent with bilateral tax treaties that has seriously undermined the stability and certainty of the global tax framework.

(b) Double Taxation/Relationship to Other Taxes

Income arising from the provision of covered services that is subject to the Advertising EL is exempt from income tax under the ITA further to ITA Section 10(50). The Advertising EL statute also contains language that exempts monies from the Advertising EL if the nonresident providing the specified service has a PE in India and the specified service is effectively connected with such PE. This coordination with domestic income tax and PE arising under treaties illustrate that the Advertising EL is intended to directly tax income of nonresidents in a manner that expands India's taxing rights over foreign, particularly U.S. companies.

6. India's 2020 E-Commerce Equalisation Levy ("E-Commerce EL")

6.1 Introduction

The E-Commerce EL appeared unannounced on March 23, 2020 in amendments to the 2020 Finance Act, and was enacted as part of the 2020 Finance Act on 27 March 2020. This new tax appeared completely without notice to taxpayers, as the provision was not included in the original 2020 Finance Act presented before the Indian Parliament on February 1, 2020. It was introduced and passed by both houses without debate, immediately after which Indian Parliament closed down for several weeks in response to COVID. The effective date was set only 4 days later, i.e. April 1, 2020.

The scope of the tax is extremely expansive on its face, and apparently imposes tax on most online transactions between a nonresident business and any Indian resident or person with an IP address in India buying goods or services. In contrast to the French or Italian DSTs, for example, this tax appears to cover software-as-a-service ("SaaS"), cloud services (infrastructure-as-a-service or "IaaS" and platform-as-a-service or "PaaS"), subscription video streaming, and sale of own-goods, all of which are out of scope of those DSTs based on the 2018 EC DST model. This wide scope expansion would capture substantially more revenue in scope than DSTs and bring a considerably larger number of companies in scope as taxpayers.

The other aspect of the E-Commerce EL that is particularly notable is the abrupt way in which it was passed into law with mere days before the effective date (April 1, 2020), and the fact that implementing regulations still have not been issued though the first payment date is July 7, 2020, except for the payment and return form which was published 4 days before the due date (on July 3, 2020). It appears based on press comments from unnamed government officials that the Indian government has cited the need to raise revenue and COVID concerns as justifications for the measure, as described further in 6.3 below.

6.2 Technical Details

India's E-Commerce EL is a 2% tax that applies to consideration received by "e-commerce operators" from "e-commerce supply or services."

An "e-commerce operator" is defined as a non-resident that owns, operates or manages a digital or electronic facility or platform for online sale of goods or the online provision of services.

E-commerce supplies or services refers to: the online sale of goods owned by the e-commerce operator; the provision of services provided by the e-commerce operator; the online sale or provision of goods or services facilitated by the e-commerce operator (i.e. through a platform), and any combination of the above activities, plus additionally the provision of advertising services between nonresidents targeting Indian users, or users with an Indian IP address.

The gross receipts / turnover threshold in respect of goods sold / services provided to residents, non-residents and persons using IP addresses in India is less than Rs. 2 crores in a year (approximately U.S. $267,000); this is a very low threshold compared to the European DSTs, especially given the size of the Indian market. Unlike the other DSTs, a low threshold does not expose domestic suppliers to the tax, as the tax is imposed only on nonresidents.

The E-Commerce EL is designed to apply only to nonresidents, which is facially discriminatory against non-residents vis-à-vis domestic Indian companies. Economically, the effect of the E-Commerce EL is that of a tariff on foreign goods/services supplied over the internet. The scope of the E-Commerce EL is much broader than that of the French DST. However, by virtue of the fact that many U.S. companies are market leaders in the targeted business models, namely provision of goods and high value services over

the internet, de-facto discrimination against U.S. companies results from the scope of the E-Commerce EL.

The intention and result of the E-Commerce EL is to disadvantage U.S. e-commerce suppliers vis a vis domestic Indian e-commerce suppliers. This disparate effect on domestic vs. foreign companies is even reflected in the name - equalisation levy - as India positions the tax as a "leveling of the playing field" between foreign companies and domestic Indian companies.

6.3 Policy Justifications

Even though the E-Commerce EL is very broad in scope, statements by Indian officials demonstrate that imposing a tax on U.S. companies was an explicit policy goal of the tax. For example:

- On May 4, 2020 in CNBC TV-18 Coverage, on the subject of global businesses seeking deferment of Equalisation Levy in India by 9 months, the media report read as follows: "According to senior government officials, the revenue department of the finance ministry, which is the custodian to collect this levy, is of a view that "the e-commerce giants are flourishing and thus there is hardly any merit in their plea". Not just this, two senior government officials dealing with the matter told CNBC-TV18 that "non-resident ecommerce companies are seeking a deferment by nine months due to the crisis triggered by COVID-19, on the contrary, due to the pandemic, globally it is only such e-commerce giants which have generated more business. Even in India, tax departments have seen that, during the ongoing lockdown, giants like Netflix, Facebook, Google, Amazon and many more, saw huge traffic and a sudden increase in subscriptions and business. Thus, it is not a genuine demand."
- On May 5, 2019, a Bloomberg Quint article titled *BEPS Skirted taxing the Digital Economy - says CBDT's Akilesh Ranjan*, in which Mr. Ranjan is quoted as saying: "India has taken a very sober and considered approach on these issues. India made it clear right from the beginning that the challenges thrown by the digital economy need fundamental changes in tax rules. In the absence of consensus, India made it clear that it would take unilateral measures like Equalisation Levy… India introduced Equalisation Levy as an interim measure because the administration realised that this is not the best way of taxation. India would like to see a consensus on actual corporate net profit taxation but that needs drastic changes in the rules and a fundamental shift from the concept of fixed place of business"

6.4 Relevant Attributes

(a) Extraterritoriality

The Indian E-Commerce EL's extraterritoriality is inconsistent with international tax principles and unusually burdensome for U.S. affected companies. The E-Commerce EL is imposed only on nonresidents, so by design all Indian resident persons are exempt from the tax. Thus, as compared to the French DST under which some domestic French companies might pay tax, the burden of the E-Commerce EL is designed to fall entirely on nonresidents.

(b) Revenue not Income

The revenue base, defined as "consideration received" appears to include all amounts collected from customers even if the trading platform subject to tax acts as an agent for other suppliers, meaning that the tax is imposed on a revenue base significantly larger than the actual revenue recognized by the nonresident platform.

(c) Administrative burden

The E-Commerce EL came into effect 4 days after enactment, without sufficient prior notice and without any open governmental discussion, technical consultation, or hearings on the subject. The tax is novel, and its scope is extremely broad. Given the unique structure of this tax, companies will not have the information necessary for compliance at hand, and will need to build systems to capture and track the necessary information. Indeed, due to the broad scope, many suppliers remain completely unaware of the new obligation. This will lead to uneven and unfair compliance experiences. This imposes an unreasonable burden on nonresident suppliers, who will need to design and implement new systems to track and store the user data required to comply with this novel tax.

Furthermore, the specific implementing guidelines of the E-Commerce EL, *except* for the payment and return form, have still not been issued despite the fact that the first due date for payment under the tax was July 7, 2020. On July 3, 2020, the Indian government published the tax return form to pay the E-Commerce EL (Challan (ITNS 285) for deposit of E-Commerce EL), which notably requires that e-commerce operators must include a Permanent Account Number ("PAN") in this filing. Obtaining a PAN is a time-consuming process, and as many non-residents may not have a PAN already, it will be impossible to meet the first compliance deadline. Imposing obligations with which it is impossible to comply is unduly burdensome for nonresident suppliers.

(d) Relationship to other Taxes

The E-Commerce EL contains provisions that coordinate with the Advertising EL and income tax imposed under PE rules, which links its administration to both nonresident income tax nexus, and another unilateral measure designed to avoid treaty obligations. It provides that the EL Expansion would not be charged where:

- an e-commerce operator making, providing or facilitating e-commerce supply or services has a PE in India and the e-commerce supply or services are effectively connected with such PE; [or]
- the EL at 6% applies.

The E-Commerce EL is also intentionally coordinated with domestic Indian income taxes imposed under the ITA such that, other than a 1 year lag in effective date, ITA and E-Commerce EL shall not apply to the same items of income. Section 10 of the ITA includes a list of exemptions from the domestic Indian income tax regime.[110] Section 10(50) contains the exemption from the ITA for the Advertising EL, and was amended by Finance Act 2020 to also include the coordination rule for the EL Expansion. The relevant amendments provide that any income arising from covered supplies on or after April 1, 2021 are not included in computing income under the ITA.

Notably, the effective date of April 1, 2021 of this coordination rule is offset by a full year with the EL Expansion's effective date (April 1, 2020). The result of this one year timing gap is that for India's fiscal year ("FY") 2020-2021 (as the Indian FY runs from April 1 - March 31) it is possible that both the withholding tax under the ITA and EL Expansion could theoretically apply to the same revenue, for instance, a supply of technical services over the internet, resulting in double taxation.

There is no effort under the E-Commerce EL to relieve double taxation on transactions that may be subject to other DSTs. The greatest risk of double taxation due to uncoordinated national DSTs lies in the context of two-sided intermediary platforms where both sides are considered users, and thus attract the revenue from those transactions to a DST jurisdiction if either user is in the jurisdiction. The scope provision for services under the E-Commerce EL is for services "provided / facilitated … to" an Indian person. Accordingly, in the case of an intermediary platform where only one user is a payor, it is not clear whether the revenue would be in scope if (i) only the payor is located in India on the basis that only the

[110] Income-Tax Act (ITA), 1961, § 10(50).

payor should be considered the recipient of the service, or (ii) either user is in India, including the non-paying party, on the basis that the provider provides or facilitates services to both sides. Similarly, in the case of an intermediary platform where both users make some payment, albeit possibly of different amounts, it is not clear whether the amounts are combined and subject to the tax, or whether the only revenue in scope is that from the payor located in India.

7. Indonesian Electronic Transaction Tax ("ETT")

7.1 Introduction

On Tuesday, March 31, 2020, the Indonesian government issued Government Regulation in Lieu of Law (Peraturan Pemerintah Pengganti Undang-Undang) No. 1 of 2020 ("Perppu") imposing new direct and indirect tax obligations on nonresident digital goods and services providers, with immediate effect. The unique legal character of the type of emergency pronouncement does not require advance approval of Indonesia's Parliament before it becomes law in force, but rather it becomes law at the date of promulgation, and must later be ratified by Indonesia's Parliament to become permanent. Through a series of intensive discussions between the Indonesian government and the Indonesian Parliament, in the Plenary Session on 12 May 2020, the Indonesian Parliament passed the Perppu into law as Law No. 2 of 2020 on the Financial Policy and Stability of Financial System for COVID-19, and it was enacted as of 18 May 2020.

The direct tax obligations (i.e. income tax obligations) imposed by the Perppu are: (1) a new "significant economic presence" income tax nexus based on consolidated group's turnover, sales in Indonesia, and number of active digital media users in Indonesia ("SEP PE") which would be subject to treaty relief including under the U.S.-Indonesia Tax Treaty; and (2) a back-up electronic transaction tax that would apply where double tax treaties prevent the SEP PE from applying.

Notably, we understand that the implementation of this measure and SEP has been postponed to 2021 in order to allow the OECD consensus process to proceed.

7.2 Technical Details

Please refer to Appendix 1 for an unofficial translation or official version of the legislative text and any available implementing guidelines, as described therein.

We understand that no rate has yet been published, nor has the scope been defined for either the ETT or the SEP. The bare bones nature of the Perppu allows a remarkable amount of discretion to the Indonesian Ministry of Finance to define all material elements of the taxes, including scope and rate. The implementing rules will need to be issued in order for taxpayers to comply with the rules. Since further details of the ETT and SEP have not yet been released, we provide some speculative commentary on scoping and thresholds.

While the form of the ETT has not been disclosed, it would seem to follow from the Perppu's recognition that bilateral tax treaties may preclude imposition of the SEP PE that the ETT is likely to be styled as a transactional tax like the Indian EL and sundry DSTs in an effort to escape treatment as a "covered tax" under tax treaties. We expect that its scope will not be narrower than the EU DSTs. Furthermore, there is no reason to believe that the tax will be imposed on any Indonesian resident, as the ETT by design is to apply to non-Indonesian residents of countries with tax treaties with Indonesia.

The elements of the SEP PE definition of consolidated group's turnover, local sales and number of local users reflect the original EU proposal for a virtual PE, as well as some of the factors that are discussed in the Pillar 1 / Amount A for nexus and nonroutine return profit allocations.

While there is no information yet on thresholds, we expect they will likely be set low enough to maximize revenue collections.

We can provide follow-up insights on this measure if and when further details are released.

7.3 Policy Justification

Statements by Indonesian officials responsible for advancing the ETT show that the measure is focused on U.S. digital companies. For example:

- On July 1, 2020, in an article on national.kontan.id, the Indonesian Director of International Tax of Directorate General of Tax (DGT), John Hutagaol, said: "After the government successfully imposes VAT on e-commerce, the tax authority will in parallel impose income tax (PPh) or electronic transaction tax (ETT) on the digital economy companies. However, the government is still waiting for a global consensus regarding the fate of digital taxes. Unfortunately, the agreement of more than 137 countries/ jurisdictions including Indonesia, will be delayed from the agreed time that is scheduled to take place this month. Most important is that currently Indonesia has a legal basis to impose income tax or ETT on e-commerce businesses, i.e., Law No. 2 of 2020 which is the stipulation of Government Regulation in Lieu of Law (Perppu) No. 1 of 2020 on State Financial Policy and Financial System Stability For Managing the Corona Virus Disease 2019 (Covid-19) and/or In the Context of Facing Threats that Harm National Economy and/or Financial System Stability."
- On November 25, 2019, in an article on finance.detik.com, the Director of General of Tax ("DGT"), Suryo Utomo, said: "The Directorate General of Tax (DGT) of the Ministry of Finance is still having difficulty to collect taxes on digital-based international companies that earn profits in Indonesia. Starting from Netflix, Spotify, Google, Facebook, to Twitter."
- In the same article, the DGT explained that virtually every company that earns income in Indonesia must pay its taxes to the Government, and the digital-based international companies such as Netflix, Spotify, Google, Facebook and Twitter should pay Value Added Tax (VAT) and income tax, saying: "But in principle we want a fair play, whoever buys must pay, anyone who earns income in Indonesia must pay. That's the point."
- On June 8, 2019, in an article on economy.okezone.com, Finance Minister, Sri Mulyani, said: "Finance Ministers who are members of the G20 agreed to make general regulations that will close the gaps of global technology giants like Facebook in reducing their corporate taxes. This was agreed at the G20 ministerial-level meeting on International Taxation, in Fukuoka, Japan. Finance Minister Sri Mulyani also attended the meeting. Facebook, Google, Amazon, and other big technology companies have come under fire for not paying taxes but posting profits from countries where people are using the application. The practice was considered by many to be an unfair act."
- On September 3, 2019, in an article on msn.com, Finance Minister, Sri Mulyani, said: "The government confirms its serious steps to expand tax revenues from multinational digital companies such as Google, Twitter, Netflix, Facebook and Amazon. So far, these companies cannot be confirmed as foreign tax subjects on which tax can be imposed"

Statements provided in government documents describing the policy justification for the ETT and SEP also reflect a protectionist intent. The introduction of a tax on the digital economy was initially stated in the draft of the Omnibus Law that was drafted by the Government of Republic of Indonesia and the draft forwarded to the parliament to be discussed at the end of 2019. Due to the COVID-19 pandemic, the Government decided to accelerate the introduction of the tax on the digital economy by putting the relevant clauses into a separate law, i.e. the Perppu, which then was ratified by the Indonesian Parliament as Law No. 2 of 2020.

The following is the excerpt from the academic paper for the prior Omnibus Law bill, which is discussing the rationale behind the Government decision to impose tax on the digital economy, including the

introduction of the ETT which is a new kind of tax that has not been stated in previous Indonesian tax laws:

- "With regard to the large value of transactions and capitalization of intangible goods, the development of the digital economy in Indonesia shows the fastest growth and the largest market size in Southeast Asian countries. Taking into account the size of the capitalization of the digital economy, there are several main points of concern in the scope of the digital economy. First, the issue of unequal treatment due to digital economic development, for the people of a jurisdiction, for example developing countries, should not only be used as an e-commerce market, but must also be involved as actors in e-commerce markets. **Therefore, the tax is expected to be a fiscal barrier to cross-border competition**.[111] Second, there is a risk of tax avoidance in the scheme of e-commerce, which is proven empirically by the scouring of the taxation base as a consequence of a shift in the transaction done conventionally to be done electronically.
- A tax breakthrough for e-commerce activities is needed in order to provide equal treatment to business actors (equal level playing field) between conventional and e-commerce trading that exists today and other digital economic patterns which will develop in the future, as well as to mitigate the risk of tax avoidance in the e-commerce transaction scheme. The taxation arrangement is formulated in the taxation provisions in the form of (1) imposition of income tax; (2) imposition of VAT and (3) electronic transaction tax (using the digital service tax approach that is the non-income tax approach)."

7.4 Relevant Attributes

(a) Relationship to other Taxes

The interaction between liability for the SEP PE and the ETT is interesting, in that the ETT is clearly expressed as a substitute for the direct taxation that would result from a SEP PE. This substitution is an expression of the intent to tax the same set of taxpayers, on the same revenues, that are not taxable under traditional income taxes as a result of bilateral tax treaties.

Article 6 (8) especially indicates that the ETT is intended to be a substitute for an income tax, and is designed to avoid Indonesia's double tax treaty obligations, saying:

> "[i]n the case of validation as permanent establishment as referred to in paragraph (6) cannot be carried out due to application of agreement with government of other countries in the context of avoiding double taxation and prevention of tax evasion, foreign traders, foreign service providers, and/or foreign Providers of E-Commerce (PPMSE) who meet the provisions of significant economic presence are subject to tax on electronic transactions."

[111] (Emphasis added). The policy justification to discriminate against nonresidents cannot be clearer.

8. Italy ("Italian DST")

8.1 Introduction

The Italian Parliament introduced a 3% Italian DST at the end of 2018, and approved a revised bill on December 23, 2019 as part of the 2020 Budget Law. The Italian DST proposal was part of the initial wave of European DSTs and the legislation mirrors the 2018 EC DST in many respects. The effective date of the law is January 1, 2020 and the first DST payment should not be due until 2021, although the liability is expected to accrue from January 1, 2020.

8.2 Technical Details

Please refer to Appendix 1 for an unofficial translation or official version of the legislative text and any available implementing guidelines, as described therein.

The scope of the Italian DST is similar to the scope under the EC 2018 DST. In scope services include (a) the conveyance of advertisement on a digital interface, targeting the users of that interface; (b) the provision of a multilateral digital interface that allows users to contact and interact with each other, also for the purpose of facilitating the direct supply of goods or services; and (c) the transmission of data collected about users and generated through the use of a digital interface. Intra-group services are excluded.

The following services are also excluded:

a) The direct provision of goods and services in the context of a digital intermediation service;

b) The supply of goods or services ordered through the website of the supplier of those services and goods, when the supplier is not acting as an intermediary;

c) The provision of a digital interface whose main or exclusive scope is the provision by the entity that manages the interface to the users of the same interface of digital content, communication services, or payment services;

d) The provision of a digital interface used to manage:

    1. The interbank settlement systems…, or settlement /delivery of financial instruments;

    2. Negotiation platform or systems of the systematic internalisers…;

    3. Consultation activities in participating financial instruments and in case they facilitate the granting of loans, the intermediation services in the participating financial instruments;

    4. The wholesale negotiation locations…;

    5. Central counterparties …;

    6. Central repository…;

    7. The other connection systems whose activity is subject to authorization and the provision of services is subject to the supervision of an authority in order to assure the transparency, the safety and quality of the transactions concerning financial instruments, saving products or other financial activities;

e) The sales of data by the subjects indicated above;

f) The activities concerning the organization and management of telematics platforms for the exchange of electric energy, gas, environmental certificates and fuels as well as the transmission of data therein collected or any other connected activity.

When a taxable service is provided in Italy during a calendar year, the total amount of taxable revenues is equal to the total worldwide revenues[112] from digital services multiplied by the percentage representing the amounts of services connected to the Italian territory.[113]

The taxable revenues are considered gross of costs and net of VAT and other indirect taxes.

A device is considered to be located in Italy with reference mainly to the Internet protocol address (IP) of the device itself or to other geolocation system, in compliance with data privacy rules.

Similar to the EC 2018 DST, the Italian DST threshold for worldwide revenue is €750 million. By contrast, the French DST worldwide threshold was based on in-scope revenue. Italy has a much smaller local threshold of €5.5 million, but it only covers in-scope supplies. Similar to the French DST, the Italian DST revenue thresholds will have a disproportional effect on U.S. companies, and given the large size of the Italian economy, the economic effect of the Italian DST is expected to be commensurately large.

The specific advertising formats that will be in scope are to be specified through implementation guidelines from the revenue agency, still to be issued. The decisions on implementation will determine if, and to what extent, there will be a disproportionate effect on U.S. companies, and the ultimate amount of the taxes collected. We do not expect, however, that the disproportionate effect on U.S. companies will be less than is the case under the French DST.

8.3 Policy Justifications

The Italian DST legislation is very closely based on the EU's failed DST Directive, which was designed to target U.S. companies.

As reported by the Italian press, at the 2018 ECOFIN meeting, the then-Italian Prime Minister, Paolo Gentiloni, now EU Commissioner noted:

> Individual countries not only can, but must work in coordination with each other also with strengthened cooperation, and in a short time….We cannot accept the idea that the right of establishment of companies with regard to the giants of the web and platforms is conceived as in the past, when the plant meant paying taxes in the place where the factory was located. There are platforms that simplify our lives and that we do not want to give up at all in the world, which nevertheless have amazing volumes of business in our countries and maybe few

[112] The revenues deriving from the provision of a digital interface that facilitate the sales of products subject to excess duty are excluded when they have a direct and inseparable link with the volume of the value of those sales, according to art. 1, par. 1, of Council Directive 2008/118/CE, dated December 16, 2008, on the general regime for excise duties and repealing Directive 92/12/CEE.

[113] The calculation of revenues attributed to Italy for purposes of the DST is similar to that of the French DST. The percentages are as follows: 1) for advertisement, "the proportion of advertisements placed on a digital interface based on data relating to a user who consults this interface while located in Italy"; 2) for digital interfaces for the sale of goods and services "the proportion of operations of delivery of goods or provision of services for which one of the users of the digital interface is located in Italy"; for digital interfaces for other than the sale of goods and services "the proportion of users holding an account which has been opened in Italy and allowing the access to all or part of the services available from the interface and that have used this interface during the calendar year concerned"; and 3) for the transmission of data "the proportion of users for whom all or part of the data sold were generated or collected during the consultation of a digital interface, when these users were located in Italy."

employees and no chimney. ... individual countries must work in coordination with each other also with enhanced cooperation. *Since the EU has to deal with giants that are largely non-European, the problem of harmonizing fair taxation for these digital giants must be very serious.* ".[114]

This sentiment was also shared by the President of the Chamber of Deputies at the Italian Parliament, Laura Boldrini, noting that "[the DST] could be a tool of fiscal justice: it is unacceptable that these web giants who make a lot of money do not pay taxes in the country in which they do business."[115] In an interview with Francesco Boccia, the current Minister for Regional Affairs and Autonomies, he declared that web giants, specifically naming Amazon as an example, must pay taxes in countries where they operate their business.[116]

8.4 Relevant Attributes

(a) Extraterritoriality and Revenue not Income

The Italian DST's, like the French DST's, application to revenue rather than income and its extraterritoriality are inconsistent with international tax principles and unusually burdensome for U.S. affected companies.

(b) Relationship to other taxes

According to Italian tax law general principles, any tax, other than income taxes and taxes which are required to be recharged to third parties (as VAT), qualifies as deductible cost for corporate income tax (CIT) purposes. The deduction is available in the in the fiscal year of actual payment (i.e. for the DST concerning FY 2020, in FY 2021).

Based on the above, under the view that the DST does not qualify as income tax, it should be deductible for CIT purposes.

DST is not creditable against Italian corporate income tax liability. This is based on general principles of Italian taxation as confirmed by several scholars commenting on the Italian DST. However, Italian law does not expressly clarify the issue with respect to DST and the tax authorities have not yet provided confirmation.

(c) Administrative Burden

The DST took effect from January 1, 2020, but the government has not yet provided implementing regulations to provide compliance guidance. A draft of the guidance is expected to be made available for public consultation in the next few months. The first DST payment will be due by February 16, 2021, although the liability is expected to accrue from January 1, 2020.

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[114] "Web tax, slitta tutto al 2018, Gentiloni: 'Avanti anche senza intesa europea'", CORCOM (Sept. 29 2017), available at https://www.corrierecomunicazioni.it/digital-economy/web-tax-gentiloni-avanti-anche-senza-intesa-generale-europea/ (emphasis Added). Mr. Gentiloni is a strong supporter of an EU DST tax.

[115] *Id*.

[116] Antonio Sciotto, "*Boccia: «La web-tax è solo linizio. I colossi del web paghino l'Iva e tutte le altre imposte*» (September 30, 2017), available at https://ilmanifesto.it/boccia-la-web-tax-e-solo-linizio-i-colossi-del-web-paghino-liva-e-tutte-le-altre-imposte/.

9. Spain ("Spanish DST")

9.1 Introduction

On April 27, 2018, the then-Spanish Finance Minister Mr. Cristobal Montoro first announced that Spain intended to pursue a new turnover tax on the digital economy as a way to finance increased public pension costs, and a Spanish DST draft bill was published in October 2018 (referred to as the "2018 Spanish DST Bill"). Following a period of consultation, on January 25, 2019, a new draft law was published (referred to as the "2019 Spanish DST Bill", or generally as the "Spanish DST"). With the establishment of a new Spanish government in November 2019, the Council of Ministers approved the 2019 Spanish DST Bill on February 18, 2020. The Spanish DST entry into force is currently pending discussion and final approval by the Spanish Parliament, which have been postponed in light of the COVID-19 crisis. These discussions resumed in June and the Spanish left-leaning coalition secured a recent victory at the Lower House in favor of the passage of the DST. The bill will now continue to the Lower House Budget commission for review and amendments. After that, the bill will continue at the Upper House (Senate) that presumably will approve the text in a maximum of two months. Then, the Plenary of the Lower House will finally approve the text in a straightforward manner, it will be published in the Spanish Official Gazette and will come into force three months after publication.

The Spanish Ministry of Finance has postponed the first DST payment until the end of 2020. Although the payment obligation has been delayed, the law once effective will cause DST liability to accrue from the effective date. Per the wording of the Bill, the Spanish DST, if approved, will enter into force 3 months after its publication in the Spanish Official Gazette. The self-assessment and payment obligation has been deferred until no later than December 20 for the Q3 period of 2020, if the law enters into force. We expect that self-assessments and payments with respect to Q4 2020 will be paid during Q1 2021, following the ordinary tax assessment period.

9.2 Technical Details

Please refer to Appendix 1 for an unofficial translation or official version of the legislative text and any available implementing guidelines, as described therein.

The scope of the Spanish DST closely follows the 2018 EC DST and its original form has not been materially amended through the legislative process. Similarly, the global revenue threshold of €750 million is based on global revenue rather than in-scope revenue, following the 2018 EC DST rather than the French DST. By contrast, the local revenue threshold of €3 million is significantly lower than either the French or Italian DST. Taxable intra-group transactions will be taken into account when calculating the local €3 million threshold. Similar to the French DST, the Spanish DST scope and revenue thresholds are designed to capture mainly larger global and foreign digital services providers while excluding smaller local competitors, even if such competitors have a substantial local market presence.

An Impact Assessment prepared by the Spanish Government explains the reason behind the threshold chosen:

> …The objective of setting the first threshold is to limit the application of the tax to undertakings of a given size, which are mainly capable of providing those digital services in which the data and contribution of users play a fundamental role, and which rely heavily on the existence of large user networks, a high level of data traffic and the exploitation of a strong market position. In fact, this is the reason why the European Union itself has established the same threshold in some of its other

initiatives, as is the case with the declaration regarding the Country-by-Country Report, approved by Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards the automatic and compulsory exchange of information in the field of taxation. This threshold is also intended to provide legal certainty, as it would allow companies and tax administrations to ascertain more easily and in a less burdensome manner whether an entity is subject to tax. This threshold also makes it possible to exclude SMEs and start-ups from the new tax, for which the compliance costs linked to the tax could have a disproportionate effect. The second threshold should make it possible to limit the application of the tax to cases where there is a significant digital footprint in the territorial scope of the tax for those types of services, which is understood to occur when the share of the revenue from the provision of digital services accounted for by users located in the territory of application of the tax exceeds that limit of EUR 3 million.[117]

Further, the Spanish DST does not include a safe harbor clause that would provide some relief to low-margin or loss-making companies. Similarly, it does not provide relief from double taxation although the expense is deductible for Spanish income tax purposes if paid by a Spanish taxpayer. Commentators have noted that this is likely in conflict with the Spanish Constitution.[118] The Spanish DST should also be considered inconsistent with the Spanish General Tax Act, which provides for a tax system based on taxpayers' ability to pay, and on the principles of equality, equitable distribution, proportionality and efficiency. [119] Notably, the Third Final Provisions of the Spanish DST Bill does not respect these principles by stating that thresholds and tax rates may be amended, and new regulations may be added as necessary through the Spanish General Budget process to fulfill Spain's obligations derived from its EU membership or to respond to non-taxable events. These provisions allow for potential amendments in the future based on political circumstances and needs rather than through the ordinary parliamentary process.

9.3 Policy Justifications

The 2019 Spanish DST Bill includes a statement of purpose claiming the unsuccessful negotiations at the international level and Spain's autonomy to exercise its taxing rights as policy justifications for the tax.[120]

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[117] Spanish Finance Ministry, Notes to the Impact Assessment of the Spanish DST Bill Draft (*Memoria del análisis del impacto normativo del anteproyecto de la Ley XX/2018, de XX de XX, del Impuesto sobre determinados servicios digitales*), available at https://www.hacienda.gob.es/Documentacion/Publico/NormativaDoctrina/Proyectos/Tributarios/MAIN%20APL%20DST.pdf (hereinafter, "Spanish Impact Assessment Notes").

[118] In previous judgments, the Spanish Constitution Court ordered the amendment of tax laws that were levied on non-existing gains not proportionate to a taxpayer's financial means. Such doctrine would apply to the Spanish DST which is levied on companies regardless of their profits, including low-margin or loss companies. S*ee e.g.*, Judgement of the Constitutional Court 59/2017 (May 11, 2017).

[119] Spanish General Tax Act, Article 3.1.

[120] In relevant part:

> …the Tax on Certain Digital Services regulated in this Law foresees the conclusion of discussions related to it within the international forums. A long time has passed since international debates on this matter began without it having been possible to adopt any practical solutions in this regard, together with grounds based on social pressure, tax justice and the sustainability of the tax system, which means that, following the path paved by other countries, a unilateral solution must be adopted allowing Spain immediately to exercise the tax rights that legitimately correspond to it in its territory, as the data and contributions of users that create value for the company come from this country…"… By focusing on the services provided, without taking into account the characteristics of the service provider, including its economic capacity, the Tax on Certain Digital Services is not a tax on income or wealth, and therefore is not included in double taxation agreements, as established in the aforementioned G20/OECD Interim

The policy reasons advanced by legislators and government officials for the Spanish DST clearly demonstrate an intent to tax large digital companies, with a focus on U.S. / "Silicon Valley" companies, driven by a political effort to fund increasing public costs for the country. Such justification has been made publicly known by government representatives, as the passages below demonstrate.

At the introduction of the draft DST law in April 27, 2018, Mr. Cristobal Montoro, former Spanish Minister of Finance, stated the objective of the law to tax "big companies":

> …it is not a tax on consumers, nor users of those services. It is a tax on the big companies that do not pay enough in the countries where they carry out a significant amount of their businesses…. It is a tax on big digital companies…. That will contribute to better financing of the Government and allow the Government to finance the proposal of other political parties.[121]

The Area Coordinator of the General Sub-Directorate for International Taxation of the General Directorate of Taxes of the Ministry of Finance of Spain, Jaime Mas, explained that the "original intent of Spain's proposed DST was to tax 'Silicon Valley' companies such as Apple, Google, Facebook, Amazon, and Microsoft, but that Spain's WTO commitments required that Spain not discriminate against non-resident companies."[122]

Spanish Ministry of Economy, Nadia Calviño, explained that "internet giants and new digital platforms such as Facebook, Google, Apple or Amazon, among others," have rendered obsolete the current international tax rules.[123] The Finance Minister, María Jesús Montero, an avid public supporter of the tax, defended Spain's right to approve the so-called "Spanish Google tax", going as far as saying that Congress would approve the Spanish DST regardless of whether the G20 reaches an agreement.[124] In statements reported by the Europa Press, the Minister said that corner stores pay many times more than a technology

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> Report on tax challenges arising from digitalization. It therefore takes the form of a tax that is indirect in nature, and which is otherwise compatible with Value Added Tax. Statement of Purpose of the official text of the 2019 Spanish DST Bill, Feb. 28, 2020.

[121] *See* https://elpais.com/economia/2018/04/27/actualidad/1524850001_344743.html. *See also*, María Jesús Montero, Finance Minister stating "they [large technology companies and intermediate platforms] do not pay the taxes they owe in an appropriate way and sometimes they take part in unfair competition against traditional sectors". *La ministra Montero sí se atreve: Amazon, Google, Facebook, Uber, Cabify y Airbnb pasarán por caja* (October 5, 2018), available at https://www.hispanidad.com/confidencial/la-ministra-montero-si-se-atreve-amazon-google-facebook-uber-cabify-y-airbnb-pasaran-por-caja_12004470_102.html; Pedro Sánchez, Prime Minister of Spain described the DST as "a tax, let's say, on the big digital platforms", video interview on October 8, 2018, available at https://www.youtube.com/watch?v=tlPXF8ldzDg (min. 2:53); Members of the Technical Union of the Ministry of Finance stated "what's going to be raised is petty cash, a ridiculously small amount. The government's predictions are to make EUR 1.2 billion in cash, but apart from being too optimistic a calculation, it is a pitiful amount proportionally. This amount will never compensate for the 25% corporate tax savings obtained by the big technology companies through taxation in tax havens." "Los técnicos de Hacienda ridiculizan la tasa Google de Pedro Sánchez y Pablo Iglesias", VOZPOPULI (November 15, 2019), available at https://www.vozpopuli.com/economia-y-finanzas/hacienda-tasa-google-sanchez-iglesias_0_1300370970.html.

[122] *Hacienda tratará de evitar la doble imposición en la 'tasa Google,'* EXPANSION (June 1, 2018).

[123] "Calviño no descarta recuperar la tasa Google española", LAVANGUARDIA (July 16, 2019), available at https://www.lavanguardia.com/economia/20190716/463514803242/tasa-google-impuesto-tecnologicas-espana-calvino-gobierno.html.

[124] "El Gobierno defiende la 'tasa Google' y dice que la aprobará, haya o no acuerdo en el G-20", EXPANSION (Sept. 2, 2019), available at https://www.expansion.com/economia/2019/09/02/5d6cd069468aeb00598b463d.html.

multinational with a €3 million turnover. It seems clear that the Minister used the €3 million figure to refer to nonresident taxpayers who may exceed the local threshold under the Spanish DST. "What is not right is that traditional taxation is weighing more heavily on small traditional businesses than on these companies."[125]

An Impact Assessment prepared by the Spanish Government provides several additional policy statements for the Spanish DST tax.[126] For example, the justification of purpose and reasons behind the DST points to the need to tax companies in countries where the data and user contributions take place, while recognizing the such tax as proposed would lead to double taxation.

> …The DST regulated by this law follows an identical objective to that of the tax proposed by the European Commission, and in fact is largely in line with the latter. However, it foresees completion of discussions on the tax within the European Union…. it is necessary to adopt, in line with the approach taken by other countries, a unilateral solution allowing Spain to exercise its legitimate taxation rights immediately throughout its territory, since this is where the data and user contributions that create value for the company originate from. This is the main justification for the tax, and recognizing the fact that as it is an indirect tax it can lead to issues of double taxation for certain companies that have already been taxed in their countries of residence through corporation tax, it is understood to be a provisional tax, which should cease to exist as soon as it has been implemented worldwide and a lasting solution has been found that allows a share of the profit obtained by the most digitalized multinational companies, equivalent to the value derived from the data and contributions of users, to be allocated to the country from which these data and users originate or in which they are located.…

The government recognizes the policy shortcoming of the draft law, showcasing its departure from international tax principles of taxing the profits of a company, in the case of a direct tax, or the value add of an entity, in the case of an indirect tax:

> …as [the DST] is not a direct tax, the tax is completely unrelated to the economic capacity of the group from which the digital services are provided, which cannot and should not be taken into account; and…although it is an indirect tax which, like VAT, will be levied on each and every transaction, unlike VAT, there is no objective here of protecting the final consumer with a single tax on a global value added; on the contrary, the objective of the DST is to tax the proportion of the value included in the services provided thanks to the data and contributions of the users; being consistent with the argument that data in the digital economy (unlike inputs in the traditional economy, such as in the traditional example of mining ore) are not exhausted in a single transaction, but rather allow for the multiplication of the value generated by the company that initially collected them as these data are transmitted, one would have to conclude that in each intra-group transaction a new value is generated, even if each of these new values comes from the same set of original data; Consequently, each and every such intra-group transaction (as well as transactions out of the group, of course) should be subject to re-taxation.[127]

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[125] *Id*.

[126] *See, generally*, Spanish Impact Assessment Notes.

[127] *Id*. Justification of the consideration of intra-group transactions as taxable events, as part of the Spanish DST Draft bill dated October 2018. In the initial Spanish DST Draft Bill of October 2018, all intra-group transactions were considered to be included within the scope of the tax. As per the Spanish DST Bill published in January 2019, an intra-group exclusion is included, based on which "intra-group transactions performed between entities belonging to the same group with a stake, direct or indirect, of 100 per cent" are considered as non-taxable events.

In a Congressional appearance to discuss the main goals of the Ministry of Finance, the Finance Minister, María Jesús Montero, argued that the DST was a means to harmonize tax in Europe despite U.S. views, but also tellingly commented that the tax was meant to increase the tax rates on U.S. companies "to the EU level":

> Why do you grant that power to Mr. Trump? What do you think, that we have to get down on our knees or that what we have to do is to lead Europe so that it can be a harmonized tax?... Mr. Trump must not turn into a leader who tells the EU countries what to do. Europe is not going to let any power blackmail it…We must bring the average level of taxation closer to the EU level. And we must also increase public spending. We are the fifth country with the lowest- income over GDP in the EU.[128]

More recently, the Spanish press has reported that the COVID-19 crisis has fueled the rhetoric against large digital companies. The Finance Minister, María Jesús Montero, reiterated that "the digital companies are generating greater profits in the crisis…. As far as lockdown is concerned, citizens' consumption patterns are being re-directed toward these companies, which are seeing increased profits."[129] Spain's Prime Minister, Pedro Sanchez, agreed:

> …these are big corporations that do not pay taxes and create distortion. There is an urgent need for these large corporations to put resources back on the public agenda. If it can be done at an international level, great, if it can be done at a European level, the Spanish Government will be delighted, because it will send a stronger message to a digital world that needs to provide resources for the sake of social justice…[130]

In recent Parliamentary debates, the Finance Minister noted that at least three Spanish companies would be subject to the DST since these Spanish companies exceed the €750 million threshold.

> … This project that we discussed this morning will tax advertising services, online mediation and the sale of data collected from information provided by the user at a rate of 3%, all in line with the European Commission's suggestion. It will only apply to companies whose turnover in the previous calendar year exceeded EUR 750 million worldwide, three of which are in Spain. Therefore, it is not going to have any kind of impact on SMEs, unless some of you believe that, with a turnover of EUR

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[128] *Comparecencia en el Congreso - Montero responde a las amenazas de EEUU por la 'tasa Google': '¿Nos tenemos que arrodillar?*, EL MUNDO (February, 20, 2020), available at

https://www.elmundo.es/economia/macroeconomia/2020/02/20/5e4eb344fc6c837c1f8b462e.html.

[129] "Montero defiende la tasa Google porque las grandes tecnológicas tienen «más beneficios en esta crisis»", ABC Economia, April 30, available at https://www.abc.es/economia/abci-montero-defiende-tasa-google-porque-grandes-tecnologicas-tienen-mas-beneficios-esta-crisis-202004301531_noticia.html; *see also* the President of the Spanish Association of Tax Auditors, Berta Tomás, stating "…the Spanish DST needs to be implemented given the expected increase in digitization that will occur as a result of the lockdown due to COVID-19 and the presence of social distancing measures for a long time to come…. The pandemic is 'an important context' for developing and compensating for the fall in public revenue resulting from the coronavirus crisis." According to multiple press reports, available at: https://www.europapress.es/economia/fiscal-00347/noticia-inspectores-hacienda-ven-ahora-mas-necesaria-tasa-google-alza-comercio-online-covid-20200428110844.html, https://www.elmundo.es/economia/empresas/2020/04/29/5ea958d321efa046058b45ec.html.

[130] *Sánchez confía en un consenso europeo sobre la 'tasa Google'*, NOTICIAS BANCARIAS (June 2, 2020), available at https://noticiasbancarias.com/economia-y finanzas/02/06/2020/sanchez-confia-en-un-consenso-europeo-sobre-la-tasa-google/214010.html.

> 750 million, you fall into the category of a small or medium-sized enterprise. The tax we are proposing does not affect, and I would like to make this very clear, e-commerce retail activities or online sales between individuals….[131]

The Minister also noted that "…the tech giants that would be affected are big multinational companies that barely contribute in the countries where they make profits."[132] The Finance Minister, in her response to the recent letter from the U.S. Secretary of the Treasury, Steven Mnuchin, to several countries involved in the IF discussions, including Spain, announced that "no threats will be accepted" from the United States to stop the so-called Spanish Google tax, adding "[i]t is not a whim, nor the eccentricity of one country against another, but a need to adapt taxation to the 21st century."[133] The Prime Minister, in response to comments made by a leader of a Spanish political party, noted:

> If you want to make compromises, let's start with the basics, the fundamentals, Mr. Casado. Defend Spain's interests alongside the Spanish Government… the Honorable Gentleman should take a stand with the Spanish Government, with Europe, on setting up a tax for digital corporations, which would therefore be contrary to the interests of the U.S. administration….If you want to support the government, if you want to stand shoulder to shoulder with it, I make it very clear to you:…back the Spanish Government in setting up this digital tax against big tech corporations.[134]

Prominent EU academics and business associations have criticized the Spanish DST on grounds of discrimination, treaty violation and economic inefficiency, including voices from Spain. Many European business associations, including Spanish associations, have criticized the proposed tax on the grounds that gross based taxes impede economic growth, and this measure particularly would suppress both the growth of digitalized businesses and of other companies who rely on digital interfaces to promote their businesses.

AMETIC (Asociación Multisectorial de Empresas de la Electrónica, las Tecnologías de la Información y Comunicación, de las Telecomunicaciones y de los Contenidos Digitales) published a press release on October 22 criticizing the Spanish DST, in which it argues that the Spanish DST would violate double tax treaties, create double taxation of Spanish companies, and put Spain at a competitive disadvantage.[135]

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[131] June 4, 2020 Parliamentary debates, amendment in full, in relevant part.

[132] *Id*.

[133] "Bruselas impulsará su propia tasa Google si Trump boicotea el acuerdo en la OCDE", LA VOZ DE GALICIA (June 18, 2020), available at https://www.lavozdegalicia.es/noticia/economia/2020/06/18/bruselas-impulsara-propia-tasa-google-trump-boicotea-acuerdo-ocde/00031592503720899913225.htm.

[134] Lower House Control Session, Prime Minister's response to question from Congressman Pablo Casado Blanco, (June 24, 2020), available at https://www.lamoncloa.gob.es/presidente/intervenciones/Paginas/2020/prsp24062020.aspx.

[135] AMETIC, *AMETIC alerta de las consecuencias en la inversión, digitalización y competitividad de la Tasa Digital* (October 22, 2018). Available at https://ametic.es/es/prensa/ametic-alerta-de-las-consecuencias-en-la-inversion-digitalizacion-y-competitividad-de-la-tasa.

Adigital (the Spanish Association of the Digital Economy) issued an October 11 press release criticizing the Spanish DST, calling the DST discriminatory and noting that it is not consistent with accepted international tax principles.[136]

AmCham Spain criticized the Spanish DST on October 18, stating that "[a]ny solution should be applied comprehensively to the economy as a whole, be based on corporation tax and, thirdly, respect international tax agreements and the international obligations derived from them."[137]

Also of particular note, on October 30, leaders of 16 European companies operating highly digitalized business models, including Spanish company eDreams ODIGEO, wrote a letter to EU Ministers of Finance to oppose the 2018 EC DST and stating that DST measures would "harm the very businesses that are the catalysts for economic growth and employment in the European economy."[138]

Spanish professor Adolfo Martín Jiménez published an article that is highly critical of the 2018 EC DST. [139] He notes that it is arbitrary and likely inconsistent with tax treaties.[140]

9.4 Relevant Attributes

(a) Extraterritoriality and Revenue not Income

Like the French DST, the Spanish DST's application to gross revenue rather than net income and its extraterritoriality are inconsistent with international tax principles and unusually burdensome for U.S. affected companies.

(b) Relationship to other taxes

The Spanish DST is likely to give rise to double taxation. It taxes revenues that are already subject to income taxes and does not contemplate mechanisms to avoid double taxation. An amendment added to the current 2019 Spanish DST bill exempts intra group transactions avoiding possible further double taxation. However, this exemption applies exclusively when in-scope intra-group transactions are carried

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[136] Adigital, *Adigital rechaza rotundamente la propuesta unilateral de un impuesto a determinados servicios digitales* (October 11, 2018), available at https://www.adigital.org/?noticias=adigital-rechaza-rotundamente-la-propuesta-unilateral-impuesto-determinados-servicios-digitales.

[137] Europa Press, *La Cámara de Comercio de EEUU en España rechaza el impuesto a los servicios digitale* (October 18, 2018), available at https://www.europapress.es/economia/fiscal-00347/noticia-camara-comercio-eeuu-espana-rechaza-impuesto-servicios-digitales-20181018120856.html.

[138] Dana Dunne, Chief Executive Offer ("CEO"), eDreams ODIGEO, Daniel Ek, Co-Founder & CEO, Spotify, François Nuyts, CEO, and Jon Eastick, Chief Finance Officer, Allegro.pl, Gillian Tans, CEO, Booking.com, Ilkka Paananen, CEO, Supercell, Iulian Stanciu, CEO, eMag, Jet Roos-Van Aerssen, Chief Financial Officer, Marktplaats, Jitse Groen, Co-Founder & CEO, TakeAway.com, João Magalhães, CEO, Code for All, Johannes Reck, Co-Founder & CEO, GetYourGuide, Kati Levoranta, CEO, Rovio, Marcin Łachajczyk, CEO, Ceneo.pl, Markus Rauramo, Chief Finance Officer, Fortum, Panos Siozos, CEO, Learnworlds, Robert Gentz, Co-founder & CEO, Zalando, and Serban Enache, CEO, Dreamstime, *Letter to European Ministers of Finance on the proposed Digital Services Tax* (Monday, October 29, 2018), available at https://www.handelsblatt.com/downloads/23245928/1/brief-der-digitalunternehmen-an-die-eu.pdf.

[139] Adolfo Martin Jimenez, *BEPS, the Digital(ized) Economy and the Taxation of Services and Royalties*, UCA Tax Working Papers 2018/1 (June 2018), available at SSRN: https://ssrn.com/abstract=3215323.

[140] *Id* at 45.

out between entities which belong to the same group with a direct or indirect 100% stake.[141] This high risk of double taxation is economically distortive and render the Spanish DST confiscatory in nature.

(c) Administrative Burden

It is worth noting that the 2018 Spanish DST Bill included an express and final provision in the form of sunset clause. Under such a clause, the Spanish DST would only apply until the entry into force of the new EU Council Directive on significant digital presence. By contrast, the 2019 Spanish DST Bill does not include such an express provision but the commitment to withdraw the Spanish DST is now mentioned in the preamble of the law. In addition, as stated above, the Spanish Finance Minister, María Jesús Montero, publicly stated before Congress that the Spanish DST would be withdrawn in the event of a global agreement.

Implementing and administering this novel tax will be extremely costly for the Ministry of Finance and to companies, including U.S. companies, to an extent not justified by a short term measure.

[141] Amendments proposed and rejected by the Spanish Lower House would have allowed a more flexible approach, which would permit for an exemption at the group level, rather than limiting it to a direct or indirect 100% ownership test.

10. Turkey ("Turkish DST")

10.1 Introduction

The Turkish DST statute was published in the Official Gazette dated December 7, 2019. On February 5, 2020, the Turkish Revenue Administration issued a draft Communiqué specifying the procedures and principles applying to the DST. The Turkish Revenue Administration withdrew this draft Communiqué on February 14, 2020. The Turkish Revenue Administration issued a revised final Communiqué published in the Official Gazette on March 20, 2020.

The Turkish DST is notable in several respects. First, it has a very high rate, 7.5%, that may be raised to as much as 15% solely by executive discretion. Second, its scope exceeds that of the DSTs in the other European countries, but we do not expect that the increased scope will dilute the discriminatory impact on U.S. companies. Third, and most troublesome, the law allows the Turkish government to block access to the Turkish market for non-compliant taxpayers.

10.2 Technical Details

Please refer to Appendix 1 for an unofficial translation or official version of the legislative text and any available implementing guidelines, as described therein.

Particularly notable is the high rate of 7.5%, and legislative authority for the President to raise the rate to as high as 15% or reduce it as low as to 1%. The DST rate of 7.5% does not align with other European DSTs (e.g. UK 2%, France 3%). The DST rate of 7.5% is extremely high for a gross based tax in general and a DST in particular.

The Turkish DST does not provide any exemption for intragroup transactions. Accordingly, the Turkish DST could be imposed more than once on a single item of income if a group structures its distribution chain to deliver digital services in Turkey through a reseller. Unlike in the case of a VAT, the law includes no offset mechanism enabling DST taxpayers to offset their input DST from their output DST, thereby resulting in multiple taxation at the different levels of distribution. The fact that this tax cascades through the related and unrelated party supply chains creating double taxation means that in many cases, the actual rate will be much higher than 7.5%.

According to Article 4 of the DST Law, those who generated revenues from in-scope services in 2019 that are below (i) TRY 20 million generated in Turkey or (ii) €750 million generated globally, or the Turkish lira equivalent thereof will be exempt from DST. In the event that the taxpayer is a member of a consolidated group in terms of financial accounting, the total revenue of the group generated from in-scope services will be taken into account in the implementation of the above limits. The global revenue threshold of €750 million (or the Turkish Lira equivalent) is based on in-scope revenue, following the French DST. As in the French case, using in-scope revenue for global revenue threshold purposes makes it less likely that any Turkish company can qualify, as it excludes even large local digital players with greater market share than nonresidents, if they don't operate globally. The local revenue threshold of in-scope revenues of at least 20 million Turkish Lira (approximately U.S. $3.5 million) is lower than the French DST thresholds. A low local threshold, has the effect of bringing more foreign suppliers in scope while still not changing scope for local suppliers excluded by the global threshold.

Similar to the French DST, the Turkish DST revenue thresholds are discriminatory in their intent and effect, as they are designed to capture large global digital services providers while excluding smaller local competitors, even if such competitors have a substantial local market presence. The preamble of the DST Law does not indicate any research conducted on the digital sector, on how the thresholds are determined, whether any opinion was received from the Turkish Competition Board etc. However, the preamble of the Turkish DST as well as public statements mentioned below (including legislative history

and informal statements) show that the target of the Turkish DST are the non-residents giants who are not tax registered in Turkey - which indirectly implies a discriminatory intention.

The Turkish DST's scope is much broader than other European DSTs. It not only includes online advertising services, social media and marketplace services, but also the sale of all types of digital content and services related to that digital content. Accordingly, app store sales of own applications or content, computer programs, software sales, and music or video streaming services fall within the scope of the Turkish DST. Similar to the advertising industry, we expect these expansions in scope to disproportionately affect U.S. companies due to the composition of the affected markets. For example, of PwC's 2014 list of 100 global software leaders, 67% were U.S. companies.

As far as we are aware, no company headquartered in Turkey will fall within the scope of the Turkish DST.[142]

While the scope of the Turkish DST is broader than the French DST, the discrimination analysis is similar (Turkey does not have many major digital competitors, and the taxes will effectively provide protection for non-digital domestic competitors). Thus, despite the fact that the scope of services covered by the Turkish DST is larger than that of the French DST, it remains discriminatory by taxing only large foreign producers as a result of the threshold design, primarily U.S. companies.

10.3 Policy Justifications

Statements in government documents and by Turkish officials advancing the Turkish DST illustrate that the measure is intended to target U.S. digital companies. For example:

- The general preamble of the DST Law states: *"*The developments and innovations in the information technology accelerated the globalization in the social, cultural and economic area, and this also enabled the multinational companies offering digital services to engage in commercial activities without any significant physical presence (sometimes without any physical presence at all) in non-resident countries.

  Albeit it is generally accepted that the enterprises which operate in the digital service industry should make an equitable contribution to the public revenues of the countries in which they operate, countries could not respond to the rapid developments in this area, at the same speed, and accordingly a common taxation regime which is applicable throughout the entire world has not yet been formed. Nevertheless, it is known that some countries began to tax the digital service industry whereas some countries undertake administrative and legal studies for the taxation of this area.

  Within this scope, different country applications and opinions brought up by the international organizations have also been taken into consideration in order to ensure the taxation of the revenues derived from the digital services, and regulations aimed at the tax subject, taxpayers, base, tax rate and exemptions are being made…*"*

- Mustafa Kalayci on behalf of the Nationalist Movement Party, Konya (General Assembly Meeting on November 13, 2019) - "… Dear members of the parliament, it is observed that the tax

[142] *See* R. Bicer, *Turkey proposes 7.5 percent digital services tax on large multinationals*, MNE TAX (October 28, 2019), available at https://mnetax.com/turkey-proposes-7-5-percent-digital-services-tax-on-large-multinationals-36377 ("As far as I can determine, no company headquartered in Turkey will be within the scope of the new digital services tax. Accordingly, only large foreign multinationals providing digital services will be subject to digital services tax.").

regulations introduced with the bill of law intend to impose new taxes and to increase the taxes which target high income groups and in areas which are not generally taxed. A new tax is created under the name of digital service tax. Those which generate revenues above TRY 20 million in Turkey and EUR 750 million globally with respect to the digital services listed in the bill will pay a digital service tax of 7.5 percent. According to the information provided in the commission, it is anticipated that approximately 20 companies which are all non-resident will fall within the scope."

- Salih Cora, Justice and Development Party, Trabzon (Plan and Budget Commission Meeting on October 31, 2019) – "The main objective in the determination of a rate of 7.5 percent here is the designation of a rate, by taking into account of the examples, applications in Europe and in the world, and according to a specific average, rate and the state of utilization in Turkey. In the bill, not all digital services providers which offer services digitally have been anticipated to become taxpayers, it is intended that domestic companies are not exposed to such tax and particularly, multinational digital companies deriving global income through "web" sites without opening a fixed place of business in the countries in which they offer services become liable to pay taxes if their aggregate global revenues exceed EUR 750 million or revenues in Turkey exceed TRY 20 million."

- On February 27, 2019, Turkish Treasury and Finance Minister Berat Albayrak said in a speech regarding tax and the digital economy, "as a country of free trade, we have to take necessary steps to support our local economy and sustain Turkey's competitive advantage in a global setting that increasingly grows protectionist and threatens free trade and liberal economy."[143]

10.4 Relevant Attributes

(a) Extraterritoriality and Revenue not Income

The Turkish DST has other problematic aspects that mirror the French DST, the analysis of which is very similar to the analysis in the French DST Report. Namely, Turkish DST's extraterritoriality is inconsistent with international tax principles and unusually burdensome for U.S. affected companies as is the French DST. Another point of similarity is that the Turkish DST's application to gross revenue rather than net income is inconsistent with international tax principles and unusually burdensome for U.S. affected companies, just as in the case of the French DST.

We believe that USTR's analysis on both of these points as expressed in the French DST Report apply with equal strength to the Turkish DST.

(b) Double Taxation / Relationship to Other Taxes

We note that there is no coordination between the Turkish DST and Turkish withholding tax on advertising services currently levied at a rate of 15%. Given that advertising services are in-scope for Turkish DST, this lack of coordination will result in double taxation in Turkey on the same items of income.

(c) Administrative Burden

The Turkish DST was enacted in December 2019 and was effective as of March 1, 2020. While this was not retroactive, as in the case of the French DST, the issuance of detailed compliance guidance was extremely delayed. As described above draft guidance was issued February 5, 2020 and subsequently final guidance was published *after* the effective date, on March 20, 2020. Given that the Turkish DST also has a unique scope as compared to other European DSTs (France, Italy, Spain) it was unduly

[143] *Turkey to avoid tax losses from digital economy services*, DAILYSABAH.COM/ECONOMY (February 28, 2019), available at https://www.dailysabah.com/economy/2019/02/28/turkey-to-avoid-tax-losses-from-digital-economy-services.

burdensome to U.S. taxpayers to issue specific guidance at such a late date, particularly for an extraterritorial tax obligation.

(d) Blocking Access to Turkish Market

Along with applying the usual interest and penalties under the Tax Procedural Code, the Turkish Ministry of Treasury and Finance will be able to sanction companies that fail to comply with the DST by banning their access to the Turkish market. This sanction contradicts principles of state law laid out in the Turkish Constitution. The Turkish Tax Procedural Code had historically included a provision that forced taxpayers to close their premises temporarily under certain circumstances. However, this provision was removed because the penalty was not in line with the realities of commercial life.

11. United Kingdom ("UK DST")

11.1 Introduction

The UK was one of the first countries to propose a DST. The DST was not the first unilateral tax measure introduced by the UK intended to impose separate and unique taxes on highly digitalized foreign companies. As an example, the UK introduced its Diverted Profits Tax ("DPT") in 2015, which, like the DST, brings into scope of UK tax certain profits recognized by nonresident entities.[144] In 2019, the UK also introduced the Offshore Receipts in respect of Intangible Property ("ORIP") regime, which extended the territorial scope of the UK income tax provisions, and mainly impacted U.S. multinationals. Given the UK's international leadership role in tax policy matters, we are concerned that the UK DST will have substantial precedential effect with other countries considering a similar tax.

The UK first announced its DST as part of its 2018 Budget process. The UK DST is a 2% tax on gross revenues that are derived from UK users in relation to the provision of certain business models, namely: social media platforms, search engines, and online marketplaces (including revenue from any associated online advertising service). Notably, taxable revenues will include all revenue earned by a group that is connected to the business model, irrespective of how the business monetizes the service.

Following a period of consultation and amendments to draft legislation first published in July 2019, on March 19, 2020, the UK released the proposed final UK DST legislation as part of the UK Finance Bill 2019-21. The legislation did not have material changes to the initial published draft legislation of July 2019, although HMRC has provided additional guidance on several technical aspects of the law. The Finance Bill 2019-21 is proceeding through the UK Parliamentary review process, but no changes to the UK DST legislation are expected. The tax is in force as of April 1, 2020 and it will be formally enacted into UK law on Royal Assent of the Finance Bill 2019-2021 (expected in mid-July 2020), applying to revenues generated from April 1, 2020.

We understand that the U.S. and the UK have commenced discussions on a bilateral trade agreement post-Brexit. In light of the long-standing close ties between the U.S. and the UK, we believe that USTR should establish the withdrawal of the DST as a precondition for any post-Brexit trade agreement.

11.2 Technical Details

Please refer to Appendix 1 for an unofficial translation or official version of the legislative text and available implementing guidelines, as described therein.

The UK DST presents important distinctions when compared to the other DSTs based on the 2018 EC DST. The most important is its definition of transactions falling within scope.

The scope covers the provision of (1) a social media platform, (2) search engine, or (3) online marketplace, and (4) any associated advertising revenues. The UK DST differs from the EU DSTs in that in-scope revenue is defined by reference to revenue derived by an enterprise which has adopted a particular business model as opposed to being defined by reference to a type of transaction. Despite the difference in scope definition, the in-scope taxpayers will be similar to in-scope taxpayers under the French DST.

The UK DST applies to companies with worldwide revenue of £500 million (approximately €550 million), and local revenue of £25 million (approximately €28 million). The global revenue threshold is based on all revenue rather than just in scope revenue, consistent with the 2018 EC DST. A policy paper published

[144] The DPT is often referred to by the moniker "Google tax".

with the UK DST draft legislation predicted that the impact of the measure is expected to be felt by "a small number of large multinational groups."[145]

The UK DST's mechanism for calculating the taxable base is more transaction-oriented than in the French DST, which is user-based.[146]

The UK DST contains a safe harbor for loss-making and low profit margin businesses. The first £25 million of in-scope UK revenues are exempt from the DST charge. In addition, groups can elect to calculate their DST liability under an alternative method, instead of the standard calculation of 2% of revenues. The alternative charge calculation applies a formula that considers a proportion of relevant operating expenses attributable to UK in-scope revenues. The effect of the formula is to reduce the DST rate charged where the group's operating margin is very low (less than 2.5%). If the group makes a loss on providing in-scope digital services to UK users, it will not have to pay UK DST under the alternative charge method. The exclusion of loss-making companies is welcome, but the general effect is still to include large global digital services providers while excluding smaller local competitors, even if such competitors have a significant UK market presence. Due to the large size of the UK economy, the economic effect will be significant.

The UK DST provides double tax relief for certain cross border transactions. The UK DST relieves 50% of the tax when an online marketplace transaction is subject to a foreign DST charge. The 50% double tax relief is helpful, but it doesn't completely relieve double taxation for platform intermediaries where in the other country the presence of only one of two users causes the transaction to be treated as a wholly local transaction for purposes of their DST. For example, in an intermediary transaction with a UK and French user, in principle the UK will exempt 50%, but the French DST will allocate 100% to France, so there will still be more than 100% taxation.

The determination of user location is also different under the UK DST when compared to the French DST. The location of a French user is defined by reference to the digital interface terminal being located in France at the moment the user consults the interface. The location in France of this terminal is determined by reference, for example, to its IP address. The UK definition of user includes individuals normally resident in the UK and does not look to the number of user interactions with the interface.

11.3 Policy Justifications

We are not aware of as many facially discriminatory remarks made by UK legislators as we have seen in other countries, but little doubt exists that the principal purpose of the UK DST is to tax large digital companies, which are principally U.S. companies, given other policymakers' public statements.

Mr. Philip Hammond, Chancellor of Exchequer for the UK, has commented on the UK goal of targeting the "global giants":

> [The UK DST] will be carefully designed to ensure that it is established tech giants rather than our tech startups, that shoulder the burden of this new tax… [t]he digital services tax will only be

[145] HM Revenue & Customs, *Policy paper - Introduction of the new Digital Services Tax* (July 11, 2019), available at https://www.gov.uk/government/publications/introduction-of-the-new-digital-services-tax/introduction-of-the-new-digital-services-tax.

[146] The French DST apportions revenue for French taxation using a worldwide apportionment formula, comparing users located in France accessing the interface to users globally accessing the interface.

> paid by companies that are profitable and which generate at least 500 million pounds a year in global revenues. [147]

Mel Stride, then Financial Secretary to the Treasury, made the following statement to Parliament on Nov. 29, 2018 and provided the following comparison between the DPT and the DST:

> I understand what the hon. Lady says, but the expression "preventing avoidance", which she has just used, lies at the heart of the meaningful distinction. DPT is about avoidance, as eloquently expressed by my hon. Friend the Member for Poole, whereas the digital services tax is not about avoidance at all; it is about reflecting the fact that the international tax regime is no longer fit for purpose when it comes to taxing certain types of digital businesses—those that operate through digital platforms, and that have a relationship with UK users and generate value as a consequence. *She mentioned Google specifically, but it covers search engines in general, certain online marketplaces and social media platforms.*
>
> The two taxes are so distinct. It is important to place on the record that the digital services tax is not an anti-avoidance measure; it is about redefining the way in which those businesses pay their fair share of tax.[148]

The DST is one of the measures that the UK Government has adopted to target U.S. multinationals, as described by Rishi Sunak, then Parliamentary Under-Secretary for Local Government, now Chancellor of the Exchequer:

> This Government have brought forward more ways to clamp down on international tax than any previous Government and £14 billion extra has been collected. This Government put in place the first diverted profits tax and at the last Budget announced a digital services tax, which we will put in place in line with international peers.[149]

When asked about the possible impact of the UK DST on the UK trade talks with the U.S., Elizabeth Truss, Secretary of State for International Trade and President of the Board of Trade, responded:

> Question asked in Parliament, for reference:
>
> The statement from the Trump Administration that we will be subject to retaliatory tariffs if we proceed with the digital services tax that is set to come in in April seems an early test of how we will fare in independent trade talks. Could the Secretary of State tell us if the Government intend to concede to American pressure?

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[147] Harper Neidig, *UK proposes targeting tech giants with 'digital services tax,'* THE HILL (October 29, 2018), available at https://thehill.com/policy/technology/413672-uk-proposes-targeting-tech-giants-with-digital-services-tax. *See also* Rupert Neate, *Hammond targets US tech giants with 'digital services tax,'* THE GUARDIAN (October 29, 2018), available at https://www.theguardian.com/uk-news/2018/oct/29/hammond-targets-us-tech-giants-with-digital-services-tax ("It is only right that these global giants, with profitable businesses in the UK, pay their fair share towards supporting our public services.").

[148] Finance (No. 3) Bill (Fourth sitting) (November 29, 2018), available at https://hansard.parliament.uk/Commons/2018-11-29/debates/94003c23-fb5e-457f-8f16-c971e3f6c84d/Finance(No3)Bill(FourthSitting)?highlight=%22digital%20services%20tax%22#contribution-C1677E77-2C58-4E65-AE08-D15CD707A6D3 (emphasis added).

[149] Local Government Funding, Volume 657 (March 27, 2019), available at https://hansard.parliament.uk/Commons/2019-03-27/debates/54E4B4CF-08EB-468B-9E16-B91FCFE4EEA1/LocalGovernmentFunding?highlight=%22digital%20services%20tax%22#contribution-EB463C50-03EE-40FF-86FB-EF5FC44AAB44.

Response from Ms. Truss:

Let me be clear: UK tax policy is a matter for the UK Chancellor—it is not a matter for the U.S. ; it is not a matter for the EU; it is not a matter for anybody else—and we will make the decisions that are right for Britain whether they are on our regulatory standards, our tax policy or anything else.[150]

In another parliamentary debate passage, the Financial Secretary to the Treasury, Jesse Norman, explains the decision to exclude streaming services from the UK DST scope:

Question asked in Parliament by Dame Margaret Hodge, an opposition MP:

It should be borne in mind that Netflix depends on services that are funded by the taxpayer, such as our physical and digital infrastructure, which is in part publicly funded, our world-class universities and our highly educated workforce, and our NHS, which keeps its staff healthy. It takes from the public purse, but fails to pay its fair share back.

There is one simple solution to this injustice, and I should appreciate the Minister's comments on it. Video streaming services must be included in the new digital services tax. At present they are excluded. Why? Why cannot the Government simply extend the provisions to include them?

The United States Secretary of State has threatened us with tariffs on our cars if we go ahead with the digital services tax, and I welcome the Government's resistance to that threat. Fair taxation cannot be a bargaining chip to be cashed in to secure a trade deal. We must maintain our stance, and have no truck with the bully-boy tactics of the Trump regime.

Response from the Financial Secretary to the Treasury:

The right hon. Lady asked about the digital services tax. As she is probably aware, that is designed to relate to large search engine, social media and online marketplace businesses. Those are different from the case that she is discussing, as they rely on their users to create value where that value is not recognised under current international tax rules. Therefore the set of rules would have to be entirely rewritten to take into account the circumstances of the case that she is describing now, which may be important but is in any case captured by existing Government law in many instances. In any case, the DST is intended to be a temporary measure pending agreement of a long-term global solution, potentially including the United States, that will address the wider challenges posed by digitilisation.[151]

The UK, collectively with France, Italy and Spain, has underlined the need for a different allocation of profits as a result of the current pandemic. As reported by a news outlet, the Finance Ministers of these countries sent the U.S. Treasury Secretary the following quotes:

The current COVID-19 crisis has confirmed the need to deliver a fair and consistent allocation of profit made by multinationals operating without - or with little - physical taxable presence.

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[150] Global Free Trade, Volume 670 (January 23, 2020), available at https://hansard.parliament.uk/Commons/2020-01-23/debates/E8B306D7-3D54-4DA5-8C43-640DF5C0B862/GlobalFreeTrade?highlight=%22digital%20services%20tax%22#contribution-3A692F93-CD92-48A7-B266-4781812E9D1F.

[151] House of Commons Hansard, Netflix: Tax Affairs, Volume 671 (February, 3, 2020), available at https://hansard.parliament.uk/Commons/2020-02-03/debates/D157443C-E763-4976-B0EA-CBD038B252B0/NetflixTaxAffairs?highlight=%22digital%20services%20tax%22#contribution-9652384E-19BA-4D0F-9AB3-E51413C70CCD.

> The pandemic has accelerated a fundamental transformation in consumption habits and increased the use of digital services, consequently reinforcing digital business models' dominant position and increasing their revenue at the expense of more traditional businesses.
>
> Digital giants, no matter where they are headquartered, will emerge from the current crisis more powerful and more profitable.
>
> These companies benefit from free access to the European market. It is fair and legitimate to expect that they pay their fair share of tax within countries where they create value and profit.[152]

11.4 Relevant Attributes

(a) Extraterritoriality and Revenue not Income

Like the French DST, the UK DST's application to gross revenue rather than net income and its extraterritoriality are inconsistent with international tax principles and unusually burdensome for affected U.S. companies.

(b) Relationship to other taxes / Double Taxation

As outlined above, the UK DST is the only DST that attempts to address double taxation by allowing an exclusion of 50% of the amount of taxable revenue from marketplace transactions subject to the UK DST where one of the users in relation to that transaction is located in a country which also has a DST that applies to marketplace transactions. This exclusion while limited to certain transactions is welcomed by businesses that have transactions involving users in different jurisdictions, although does not completely remove the risk of double taxation. Further, similar to all the Covered DSTs, the UK DST results in likely additional double taxation, given resident country (i.e. U.S.) taxation of the same income.

Per HMRC guidance, the DST will be deductible against UK Corporation Tax under existing principles, but it will not be creditable.

(c) Administrative Burden

Due to the size of the UK economy and the higher volume of cross-border trade in digital services with the UK, the implementation of the UK DST is likely to have a more significant and larger impact on U.S. companies when compared to the French DST.

Although it has been suggested in Parliamentary debates that the UK would remove the UK DST when a global solution is reached, no sunset clause was included in the final DST legislation. The original consultation document said that the UK DST would be withdrawn as long as "an appropriate solution" was reached. In recent Parliamentary debates, the Government was challenged to include a review of the UK DST in 12 months from its effective date, but it declined to do so. In light of this, we are not confident the UK would withdraw its DST if a global consensus is reached.

[152] Faisal Islam, *Sunak urges US to back digital services tax*, BBC NEWS (June 18, 2020), available at https://www.bbc.com/news/business-53099785.

Appendix

1. Legislative Texts

This Appendix provides legislative, regulatory, and other official guidance with respect to the Covered DSTs. When translated, the translation is informal.

1.1 Austrian DAT

Entire legislation for Austrian Digital Tax Act 2020, version of November 13, 2019

Note to the following provision

With respect to the reference period, cf. Section 7 Subsection (1)

Full title

Digital Tax Act 2020 (DiStG 2020)

Original version: Federal Law Gazette (*BGBl.*) I no. 91/2019 (NR: GP XXVI IA 983/A AB 686 S. 88. BR: AB 10251 S. 897.) [CELEX no.: 32011L0016, 32018L0822]

Note to the following provision

With respect to the reference period, cf. Section 7 Subsection (1)

Wording

Taxable item

Section 1.

(1) To the extent that online advertising services are provided domestically for consideration, they shall be subject to the digital tax. An online advertising service shall be deemed to be provided domestically if received on a user's device having a domestic IP address and if addressed (also) to domestic users in terms of content and design.

Advertisings placed on a digital interface, in particular in the form of banner advertising, search engine advertising and similar advertising services, shall be regarded as online advertising services. Advertising services subject to advertising tax pursuant to the Austrian Advertising Tax Act 2000 (*Werbeabgabegesetz 2000*), Federal Law Gazette I no. 29, shall not be regarded as online advertising services.

The Federal Ministry of Finance may define comparable online advertising services by regulation, in particular to ensure equal treatment of any such comparable services and/or to take account of technical developments.

Note to the following provision

With respect to the reference period, cf. Section 7 Subsection (1)

Definitions

Section 2.

(1) "Online Advertising Service Providers" means companies that provide online advertising services for consideration or facilitate them and that, within one fiscal year, generate

worldwide revenues of at least EUR 750 million and domestic revenues of at least EUR 25 million deriving from the performance of online advertising services.

Expenditure on intermediate consumption pursuant to Section 3 Subsection (1) second sentence shall not be included in revenues pursuant to lit. b). If such companies belong to a multinational group of companies within the meaning of section 2 of the Austrian Law on Transfer Pricing Documentation (*Verrechnungspreisdokumentationsgesetz*), Federal Law Gazette I no. 77/2016, the group's revenues shall be taken as a basis. For this purpose, the last published financial statements or consolidated financial statements shall be relevant. Any revenues resulting from the fulfillment of statutory requirements shall not be included in these revenues.

"**User**" means any natural or legal person that accesses a digital interface using a device.

"**Digital Interface**" means any software (including websites or a part thereof and mobile applications) accessible by Users.

"**IP Address**" (internet protocol address) means a series of alphanumeric digits assigned to a networked device to facilitate its communication over the Internet. Identifying the place of performance of an online advertising service through an IP Address shall be equivalent to an identification through other technologies used for the geolocalization of devices.

Note to the following provision

With respect to the reference period, cf. Section 7 Subsection (1)

Assessment basis and tax rate

Section 3.

(1) The assessment basis for the digital tax shall be the consideration that the Online Advertising Service Provider receives from the customer. It shall be reduced by expenditure on intermediate consumption of other Online Advertising Service Providers that do not belong to its multinational group of companies.

(2) The tax shall amount to 5% of the assessment basis.

Note to the following provision

With respect to the reference period, cf. Section 7 Subsection (1)

Tax debtor, accrual of the tax claim

Section 4.

(1) The tax debtor shall be the Online Advertising Service Provider having a claim for a consideration with respect to its performance of an online advertising service within the meaning of Section 1. This shall also apply if the Online Advertising Service Provider is not the proprietor of the Digital Interface.

The tax claim shall arise upon expiry of the month in which the taxable service has been provided.

If a subsequent change occurs in the amount of the consideration paid for the performance of an order, an adjustment must be made for the assessment period in which such change occurs.

Note to the following provision

With respect to the reference period, cf. Section 7 Subsection (1)

Tax collection

Section 5.

(1) The tax debtor shall be responsible for calculating the tax and paying it no later than by the 15th day of the second month following the accrual of the tax claim.

Taxes assessed pursuant to section 201 of the Austrian Federal Fiscal Code (*Bundesabgabenordnung*; "BAO"), Federal Law Gazette no. 194/1961, shall be due as set forth in Subsection (1).

Three months after the end of the fiscal year, the annual tax return for the preceding year has to be filed by the tax debtor. The annual tax return must specify the types of online advertising services and the respective considerations as well as the revenues generated globally pursuant to Section 2 Subsection (1) no. 2 lit. a).

The digital tax shall be collected by the tax office competent for collecting the tax debtor's VAT.

The Federal Ministry of Finance may introduce more detailed provisions by regulation to simplify procedures or take account of the requirements relating to the specific characteristics of online advertising services. This shall apply specifically where the tax debtors are companies that have neither a registered seat, nor their place of management or a permanent establishment in Austria.

Note to the following provision

With respect to the reference period, cf. Section 7 Subsection (1)

Record-keeping and transmission obligations

Section 6.

(1) The tax debtor is obliged to keep records of the online advertising services taken on, any other companies commissioned by it in this context, the clients and the calculation bases for the digital tax.

(2) For purposes of this federal law, records of IP Addresses or other information used for the geolocalization of devices shall be kept in a form that is limited to allowing for conclusions as to whether an online advertising service has been provided domestically. These data shall be transmitted upon the tax authority's request. Other records as well as receipts and documents relating to the books and records, such as in particular contracts for the provision of online advertising services, shall be kept in accordance with the BAO and transmitted to the tax authority upon request.

Entry into force and transitional provisions

Section 7.

(1) This federal law shall be applicable to online advertising services that are provided after December 31, 2019. In deviation from Section 5 Subsection (3), the annual tax return for fiscal years ending prior to July 1, 2020 shall be filed by September 30, 2020.

(2) Regulations issued by virtue of this federal law may be enacted as of the day following their promulgation. However, they may be applicable as of January 1, 2020 at the earliest.

Note to the following provision

With respect to the reference period, cf. Section 7 Subsection (1)

Final provisions

Section 8.

(1) This federal law shall be implemented by the Federal Ministry of Finance.

At regular intervals, for the first time as per December 31, 2021, the Federal Ministry of Finance shall evaluate the taxation of online advertising services under this federal law as to its application, the consistency of taxation and implementation as well as with respect to its effect on companies in the light of any more comprehensive measures for the taxation of the digital economy implemented on EU or OECD level.

To the extent that this federal law refers to the provisions of other federal laws and except as may be otherwise provided, these provisions shall be applied as amended from time to time.

An annual amount of EUR 15 million originating from the digital services tax revenue shall be invested in the digital transformation process of the Austrian media companies.

(a) Implementing regulations for Austrian DAT

FEDERAL LAW GAZETTE
(*BUNDESGESETZBLATT*; BGBL.)

FOR THE REPUBLIC OF AUSTRIA

Year 2019	Issued on December 4, 2019	Part II

Regulation 378:	More detailed provisions on the implementation of the Digital Tax Act 2020 (Implementation Regulation for DiStG 2020 (*DiStG 2020-UmsetzungsV*))

Regulation 378 by the Federal Ministry of Finance regarding more detailed provisions on the implementation of the Digital Tax Act 2020 (Implementation Regulation for DiStG 2020)

Based on section 5 subsection (5) of the Digital Tax Act 2020 (Digitalsteuergesetz 2020; DiStG 2020), BGBl. I no. 91/2019, and sections 86a, 90a and 97 subsection (3) of the Federal Fiscal Code (Bundesabgabenordnung; BAO), BGBl. no. 194/1961, last amended by the federal law BGBl. I no. 104/2019, the following Regulation is hereby issued:

Chapter 1.
Electronic communication within the scope of digital tax procedures

Section 1.

Online advertising service providers (section 2 subsection (1) DiStG 2020) that are FinanzOnline participants (section 2 subsection (1) FinanzOnline Regulation 2006 (*FinanzOnline-Verordnung 2006*; FOnV 2006), BGBl. II no. 97/2006) as well as representatives (*Parteienvertreter*) within the meaning of section 2 subsection (2) FOnV 2006 shall file annual tax returns pursuant to section 5 subsection (3) DiStG 2020 and any other submissions in connection with the collection of the digital tax in accordance with the FOnV 2006 using the FinanzOnline service. The annual tax return pursuant to section 5 subsection (3) DiStG 2020 may only be submitted by means of the data stream transfer or by means of a web service.

Section 2.

(1) Online advertising service providers that are neither FinanzOnline participants themselves nor have a representative that participates in the FinanzOnline service shall participate in the online procedure for digital tax (sections 3 through 5).

(2) The online advertising service providers referred to in Subsection 1 shall file the annual tax return pursuant to section 5 subsection (3) DiStG 2020 and any other submissions in connection with the collection of the digital tax using the online procedure for digital tax and participate in the electronic form of service within the scope of the online procedure for digital tax. The annual tax return pursuant to section 5 subsection (3) DiStG 2020 may only be submitted by means of the data stream transfer or by means of a web service.

Chapter 2.
Online procedure for digital tax

Section 3.

For the data transfer referred to in Section 2 Subsection (2), the Federal Ministry of Finance shall provide the online procedure for digital tax. Section 1 subsections (2) through (4), section 4, section 5, section 5b subsections (1) and (2) and section 6 FOnV 2006, except the provisions on representatives, shall be applied *mutatis mutandis* to the online procedure for digital tax. The organizational and technical specifications required for the transfer by means of web services (e.g. xml structure; WSDL) shall be kept available on the website of the Federal Ministry of Finance (https://www.bmf.gv.at).

Section 4.

(1) The registration for the online procedure for digital tax shall be made using a web form accessible for this purpose on the website of the Federal Ministry of Finance (https://www.bmf.gv.at). The online advertising service provider shall provide the following information:

name or company name

address

email address

(2) The following documents shall be attached electronically to the registration form:

an excerpt from the commercial register or a comparable proof of registration in the country where the company has its registered office

a proof of the identity of the person carrying out the registration

a proof of the power of representation of the person carrying out the registration

Section 5.

(1) The registration data shall be verified by the tax office competent pursuant to section 5 subsection (4) DiStG 2020. When all information and documents required for the registration have been provided, the tax reference number, the log-in data for the online procedure for digital tax and the Internet address that can be used to access the online procedure for digital tax shall be submitted to the online advertising service provider using the email address indicated by such provider.

(2) If any information or documents required for the registration are missing, the online advertising service provider shall be informed thereof. This can also be made using the email address indicated by such provider. The missing information or documents may be submitted subsequently by email.

Chapter 3.
Fiscal representative

Section 6.

(1) Online advertising service providers that neither have their registered office, place of management or a permanent establishment in Austria nor in a Member State of the European Union or in any other signatory to the Agreement on the European Economic Area shall commission a fiscal representative in accordance with Subsection (4) in due time prior to the filing of the first annual tax return.

(2) Online advertising service providers other than those referred to in Subsection (1) may commission a fiscal representative in accordance with Subsection (4).

(3) The fiscal representative, who must also be an authorized recipient for the online advertising service provider and be authorized to participate in the FinanzOnline service in accordance with the FOnV 2006, shall be responsible for the filing of the annual tax return pursuant to Section 1. The fiscal representative shall fulfill the duties under digital tax law that are incumbent upon the person he/she represents. The fiscal representative may exercise the rights to which the online advertising service provider is entitled.

(4) Fiscal representatives may be auditors, attorneys-at-law and notaries having their residence or registered office in Austria.

(5) Online advertising service providers shall disclose to the fiscal representative all circumstances relevant for the collection of the digital tax in due time.

Chapter 4.
Final provisions

Section 7.

To the extent that this Regulation refers to other statutory provisions, these provisions shall be applied as amended from time to time.

Section 8.

(1) The Regulation shall enter into effect as of January 1, 2020. Fiscal representatives pursuant to Section 6 may already be commissioned prior to January 1, 2020.

(2) In such cases in which online advertising service providers are unable for technical reasons to allocate consideration for the provision of online advertising services pursuant to section 1 subsection (1) DiStG 2020 to Austrian users during the first full fiscal year in which the DiStG 2020 applies, the tax office competent pursuant to section 5 subsection (4) DiStG 2020 may, upon a corresponding request, accept a different method to determine the assessment basis for the digital tax, provided that the online advertising service provider can furnish *prima facie* evidence that this method essentially yields the same results.

1.2 Brazil CIDE-Digital

Institutes the Contribution for Intervention in the Economic Domain on gross revenue from digital services provided by large technology companies (CIDE-Digital).

The National Congress decrees:

Art. 1

The Contribution for Intervention in the Economic Domain is hereby established on gross revenue from digital services provided by large technology companies (CIDE-Digital), whose proceeds from the collection will be fully allocated to the National Scientific Development Fund and Technological (FNDCT), as provided by Law No. 11,540, of November 12, 2007.

Art. 2

For the purposes of this law, the following terms have the definitions below, subject to the definitions provided for in art. 5 of Law No. 12,965, of April 23, 2014 (Marco Civil da Internet):

I. digital content: any kind of data provided by digital form, such as programs, applications, music, videos, texts, games, electronic files and alike;

II. digital platform: internet application or application that allows the electronic transfer of digital content, or even that users interact with each other;

III. gross revenue: the amounts referred to in art. 12 of Decree Law No. 1,598, of December 26, 1977.

Art. 3

The CIDE-Digital taxable event occurs at the time of the receipt of gross revenue resulting from:

I. display of advertising on a digital platform to users located in Brazil;

II. provision of a digital platform that allows users to contact and interact with each other, with the objective of selling goods or services directly between these users, provided that one of them is located in Brazil;

III. data transmission from users located in Brazil collected while using a digital platform or generated by these users.

§ 1 The user who accesses the digital platform on a device physically located in Brazil.

§ 2 The physical location of the device will be determined based on the IP address that accesses the digital platform, unless it has been adulterated to provide a location other than the real one, when they will be used other means of geolocation available.

Art. 4

CIDE-Digital taxpayer is a legal entity, domiciled in Brazil or abroad, earning gross revenue referred to in art. 3, and belong to an economic group that has earned, in the calendar year previous:

I. global gross revenue greater than the equivalent of R $ 3 billion (three billion reais); and

II. gross revenue exceeding R $ 100 million (one hundred million reais) in Brazil.

Single paragraph. For the determination of the limit provided for in item I caput, gross revenue expressed in foreign currency will be converted into United States dollar and then to reais through the utilization of the United States dollar value established for purchase by the Central Bank of Brazil for the last working day of the calendar year previous.

Art. 5

The CIDE-Financeira calculation base is the total amount of the gross revenue referred to in art. 3rd earned during the calendar year.

§ 1 If the gross revenue resulting from the display of advertising on a digital platform, referred to in item I of art. 3rd, also encompasses advertising displayed to users located in other countries, must compose the calculation basis share of gross revenue proportional to views to users located in Brazil.

§ 2 If the gross revenue resulting from the transmission of data users, referred to in item III of art. 3, also includes data from users located in other countries, must compose the base of calculation gross revenue proportional to the number of users located in Brazil.

Art. 6

The CIDE-Digital will progressively affect the following rates:

I. 1% (one percent) on the gross revenue portion up to R $ 150,000,000.00 (one hundred and fifty million reais);

II. 3% (three percent) on the share of gross revenue that exceed R $ 150,000,000.00 (one hundred and fifty million reais) up to R $ 300,000,000.00 (three hundred million reais);

III. 5% (five percent) on the share of gross revenue that exceed 300,000,000.00 (three hundred million reais).

Single paragraph. The amount of tax due is the sum of the installments determined in the caput.

Art. 7

The payment of CIDE-Digital must be made until the last working day of the month of March of the subsequent calendar year with triggering events that occurred in the calendar year.

Art. 8

The Brazilian Federal Revenue Secretariat is responsible for management of CIDE-Digital, including taxation activities, inspection and collection, as well as the establishment of obligations accessory.

Single paragraph. In the activities foreseen in the caput of this article, all rights and guarantees provided for in Law no. 13,709, of August 14, 2018 (General Law for the Protection of Personal Data - LGPD), and Law No. 12,965, of 2014 (Marco Civil da Internet).

Art. 9

CIDE-Digital is subject to the rules related to the tax administrative process for determining and demanding credits federal tax and consultation, provided for in Decree No. 70.235, of 6 March 1972, as well, in a subsidiary way and as applicable, to the provisions income tax legislation, especially with regard to penalties and other applicable additions.

Art. 10

This Law enters into force on the date of its publication and shall take effect from the first day of the subsequent financial year, subject to the minimum term of 90 (ninety days).

JUSTIFICATION

Taxation of the income of large technology companies has been at the center of the global debate in recent years, as its models of Disruptive businesses allow them to operate in a country without having any physical presence, or, even if they establish themselves there, that they displace their profits for jurisdictions where they are taxed at very low effective rates.

Concern about non-taxation or insufficient taxation of digital economy is such that the Organization for the Economic Cooperation and Development (OECD) created, in 2013, the Project BEPS ("Base Erosion and Profit Shifting" or, in Portuguese, "Base Erosion Taxable and Profit Transfer "), with 15 lines of action to discuss how to combat tax evasion, improve the coherence of tax rules international standards and to ensure transparency in the tax sphere. The importance of digital economy in this process is evident when we realize that the first line of action is dedicated to "identifying the main difficulties imposed by the digital economy, with regard to the application of international tax law and develop detailed options for resolving these difficulties, adopting a global approach and considering both the direct as well as indirect taxation.

In the discussion on income taxation, the OECD concluded that the best option would be to change the rules of international taxation so that taxable income would be better distributed among the different countries where large companies operate, in order to capture the value generated in each one of them. For example, in the case of Facebook, much of the value of depends on its user base spread across the world, which makes with many to argue that countries with the most users should have a greater participation in the company's results, and not that it could concentrate a large part of its profits in its headquarters or in countries with lower taxation.

It is not difficult to see the difficulty in reaching such consensus due to strong opposition from companies and beneficiary countries since the current model, as a rule, benefit large economies. Therefore, the OECD admitted that, in the absence of a global agreement, countries should resort to short-term, such as the adoption of a withholding income tax on payments made to large companies, or a new corporate tax gross revenue. The latter was the option most adopted, with the creation of taxes on the billing of large technology companies (digital service tax - DST).

Indeed, despite the negotiations for a global agreement in OECD to continue, in January 2020, about half of European countries organization had already announced, proposed or implemented some DST. Several experts advocate a similar solution, as is the case of renowned economist Paul Romer, Nobel Prize in Economics in 20184.

In this context, we think that Brazil cannot be left out of that movement. Therefore, in this bill, we propose the creation of a tax on the gross revenue of large technology companies, along the lines as proposed by the European Commission and implemented by France and for Italy. We seek to follow OECD guidelines to minimize possible deleterious effects of this taxation, ensuring compatibility with international rules and reducing compliance costs and discouraging innovation. For this, we propose a tax on gross revenue only from large companies with international operations, and focused only on services greater risk of under-taxation.

Analyzing the tax figures available in Brazil, we concluded that the most adapted for the purpose would be the Contribution of Intervention in the Economic Domain (CIDE). CIDE-Digital will focus only on technologies that are big on a national and international scale. There's no point to apply it to a technology company that only operates in Brazil, even if they are large, since it will not be able to transfer the profit to branches abroad.

This would only discourage the emergence of national startups. In addition, real tax advantages are only achieved by multinationals of that have organizational, financial and accounting structures that allow the reallocation of revenues and costs around the world.

In this sense, only new taxpayers will be legal entities that are part of economic groups that earned, in the previous year, annual global gross revenues greater than the equivalent of R $ 3 billion and, at the same time, that exceeded R $ 100 million in revenue gross in Brazil. We were careful to adopt, as an inclusion measure, the revenue for the entire economic group, and not for a particular company, to avoid tax planning of dividing operations in the country into several minor legal entities.

In line with international digital taxes, only services that gain scale due to the large number of users and little need for physical presence were included in the scope of the tribute: digital advertising, intermediation for the sale of goods and services in platforms and selling user data.

Unlike international experience, which uses watertight rates, we believe that progressive taxation is more just based on percentages ranging from 1% to 5% of gross sales.

In dealing with CIDE-Digital, we demand that Management Tax law respects the rights and guarantees of users provided for in Law no. 13,709, of August 14, 2018 (General Law for the Protection of Personal Data - LGPD), and Law No. 12,965, of April 23, 2014 (Marco Civil da Internet).

The collection of CIDE-Digital will go to the Fund National Scientific and Technological Development (FNDCT), which is the subject of Law No. 11,540, of November 12, 2007, to finance innovation and scientific and technological development in the country, with a view to promoting economic and social development of our Nation.

We understand that the best solution will undoubtedly be in an international solution that establishes fairer rules for taxation the profits of large technology companies. When this happens, we will be the first to defend Brazil's accession to this agreement and the extinction of CIDE-Digital, as, incidentally, has been emphasized by all countries that instituted similar taxes. However, we think it is not possible we passively wait for that global agreement, without taking the steps that are within our reach at the moment.

We are aware of the complexity of the proposal that we are presenting, and that it will be necessary to discuss the details of this new tax with the National Congress, the Executive Branch, the companies involved and all the society. But we are also sure that this debate can no longer late, otherwise we will lose an important financing instrument of the public policies that we need so much. That's why, taking into account in view of the relevance and urgency of this proposition, we hope to have the support of our Noble Peers for their improvement and approval.

1.3 Czech DST

Government Bill

ACT

dated _____ 2020

on Digital Services Tax

The Parliament has passed the following Act of the Czech Republic:

PART ONE
BASIC PROVISIONS

Section 1.
Subject Matter of Act

(1) This Act regulates the digital services tax comprising partial taxes on individual taxable services.

(2) For purposes of the digital services tax, a taxable service means:

a) Conduct of a targeted advertising campaign;

b) Use of a multilateral digital interface; and

c) Provision of user data.

Section 2.
Digital Interface and Its User

(1) For purposes of the digital services tax, a digital interface means software available to users.

(2) For purposes of the digital services tax, user means a person or unit without legal personality accessing a digital interface by means of technical equipment, irrespective of whether or not they have a user account on such digital interface.

Section 3.
Czech User

(1) For purposes of the digital services tax, Czech user means a user accessing a digital interface by means of technical equipment which, provided a suitable method of its IP address localization is used, is located in the Czech Republic.

(2) Suitable method of IP address localization pursuant to para 1 means a method through which it is possible to attribute an IP address to an individual country in most cases.

(3) If, based on an IP address and using a suitable method of localization, it is impossible to determine the country where the technical equipment is located from which a particular user has used a digital interface, such user shall be a Czech user for purposes of the digital services tax, if he/she/it resides or is seated in the Czech Republic.

(4) Unless anything to the contrary is established, the residence or seat of a user of a digital interface focusing on or targeting, including partially, a user with his/her/its residence or seat in the Czech Republic, will be deemed to be located in the Czech Republic.

(5) For purposes of the digital services tax, IP address means an identifier that is used in Internet protocols to unequivocally identify a particular end-point and is unique at the time of the communication.

Section 4
Regulated Financial Service and Regulated Financial Entity

(1) For purposes of the digital services tax, regulated financial service is a financial service for the provision of which a regulated financial entity has been licensed.

(2) For purposes of the digital services tax, regulated financial entity means a financial services provider that has obtained a license pursuant to para 1 therefor, if the provision of such services is:

a) In compliance with the European Union regulations in the area of financial services,[153] subject to the regulation pursuant to which:

1. A relevant license is necessary for their provision;

2. Their provision is subject to administrative supervision; or

b) In a non-EU member state, subject to regulation similar to the regulation under letter (a).

Section 5
Targeted Advertising and Related Event for Consideration

(1) For purposes of the digital services tax, targeted advertising means any advertisement regulated by the Act on Regulation of Advertising, which, in connection with a user's access to a digital interface, is placed on such digital interface on the basis of data collected with respect to such user, technical equipment used by such user or his/her/its activities on this, or another, digital interface.

(2) For purposes of the digital services tax, event for consideration with respect to targeted advertising means an event that is subject to the duty to pay consideration for the placement of targeted advertising on a digital interface.

[153] For instance, Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC; Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC; Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)

Section 6
Service Supplementing Placement of Targeted Advertising on Digital Interface

(1) For purposes of the digital services tax, service supplementing the placement of targeted advertising on a digital interface means a service directly relating to the placement of a targeted advertisement on a digital interface, irrespective of whether or not such service was provided before or after the placement of the targeted advertisement on the digital interface.

(2) Creation of the content of any advertisement does not constitute a service supplementing the placement of a targeted advertisement on a digital interface pursuant to para 1.

Section 7
Multilateral Digital Interface

(1) For purposes of the digital services tax, multilateral digital interface means an interface allowing a user to:

a) Search for

1. Another user;

2. Another user account; or

3. An offer of or demand for the supply of goods or provision of a service by another user; and

b) Make an offer of or demand for the supply of goods or provision of a service to another user, respond to such an offer or demand, conclude transactions with another user, communicate with another user or influence another user in another similar manner.

Section 8
Accessibility of Multilateral Digital Interface

(1) For purposes of the digital services tax, accessibility of a multilateral digital interface means allowing for:

a) Access to a multilateral digital interface or any part thereof; or

b) Use of functionalities of a multilateral digital interface.

(2) Accessibility of a multilateral digital interface pursuant to para 1 does not mean the placement of targeted advertising on a digital interface or a service supplementing the placement of targeted advertising on a digital interface.

Section 9
Participant to Transaction

For purposes of the digital services tax, participant to a transaction means a user proposing the conclusion of a transaction with another user of a multilateral digital interface, accepting such a proposal, making any similar act leading to the conclusion of such transaction, or acting in line

with such a proposal, namely providing or accepting any performance arising out of such transaction.

PART TWO
TAXABLE SERVICES

Section 10
Conduct of Targeted Advertising Campaign

(1) For purposes of the digital services tax, conduct of a targeted advertising campaign means:

a) Placement of targeted advertising on a digital interface; and

b) Provision of a service supplementing the placement of targeted advertising on a digital interface.

Section 11
Use of Multilateral Digital Interface

(1) For purposes of the digital services tax, use of a multilateral digital interface means:

a) Allowing for the conclusion of a transaction between users of a multilateral digital interface facilitating related supply of goods or provision of services; and

b) Making a multilateral digital interface available to a user.

(2) Making a multilateral digital interface partially available to a user in relation to a single consideration payment shall be deemed as separate provision of a taxable service.

(3) Use of a multilateral digital interface pursuant to para 1 does not mean:

a) Provision of a regulated financial service by a regulated financial entity;

b) Operation of gambling.

(4) Use of a multilateral digital interface pursuant to para 1 (b) does not include making a multilateral digital interface available to a user, if the sole or major purpose is:

a) Provision of digital content;

b) Playing a computer game or use of another similar interactive software intended for leisure time and entertainment;

c) Provision of a communication service;

d) Provision of a payment service; or

e) Provision of an electronic identification service pursuant to a directly applicable regulation of the European Union governing electronic identification.[154]

Section 12
Provision of User Data

(1) For purposes of the digital services tax, provision of user data means the provision of data files collected with respect to users, obtained or created on the basis of their activities on a digital interface operated by:

a) A legal entity or unit without legal personality, which has provided such data file; or

b) Another member of the same group, if such data file has been provided by a member of the group.

(2) Para 1 shall apply accordingly to a legal entity or unit without legal personality to which a part of a digital interface has been conveyed for placing targeted advertising thereon.

(3) Provision of user data pursuant paras 1 and 2 does not include the provision of data files:

a) Obtained from a sensor;

b) By a regulated financial entity.

(4) A keyboard, mouse, touchscreen, remote control, play control, movement sensor and another similar user inbound interface of technical equipment are regarded as if they were not a sensor under para 3 (a).

PART THREE
TAX

Chapter I
General Provisions on Tax

Title 1.
Tax Subject

Section 13
Tax Payer

Digital services tax payer is a person liable for the digital services tax, which is a payer of a partial tax from an individual taxable service.

Section 14
Person/Entity Liable for Tax

[154] Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC

(1) Person/entity liable for the digital services tax is:

a) An independent person/entity liable for tax; or

b) A group member liable for tax.

Section 15
Independent Person/Entity Liable for Tax

(1) Independent person/entity liable for tax is a legal entity or unit without legal personality which is not a member of a group and which has provided a taxable service performed during the decisive period, if:

a) The total amount of its revenues for such decisive period exceeds EUR 750,000,000;

b) The decisive amount for such decisive period exceeds CZK 100,000,000; and

c) The quotient of the P1 and the P2 amounts exceeds 10% in such decisive period, where:

1. P1 is the sum of amounts relating to the provision of taxable services in individual EU member states, contractual states of the Agreement on European Economic Area or Swiss Confederation ("member state") for such decisive period, calculated in the same way as the decisive amount; and

2. P2 is the total amount of its revenues for such decisive period as achieved in individual member states.

(2) A legal entity or unit without legal personality, which is not an independent person/entity liable for tax solely because the condition as set forth in para 1 (c) has not been met, is obligated to notify its tax administrator about this fact within 15 days from the first day of the taxable period.

(3) With respect to a legal entity or unit without legal personality, which is not an accounting unit, income is regarded as revenues for purposes of the digital services tax.

Section 16
Group Member Liable for Tax

(1) Group member liable for tax means a member of a group, which provided a taxable service performed during a decisive period if:

a) The total of the decisive amounts for all members of such group exceeds CZK 100,000,000 for the decisive period; and

b) The quotient of the P1 and the P2 amounts exceeds 10% in such decisive period, where:

1. P1 is the sum of amounts relating to the provision of taxable services in individual member states for all members of such group in this decisive period, calculated in a similar manner as the decisive amount; and

2. P2 is the total amount of revenues of all members of such group for this decisive period, as achieved in individual member states after deduction of revenues for the performance provided to another member of the same group.

(2) A group member that is not a group member liable for tax solely because the condition as set forth in para 1 (b) has not been met is obligated to notify its tax administrator about this fact within 15 days from the first day of the taxable period. A group member is not obligated to report this fact if another member of the same group has identified it in its own notification of such fact.

Section 17
Group and Its Consolidated Financial Statements

(1) For purposes of the digital services tax, group means:

a) A supranational group of companies under legal regulations regulating international cooperation in tax administration; or

b) A group of enterprises similar to a group of companies as specified under letter (a), including only legal entities or units without legal personality, which

1. Are subject to taxation due to their registered office or place of management in the same state or jurisdiction; and

2. Are not subject to taxation in relation to activities carried out through their permanent establishment in a different state or jurisdiction.

(2) For purposes of the digital services tax, consolidated financial statements of a group mean consolidated financial statements of a group of companies under legal regulations regulating international cooperation in tax management, which

a) Have been prepared for such group, if the group is obligated to prepare them; or

b) Would be prepared for such group, if shares or similar securities representing a share in any of the group members are traded on a regulated market, including a similar market abroad.

(3) Consolidated financial statements of a group pursuant to para 2 (b) are regarded as if prepared on the first day of the third calendar month of an accounting period that directly relates to the accounting period for which the respective financial statements have been prepared.

Section 18
Decisive Amount

(1) The decisive amount for a decisive period is the sum of partial decisive amounts for individual taxable services for the respective period.

(2) A partial decisive amount for an individual taxable service for a decisive period will be calculated in the same manner as the basis of a partial tax on such taxable service. In so doing, a decisive period is regarded as a taxable period.

(3) If a legal entity or unit without legal personality, which are not payers of the digital services tax, do not have enough information for determining a partial decisive amount for an individual taxable service for such decisive period, they will estimate such partial decisive amount.

(4) A legal entity or unit without legal personality are obligated to apply an adequate estimation method pursuant to para 3, which corresponds to the nature of their activities. If a legal entity or unit without legal personality is a member of a group, the estimation method must also correspond to the group and the nature of activities performed by its member.

Section 19
Decisive Period

(1) The decisive period of an independent person/entity liable for tax is the last accounting period for which financial statements of such person/entity were prepared before the first day of the taxable period.

(2) The decisive period of a member of a group liable for tax is the last accounting period for which consolidated accounting statements of the group were prepared before the first day of the taxable period.

Title 2
Other General Tax Provisions

Section 20
Arising of Tax Duty

(1) A tax duty with respect to the digital services tax arises as of the date of the provision of a taxable service.

(2) If, on the date of a taxable service, the amount of the consideration for its provision is not known, a tax duty arises as of the date on which the amount of the consideration for the provision of a taxable service becomes known.

Section 21
Consideration

For purposes of the digital services tax, consideration means a financial amount or the value of any in-kind performance, which are to be, or are, provided for the provision of a taxable service, irrespective of who is to provide, or provides, such consideration.

Section 22
Exemption of Intra-Group Provision of Taxable Service from Tax

Provision of a taxable service to another member of the same group is exempt from the digital services tax.

Section 23
Calculation of Tax

The digital services tax shall be calculated as the sum of partial taxes on individual taxable services.

Section 24
Taxable Period

(1) The taxable period for the digital services tax is a calendar year.

(2) The last taxable period for the digital services tax is the taxable period of 2024.

Section 25
Budget Allocation of Tax

Revenues from the digital services tax constitute income to the state budget.

Chapter II
Partial Tax on Conduct of Targeted Advertising Campaign

Section 26
Partial Tax Payer

(1) Payer of partial tax from the conduct of a targeted advertising campaign is a person/entity liable for the digital services tax, which has conducted a targeted advertising campaign in the Czech Republic during the decisive period, if the partial decisive amount for the conduct of a targeted advertising campaign for such period exceeds CZK 5,000,000.

(2) If a group member liable for tax conducted targeted advertising campaigns in the Czech Republic during the decisive period together with another member of that group, the partial decisive amount is, when assessing the fulfilment of the condition under para 1, regarded as if such amount is increased by the partial decisive amount for the conduct of a targeted advertising campaign by such other entity for the respective period.

Section 27
Subject Matter of Partial Tax

The subject matter of a partial tax on the conduct of a targeted advertising campaign is the provision of a taxable service involving the conduct of a targeted advertising campaign for consideration in the Czech Republic.

Section 28
Conveying of Part of Digital Interface to Another Entity/Person for Placement of Targeted Advertising

If targeted advertising is placed on a part of a digital interface conveyed to someone else to independently place targeted advertising on, a tax duty is established with respect to the person/entity to which such part has been conveyed.

Section 29
Performance of Taxable Service

A taxable service involving the conduct of a targeted advertising campaign is considered to be performed on the date on which the last event for consideration occurred with respect to the targeted advertising.

Section 30
Place of Provision of Taxable Service

A taxable service involving the conduct of a targeted advertising campaign is provided within the territory of the Czech Republic if at least one event for consideration with respect to targeted advertising occurs in connection with activities of at least 1 Czech digital interface user.

Section 31
Special Provision on Determination of Residence or Seat of User

Unless anything to the contrary has been established, a digital interface user in connection with whose activities an event for consideration has occurred with respect to targeted advertising which, including partly, focuses on or targets users with their residence or seat in the Czech Republic is deemed to have its residence or seat in the Czech Republic.

Section 32
Partial Tax Basis

(1) The basis of a partial tax on conduct of a targeted advertising campaign is the sum of the portions of consideration amounts attributable to the Czech Republic for the conduct of a targeted advertising campaign.

(2) A portion of the consideration for the conduct of a targeted advertising campaign attributable to the Czech Republic is the product of the following amounts:

a) Consideration for the conduct of a targeted advertising campaign;

b) The quotient of these amounts:

1. Number of events for consideration with respect to targeted advertising, which have occurred in connection with access of Czech users to a digital interface;

2. Number of events for consideration with respect to targeted advertising, which have occurred in connection with access of all users to a digital interface.

Section 33
Rate and Calculation of Partial Tax

(1) The rate of the partial tax on conduct of a targeted advertising campaign is 7%.

(2) The partial tax on conduct of a targeted advertising campaign is calculated as the product of the partial tax basis, rounded up to whole thousands of Czech crowns, and the partial tax rate.

Chapter III
Partial Tax on Use of Multilateral Digital Interface

Section 34
Partial Tax Payer

Payer of a partial tax on use of a multilateral digital interface is a person/entity liable for the digital services tax, which has used a multilateral digital interface in the Czech Republic in the decisive period of time, provided that the total number of opened user accounts in such a multilateral digital interface exceeded 200,000 within such period of time.

Section 35
Subject Matter of Partial Tax

The subject matter of the partial tax on the use of a multilateral digital interface is the provision of a taxable service involving the use of a multiple digital interface for consideration within the Czech Republic.

Section 36
Performance of Taxable Service

(1) The taxable service involving the use of a multiple digital interface is considered to have been provided on the date when:

a) All participants in a completed transaction are known, where the taxable service involves facilitation of a transaction between users;

b) The consideration, or the first portion thereof, becomes payable, where the taxable service involves access to a multilateral digital interface.

Section 37
Place of Provision of Taxable Service

(1) The taxable service involving the use of a multilateral digital interface is provided in the Czech Republic if:

a) A Czech user participates in a completed transaction, where the taxable service involves facilitation of a transaction between users;

b) The user has a user account on a multilateral digital interface and is a Czech user at the time of setting up such account, where the taxable service involves access to a multilateral digital interface.

(2) For purposes of para (1) (a), when determining whether or not a user of a multilateral digital interface is a Czech user, no account is taken of the place of:

a) Delivery of the goods or provision of the service which is subject to the transaction; and

b) Making a payment.

Section 38
Partial Tax Basis

(1) The basis of the partial tax on the use of a multilateral digital interface is the sum of the following amounts:

a) The sum of the portions of consideration for the use of a multilateral digital interface involving facilitation of a transaction between users attributable to the Czech Republic;

b) The sum of consideration amounts for the use of a multilateral digital interface involving access to a multilateral digital interface.

(2) A portion of the consideration for the use of a multilateral digital interface attributable to the Czech Republic is the product of the following amounts:

a) Consideration for the use of a multilateral digital interface involving facilitation of a transaction between users;

b) The quotient of these amounts:

1. Number of Czech users participating in the transaction;

2. Number of all users participating in the transaction.

(3) The consideration under para (2) (a) does not include any performance, or part thereof, mutually provided by participants in a transaction.

Section 39
Rate and Calculation of Partial Tax

(1) The rate of the partial tax on the use of a multilateral digital interface is 7%.

(2) The partial tax on the use of a multilateral digital interface is calculated as the product of the partial tax basis, rounded up to whole thousands of Czech crowns, and the partial tax rate.

Chapter IV
Partial Tax on Provision of User Data

Section 40
Partial Tax Payer

(1) Payer of a partial tax on the provision of user data is a person/entity liable for the digital services tax, which has provided user data in the Czech Republic in the decisive period of time, provided that the partial decisive amount for the provision of user data exceeded CZK 5,000,000 within such period of time.

(2) If a group member liable for the tax provided user data in the Czech Republic in the decisive period of time together with another member of that group, when considering whether or not the condition under para (1) has been met, the partial decisive amount will be deemed increased by the partial decisive amount for the provision of user data by such other member within that period of time.

Section 41
Subject Matter of Partial Tax

The subject of the partial tax on the provision of user data is the provision of a taxable service involving provision of user data for consideration within the Czech Republic.

Section 42
Performance of Taxable Service

The taxable service involving the provision of user data is considered to have been provided on the date when such data was provided.

Section 43
Place of Provision of Taxable Service

The taxable service involving the provision of user data is provided in the Czech Republic if such data is collected in connection with at least 1 Czech user's access to a digital interface.

Section 44
Partial Tax Basis

(1) The basis of the partial tax on the provision of user data is the sum of the portions of consideration for the provision of user data attributable to the Czech Republic.

(2) A portion of the consideration for the provision of user data attributable to the Czech Republic is the product of the following amounts:

a) Consideration for the provision of user data;

b) The quotient of these amounts:

1. Number of accesses to a digital interface by Czech users to which the data relates;

2. Number of accesses to a digital interface by all users to which the data relates.

Section 45
Rate and Calculation of Partial Tax

(1) The rate of the partial tax on the provision of user data is 7%.

(2) The partial tax on the provision of user data is calculated as the product of the partial tax basis, rounded up to whole thousands of Czech crowns, and the partial tax rate.

PART FOUR
TAX ADMINISTRATION

Chapter I
General Provisions

Section 46
Tax Administrator

The digital services tax is administered by the Specialized Financial Authority.

Section 47
Foreign Payer Proxy

(1) A digital services tax payer not seated in a member state shall appoint a proxy for correspondence seated or residing in a member state, to the extent the payer has not included such correspondence within the scope of another empowerment.

(2) If a digital services tax payer does not appoint a proxy under para (1), written documents will be deposited for the payer at the tax administrator with the effective date of their delivery being the date of their issuance, if the document is a decision, and the date of

their being made in writing in all of the other cases. The tax administrator shall make an effort to notify the payer of the written documents, if the tax payer's seat is known to the tax administrator, and shall draw up an official record of the same.

Chapter II
Registration for Tax

Section 48
Application for Registration

(1) A payer of the digital services tax shall file an electronic application for registration for the digital services tax no later than 15 days of the day on which the tax payer, for the first time from its becoming a payer, becomes liable for the digital services tax.

(2) In its application for registration, the tax payer shall provide:

a) Its identification data;

b) Identification data of a foreign payer's proxy;

c) Number of the account with a payment services provider; and

d) The date on which tax liability arose with respect to the digital services tax.

Section 49
Cancellation of Tax Registration

(1) The tax administrator shall cancel the registration of a payer for the digital services tax, if the legal entity or unit without legal personality ceases to be a payer of the tax.

(2) A legal entity or unit without legal personality shall notify the tax administrator of its having ceased to be a payer of the digital services tax within 15 days from the date when such fact has occurred.

Chapter III
Recording Duty

Section 50
Records for Tax Purposes

(1) A payer of the digital services tax shall maintain records for purposes of the digital services tax to include any and all data relating to its tax duties, structured as required for the preparation of a tax return.

(2) A payer shall maintain separate records of each individual provision of the taxable service for purposes of the digital services tax.

Chapter IV
Assessment of Tax

Section 51
Tax Return

A payer of the digital services tax shall file a digital services tax return electronically.

Section 52
Last Known Tax

(1) The last know tax for purposes of the digital services tax is understood to mean a tax in the amount corresponding to the sum of:

a) Tax assessed based on a filed or not filed tax return;

b) Difference, if any, reassessed based on an additional tax return; and

c) Difference, if any, validly and effectively reassessed *ex officio*.

Section 53
Self-Assessment and Additional Self-Assessment of Tax

(1) The tax reported by a digital services tax payer in its tax return is considered to be assessed as of the date on which the deadline for filing of the tax return elapses, in the amount as reported therein.

(2) If a payer of the digital services tax does not file a tax return within the deadline stipulated by law, the tax is considered to be alleged in the amount of the sum of the tax advances paid within the taxable period; no sanction for a belatedly alleged tax shall apply.

(3) A tax alleged by a payer of the digital services tax in a supplementary tax return is considered to be additionally assessed as of the date when the supplementary tax return is filed, in the amount of the alleged difference as compared to the last know tax; this shall not apply if the supplementary tax return is filed during the course of additional assessment proceedings commenced *ex officio*.

(4) A supplementary tax return does not state the date when the difference has been ascertained as compared to the last known tax.

(5) The tax administrator shall specify the additionally assessed tax as per para 1 or the additionally assessed difference as per para 3 in the tax records.

Section 54
Special Provision on Additional Assessment of Tax *Ex Officio*

A tax may also be additionally assessed *ex officio* if the tax administrator, using the procedure for removal of any doubts, ascertains that the amount of the last known tax is not correct.

Section 55
Bearing to Lapse Periods

(1) It is not permissible to file a supplementary tax return for a tax amount lower than the last know tax after 9 years elapse from the commencement of the deadline for the determination of the tax.

(2) With respect to an undercharge of a tax amount that is to be paid on the basis of a supplementary tax return, the deadline for the tax payment shall commence on the date when the tax is additionally assessed based on such supplementary tax return.

Chapter V
Tax Advances

Section 56
Advance

(1) A payer of the digital services tax is obligated to pay the digital services tax by means of advances during an advance period.

(2) Advance period is a period of time from the first day following the last day of the deadline for filing of a tax return for the directly preceding taxable period until the last day of the deadline for filing of a tax return in the following taxable period.

(3) Advances shall amount to one twelfth of the previous tax. If a payer of the digital services tax was a payer during only a part of the preceding taxable period, the advances shall amount to the quotient of the previous tax and the number of whole calendar months for which the payer was a payer.

(4) Preceding tax pursuant to para 3 is the tax alleged by a payer of the digital services tax in the tax return for the preceding taxable period. Should the payer file a supplementary tax return for that taxable period for a higher amount of the tax, such higher amount shall be the preceding tax. If the tax administrator assessed a higher tax for that taxable period, the higher tax so assessed shall be the preceding tax.

(5) Advances are payable monthly, by the fifteenth day of the month following the end of the calendar month for which the advances are paid.

(6) After the end of a taxable period, advances paid during the course of that period shall be used towards payment of the tax due for that taxable period.

Section 57
Special Provision for First Advance Period

(1) The first advance period of a payer of the digital services tax shall commence on the date when the payer, for the first time since it has become a payer, becomes liable for the digital services tax.

(2) Advances in the first advance period amount to one twelfth of the sum of the products of the partial decisive amount per one taxable service for the taxable period and the partial tax rate for such taxable service.

(3) A payer of the digital services tax is obligated to make an electronic notification, stating the partial decisive amounts for the individual taxable services in the decisive period. Where the partial decisive amount has been estimated by the payer, the payer shall note this fact in the notification along with a description of the methods used to make the estimate. The notification is to be made within the deadline applicable to filing of an application for registration for the digital services tax.

(4) The tax administrator shall also determine advances differently if:

a) The tax administrator has any specific doubt as to the correctness, conclusiveness or completeness of the notification made pursuant to para 3 and if such doubt is not removed using a procedure to remove doubts; or

b) The payer of the digital services tax has not made a notification as per para 3.

Chapter VI
Consequences of Breach of Duties in Tax Administration

Section 58
Unreliable Payer of Digital Services Tax

(1) If a payer of the digital services tax materially breaches its duties relating to administration of the digital services tax, the tax administrator shall determine that such payer is an unreliable payer of the digital services tax.

(2) An appeal against the determination as per para 1 may be lodged within 15 days from the delivery of the decision and has a suspensory effect.

(3) An unreliable payer of the digital services tax may request that the tax administrator issue a decision to the effect that such payer is not unreliable. Such request may be made by it no earlier than 1 year after the legal force date of the decision:

a) That such payer is unreliable; or

b) Whereby the tax administrator rejected the request for issuance of a decision that the payer is not unreliable.

(4) The tax administrator shall accommodate a request as per para 3 if the payer of the digital services tax did not materially breach its duties relating to tax administration for a period of 1 year.

(5) The tax administrator shall publish the fact that the respective payer of the digital services act is unreliable in a manner allowing for remote access.

PART FIVE
JOINT, TRANSITORY AND FINAL PROVISIONS

Section 59
Currency Conversion

(1) For purposes of the digital services tax, a foreign currency shall be converted to the Czech currency using the exchange rate determined based on the law regulating the income tax.

(2) For purposes of the digital services tax, the Czech or a foreign currency shall be converted to EUR using the exchange rate determined accordingly based on the law regulating the income tax. In doing so, exchange rates shall be applied as announced by the European Central Bank.

Section 60
Determination of Value of In-Kind Performance

The value of any in-kind performance shall be determined pursuant to the law regulating valuation of assets.

Section 61
Transitory Provision

For purposes of determining the basis of a partial tax on an individual taxable service, any taxable services provided before the effective date of this Act shall be disregarded.

Section 62
Effectiveness

This Act becomes effective on the fifteenth day after its declaration.

1.4 2018 EC DST

European commission draft DST directive language, November 2018

CHAPTER 1
SUBJECT MATTER AND DEFINITIONS

Article 1
Subject matter

This Directive establishes the common system of a digital services tax ('**DST**') on the revenues resulting from the provision of certain digital services.

Article 2
Definitions

For the purposes of this Directive, the following definitions shall apply:

'**entity**' means any legal person or legal arrangement that carries on a business through either a company or a structure that is transparent for income tax purposes;

(1a) 'established within the Union' means having established a business in the Union or a fixed establishment there;

(1b) 'not established within the Union' means having neither a business in the Union nor a fixed establishment there;

'**group**' means all entities including a parent undertaking and all its subsidiary undertakings pursuant to Article 2 paragraph 11 of Directive 2013/34/EU of the European Parliament and of the Council[155];

'**digital interface**' means any software, including a website or a part thereof and applications, including mobile applications, accessible by users;

(3a) 'multi-sided digital interface' means a 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;

'**user**' means any individual or any legal person or legal arrangement, whatever its nature is, that accesses a digital interface with a device;

'**digital content**' means data supplied in digital form, such as computer programmes, applications, music, videos, texts, games and any other software, other than the data represented by a digital interface;

(5a) 'targeted advertising' means any form of digital commercial communication aimed at promoting a product, a service or a brand, targeted at users of a digital interface based on data collected on them.

(5b) 'sale of user data' means any form of transmission of data for consideration (including e.g. licensing of data).

[155] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

'**Internet Protocol (IP) address**' means a series of alphanumerics assigned to networked devices to facilitate their communication over the internet;

'**tax period'** means a calendar year.

'**regulated financial service**' means the financial services for which a regulated financial entity is authorised.

'**regulated financial entity**' means a provider of financial services who is subject to authorisation and supervision under any harmonisation measure adopted by the Union for the regulation of financial services, including providers subject to non-Union supervisory frameworks which are considered to be equivalent to Union measures, as determined in accordance with a Union legal act.

Article 3
Taxable revenues

1. The revenues resulting from the provision of each of the following services by an entity shall qualify as 'taxable revenues' for the purposes of this Directive:

   (a) the placing on a digital interface of targeted advertising;

   (b) the making available to users of a multi-sided digital interface;

   (c) the sale of data collected about users and generated from users' activities on digital interfaces.

2. The reference in paragraph 1 to revenues shall include total gross revenues, net of value added tax and other similar taxes.

3. Point (a) of paragraph 1 shall apply whether or not the digital interface is owned by the entity responsible for placing the advertising on it. Where the entity placing the advertising does not own the digital interface, that entity, and not the owner of the interface, shall be considered to be providing a service falling within point (a).

4. Point (b) of paragraph 1 shall not include:

   (a) the making available of a digital interface where the sole or main purpose of making the interface available is for the entity making it available to supply digital content to users or to supply communication services to users or to supply payment services to users;

   (b) the supply of regulated financial services by regulated financial entities;

   (c) deleted

5. Point (c) of paragraph 1 shall not include

   (a) the sale of data generated from sensors;

   (b) the sale of data by a regulated financial entity.

6. deleted

7. Revenues resulting from the provision of a service falling within paragraph 1 by an entity belonging to a group to another entity in that same group shall not qualify as taxable revenues for the purposes of this Directive.

8. If an entity belonging to a group provides a service falling within paragraph 1 and the revenues resulting from the provision of that service are obtained by another entity in the group, those revenues shall be deemed for the purposes of this Directive to have been obtained by the entity providing the service.

9. Services falling within paragraph 1 are referred to in Chapters 2 and 3 as 'taxable services'.

Article 4
Taxable person

1. '**Taxable person**', with respect to a tax period, shall mean an entity providing the taxable services described in Article 3(1) meeting both of the following conditions:

   (a) the total amount of worldwide revenues reported by the entity for the relevant financial year exceeds EUR 750 000 000;

   (b) the total amount of taxable revenues obtained by the entity within the Union during the relevant financial year exceeds EUR 50 000 000.

2. Where an entity reports or obtains revenues in a currency other than euro, the revenues shall be converted into euro for the purposes of paragraph 1 by applying the exchange rate as published in the *Official Journal of the European Union* on the last date of the relevant financial year or, if there is no publication on that day, the rate published on the previous day.

3. In paragraphs 1 and 2, 'the relevant financial year' means the financial year covered by the latest available financial statements issued by the entity before the end of the tax period in question.

4. The rule in Article 5(1) shall apply in determining under paragraph 1(b) whether taxable revenues are obtained within the Union.

5. Taxable revenues shall be recognised for the purposes of this Directive as having been obtained at the time when they fall due, irrespective of whether the relevant amounts have actually been paid.

6. If the entity referred to in paragraph 1 belongs to a group, the thresholds in that paragraph shall be applied instead to the worldwide revenues reported by, and taxable revenues obtained within the Union by, the group as a whole. However, each entity within the group providing the taxable services described in Article 3(1) and not the group as a whole shall qualify as a taxable person if the conditions in paragraph 1 are fulfilled.

CHAPTER 2
PLACE OF TAXATION, CHARGEABILITY AND CALCULATION OF THE TAX

Article 5
Place of taxation

1. Taxable revenues obtained by an entity in a tax period shall be treated for the purposes of this Directive as obtained in a Member State in that tax period if users with respect to the taxable service are located in that Member State in that tax period.

2. The first subparagraph applies irrespective of whether such users have contributed in money to the generation of those revenues.

3. With respect to a taxable service, a user shall be deemed to be located in a Member State in a tax period if:

   (a) in the case of a service falling within Article 3(1)(a), the advertising in question appears on the user's device at a time when the device is being used in that Member State in that tax period to access a digital interface;

   (b) in the case of a service falling within Article 3(1)(b):

      (i) if the service involves a multi-sided digital interface that facilitates the provision of underlying supplies of goods or services directly between users, the user uses a device in that Member State in that tax period to access the digital interface and concludes an underlying transaction on that interface in that tax period;

      (ii) if the service involves a multi-sided digital interface of a kind not covered by point (i), the user has an account for all or part of that tax period allowing the user to access the digital interface and that account was opened using a device in that Member State;

      (iii) in the case of a service falling within Article 3(1)(c), data generated from the user having used a device in that Member State to access a digital interface, whether during that tax period or any previous one, is transmitted in that tax period.

4. For each tax period, the proportion of an entity's total taxable revenues that is treated under paragraph 1 as obtained in a Member State shall be determined for each transaction as follows:

   (a) as regards taxable revenues resulting from the provision of services falling within Article 3(1)(a), in proportion to the number of times an advertisement has appeared on users' devices in that tax period;

   (b) as regards taxable revenues resulting from the provision of services falling within Article 3(1)(b):

      (i) if the service involves a multi-sided digital interface that facilitates the provision of underlying supplies of goods or services directly between users, in proportion to the number of users having concluded underlying transactions on the digital interface in that tax period;

      (ii) if the service involves a multi-sided digital interface of a kind not covered by point (i), in proportion to the number of users holding an account for all or part of that tax period allowing them to access the digital interface;

   (c) as regards taxable revenues resulting from the provision of services falling within Article 3(1)(c), in proportion to the number of users from whom data transmitted in that tax period has been generated as a result of users having used a device to access a digital interface, whether in that tax period or a previous one.

5. For the purposes of determining the place of taxation of the taxable revenues subject to DST, the following elements shall not be taken into account:

   (a) if there is an underlying supply of goods or services directly between the users of a multi-sided digital interface referred to in Article 3(1)(b), the place where that underlying supply takes place;

   (b) the place from which any payment for the taxable service is made.

6. For the purposes of this Article, the Member State where a user's device is used shall be determined by reference to the Internet Protocol (IP) address of the device.

7. The data that may be collected from users for the purposes of applying this Directive shall be limited to data indicating the Member State where the users are located, without allowing for the identification of those users.

Article 6
Chargeability

DST shall be chargeable in a Member State on the proportion of taxable revenues obtained by a taxable person in a tax period that is treated under Article 5 as obtained in that Member State. The DST shall become due in that Member State on the next day following the end of that tax period.

Article 7
Calculation of the tax

1. DST shall be calculated for a Member State for a tax period by applying the DST rate to the proportion of taxable revenues referred to in Article[s] 6 [and 6a]. The percentage for calculating the proportion of taxable revenues shall be rounded off to two decimal places for this purpose.

2. If the amount contains at least three decimal places and the value of the third decimal is six or more, the second decimal is increased by one. If the value of the third decimal is four or less, the second decimal remains the same. If the value of the third decimal is five, the second decimal remains the same in case it is even and is increased by one in case it is odd. If a digit is 9 and has to be increased by one according to the above rules, then the previous digit is increased by one and the rounded digit is 0.

Article 8
Rate

The DST rate shall be 3%.

CHAPTER 3
OBLIGATIONS

Article 9
Person liable for payment and fulfilment of obligations

1. DST shall be payable and the obligations in this Chapter shall be fulfilled by the taxable person providing the taxable services.

2. Without prejudice to paragraph 1 and Article 4(1) where one or more taxable persons established within the Union belong to a group, that group shall be permitted to nominate a single entity established within the Union and belonging to theat group for

the purposes of paying DST and fulfilling the obligations in this Chapter on behalf of each taxable person in the group who is liable to DST.

3. Where a taxable person not established within the Union belongs to a group of which one or more entities are established in the Union, the taxable person shall nominate one of those entities for the purposes of paying DST and fulfilling the obligations in this Chapter on behalf of the taxable person.

4. Where a taxable person is not established within the Union belongs to a group of which one or more entities are established in the Union, and where the taxable person has not fulfilled its obligations pursuant to paragraph 3, Member States may require one of those entities to pay DST and fulfil the obligations in this Chapter on behalf of the taxable person.

5. A taxable person not established within the Union and not part of a group shall nominate a tax representative established in one Member State for the purposes of paying DST and fulfilling the obligations in this Chapter on behalf of that taxable person.

6. Where a taxable person is not established within the Union, and where that taxable person belongs to a group with no entities established in the Union, the taxable person shall nominate a tax representative established in one Member State for the purposes of paying DST and fulfilling the obligations in this Chapter on behalf of each taxable person in that group who is liable to DST.

7. Where an entity or a tax representative is appointed in accordance with paragraphs (2) to (6) of this Article, the reference to the taxable person in this chapter shall include the reference to the tax representative or nominated entity for the purposes of this Chapter.

Article 10
Identification

1. A taxable person shall identify in each Member State where that taxable person is liable to DST.

2. The identification shall be made electronically by no later than 30 days following the end of the first tax period for which the taxable person is liable to DST under this Directive ('the first chargeable period').

3. deleted

4. The identification required under paragraph 1 shall include at least the following information with respect to the taxable person:

   (a) name;

   (b) trading name, if different from the name;

   (c) postal address;

   (d) electronic address;

   (e) national tax number, if any;

   (f) contact name;

(g) telephone number;

(h) IBAN or OBAN number.

5. The taxable person shall notify each Member State where it is liable to DST of any changes in the information provided under paragraph 4 provided to them within [30] days after the change has occurred.

6. When an entity or tax representative is appointed under Article 9(2) to (6) the information provided by that nominated entity or tax representative under this Article with respect to each taxable person in the group or each represented taxable person shall also include information with respect to itself in relation to the items listed in paragraph 4.

7. The Commission may adopt implementing acts to determine a common format for the notification required under this Article. Those implementing acts shall be adopted in accordance with the procedure provided for in Article 24(2).

Article 11
Identification number

1. A Member State where DST is due shall allocate to the taxable person an individual DST identification number and shall notify the taxable person of that number by electronic means within 30 days from the day on which the notification under Article 10 was received.

2. When a tax representative is nominated under Article 9(5) or (6), a Member State where DST is due shall allocate to the tax representative an individual DST identification number and shall notify the tax representative of that number by electronic means within 30 days from the day on which the notification under Article 10 was received.

3. Each individual identification number shall have a prefix in accordance with ISO code 3166 Alpha 2 referring to the Member State where DST is due. However, Greece and the United Kingdom shall use the prefix 'EL' and 'UK' respectively.

4. Member States shall take the measures necessary to ensure that their identification systems allow taxable persons to be identified and shall keep an identification register with all the individual identification numbers allocated by them.

Article 12
deleted

Article 13
deleted

Article 14
DST return

1. A taxable person shall submit to each Member State, where it is liable to DST, a DST return for each tax period. The return shall be submitted electronically within 90 days following the end of the tax period covered by the return.

2. Where a taxable person has made use of the option in Article 9(2) or is obliged under 9(3) or 9(6) to nominate an entity or a tax representative, that entity or tax

representative shall be permitted to file a consolidated DST return on behalf of all taxable persons in the group.

Article 15
DST return information

1. The DST return shall show the following information:

   (a) all DST identification numbers allocated by Member States under Article 11; when a tax representative is nominated under Article 9 (5) or (6), the DST identification numbers of the representative.

   (b) for all Member States where DST is due for the relevant tax period, the total amount of taxable revenues treated as obtained by the taxable person in those Member States, together with the amount of DST due on that amount in those Member States.

2. The DST return shall also show, with respect to the tax period, the total amount of worldwide revenues and the total amount of taxable revenues within the Union applicable for the purposes of Article 4(1).

3. Member States may require the return to be made out in their national currency. A conversion shall be made pursuant to Article 4(2).

4. deleted

5. deleted

6. The Commission may adopt implementing acts to determine a common format for the DST return. Those implementing acts shall be adopted in accordance with the procedure provided for in Article 24(2).

Article 16
Payment arrangements

1. The DST due from a taxable person in each Member State for a tax period shall be paid by the taxable person in each Member State, where it is liable to DST no later than 90 days following the end of the tax period concerned.

2. deleted

3. Payment shall be made to the bank account designated by each Member State.

4. deleted

5. Member States may require the payment to be made in their national currency.

6. deleted

7. deleted

Article 17
DST return amendments

1. Changes to the figures contained in a DST return initiated by the taxable person shall be made only by means of amendments to that return and not by adjustments to a subsequent return.

2. The amendments referred to in paragraph 1 shall be submitted electronically to all Member States where DST was due not later than three years of the date on which the initial return was required to be submitted.

3. Any additional payment by a taxable person of DST due derived from the amendments in paragraph 1 shall be made at the same time when the amended DST return is submitted.

Article 18
Accounting, record-keeping, anti-fraud, enforcement and control measures

1. Member States shall lay down accounting, record-keeping and other obligations intended to ensure that the DST due to the tax authorities is effectively paid.

2. Member States shall foresee that the taxable person has to be able to demonstrate that non- declared online advertising revenues were obtained from non-targeted advertising.

3. deleted

4. Each Member State where DST is due shall enforce payment of the DST against the relevant taxable person. To that extent, the rules and procedures of each Member State shall apply, including the rules and procedures relating to penalties, interest and other charges for late payment or non-payment of DST and the rules and procedures relating to the enforcement of debts.

5. deleted

CHAPTER 4
ADMINISTRATIVE COOPERATION

Article 19
Appointment of competent authorities

Each Member State shall designate the competent authority to be responsible in that Member State for managing all aspects related to the obligations set out in Chapter 3 and in this Chapter, and shall notify the name and electronic address of that authority to the Commission. The names and electronic addresses of the competent authorities shall be published by the Commission in the *Official Journal of the European Union*.

Article 20
Exchange of information

The competent authority of each Member State shall communicate within [30] days to the competent authority of all other Member States where the taxable person is liable to DST any changes in the declared revenues referred to in Article 15 (1) (b) and (2) because of tax audits and control measures. Information communicated between Member States in any form pursuant to this Directive, shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it. Such information may be used for the administration and enforcement of the domestic laws of all the Member States concerning the taxes referred to in Article 2 of Directive 2011/16/EU.

Article 21
Means of information exchange

1. Information and documentation to be transmitted under this Chapter shall be transmitted by electronic means using CCN network.

2. The Commission may adopt implementing acts to determine the technical details by which such information and documentation is to be transmitted. Those implementing acts shall be adopted in accordance with the procedure provided for in Article 24(2).

CHAPTER 5
FINAL PROVISIONS

Article 24
Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Article 25
Transposition

1. Member States shall adopt and publish, by 31 December 2021 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately inform the Commission thereof.

2. They shall apply those provisions from 1 January 2022.

3. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication.

4. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

5. The Commission shall by 31 December 2020 prepare a report assessing the progress made on the revisions to the international corporate tax standards to address the challenges arising from digitalisation agreed at the OECD level, accompanied, if appropriate, by a proposal to postpone the application of this Directive or to repeal this Directive.

6. This Directive shall expire upon the entry into application of the revisions to the international corporate tax standards to address the challenges arising from digitalisation agreed at OECD level, or by 31 December [X] at the latest.

Article 26
Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

1.5 India EL Statute (Advertising EL & E-commerce)

CHAPTER VIII
EQUALISATION LEVY

Extent, commencement and application.

(1) This Chapter extends to the whole of India except the State of Jammu and Kashmir.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

(3) It shall apply to consideration received or receivable for specified services provided on or after the commencement of this [*Chapter, and to consideration received or receivable for e-commerce supply or services made or provided or facilitated on or after the 1st day of April, 2020.*].

Definitions.

In this Chapter, unless the context otherwise requires,—

(a) "**Appellate Tribunal**" means the Appellate Tribunal constituted under section 252 of the Income-tax Act;

(b) "**Assessing Officer**" means the Income-tax Officer or Assistant Commissioner of Income-tax or Deputy Commissioner of Income-tax or Joint Commissioner of Income-tax or Additional Commissioner of Income-tax who is authorised by the Board to exercise or perform all or any of the powers and functions conferred on, or assigned to, an Assessing Officer under this Chapter;

(c) "**Board**" means the Central Board of Direct Taxes constituted under the Central Boards of Revenue Act, 1963 (54 of 1963);

[(ca) "**e-commerce operator**" means a non-resident who owns, operates or manages digital or electronic facility or platform for online sale of goods or online provision of services or both;

(cb) "**e-commerce supply or services**" means—

(i) online sale of goods owned by the e-commerce operator; or

(ii) online provision of services provided by the e-commerce operator; or

(iii) online sale of goods or provision of services or both, facilitated by the e-commerce operator; or

(iv) any combination of activities listed in clause (i), (ii) or clause (iii);]

(d) "**equalisation levy**" means the tax leviable on consideration received or receivable for any specified service [ore-commerce supply or services] under the provisions of this Chapter;

(e) "**Income-tax Act**" means the Income-tax Act, 1961 (43 of 1961);

(f) "**online**" means a facility or service or right or benefit or access that is obtained through the internet or any other form of digital or telecommunication network;

(g) "**permanent establishment**" includes a fixed place of business through which the business of the enterprise is wholly or partly carried on;

(h) "**prescribed**" means prescribed by rules made under this Chapter;

(i) "**specified service**" means online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the Central Government in this behalf;

(j) words and expressions used but not defined in this Chapter and defined in the Income-tax Act, or the rules made thereunder, shall have the meanings respectively assigned to them in that Act.

[Charge of equilisation levy on specified services]

(1) On and from the date of commencement of this Chapter, there shall be charged an equalisation levy at the rate of six per cent of the amount of consideration for any specified service received or receivable by aperson, being a non-resident from—

(i) a person resident in India and carrying on business or profession; or

(ii) a non-resident having a permanent establishment in India.

(2) The equalisation levy under sub-section (1) shall not be charged, where—

(i) the non-resident providing the specified service has a permanent establishment in India and the specified service is effectively connected with such permanent establishment;

(ii) the aggregate amount of consideration for specified service received or receivable in a previous year by the non-resident from a person resident in India and carrying on business or profession, or from a non-resident having a permanent establishment in India, does not exceed one lakh rupees; or

(iii) where the payment for the specified service by the person resident in India, or the permanent establishment in India is not for the purposes of carrying out business or profession.

[Charge of equalisation levy on e-commerce supply of services.

(1) On and from the 1st day of April, 2020, there shall be charged an equalisation levy at the rate of two per cent. of the amount of consideration received or receivable by an e-commerce operator from e- commerce supply or services made or provided or facilitated by it—

(i) to a person resident in India; or

(ii) to a non-resident in the specified circumstances as referred to in sub-section (3); or

(iii) to a person who buys such goods or services or both using internet protocol address located in India.

(2) The equalisation levy under sub-section (1) shall not be charged—

(i) where the e-commerce operator making or providing or facilitating e-commerce supply or services has a permanent establishment in India and such e-commerce supply or services is effectively connected with such permanent establishment;

(ii) where the equalisation levy is leviable under section 165; or

(iii) sales, turnover or gross receipts, as the case may be, of the e-commerce operator from the e- commerce supply or services made or provided or facilitated as referred to in sub-section (1) is less than two crore rupees during the previous year.

(3) For the purposes of this section, "specified circumstances" mean—

(i) sale of advertisement, which targets a customer, who is resident in India or a customer who accesses the advertisement though internet protocol address located in India; and

(ii) sale of data, collected from a person who is resident in India or from a person who uses internet protocol address located in India.]

[Collection and recovery of equalisation levy on specified services]

(1) Every person, being a resident and carrying on business or profession or a non-resident having a permanent establishment in India (here in this Chapter referred to as assessee) shall deduct the [*equalisation levy referred to in sub-section (1) of section 165*] from the amount paid or payable to a non-resident in respect of the specified service at the rate specified in section 165, if the aggregate amount of consideration for specified service in a previous year exceeds one lakh rupees.

(2) The equalisation levy so deducted during any calendar month in accordance with the provisions of sub- section (1) shall be paid by every assessee to the credit of the Central Government by the seventh day of the month immediately following the said calendar month.

(3) Any assessee who fails to deduct the levy in accordance with the provisions of sub-section (1) shall, notwithstanding such failure, be liable to pay the levy to the credit of the Central Government in accordance with the provisions of sub-section (2).

[Collection and recovery of equalisation levy on e-commerce supply or services.]

The equalisation levy referred to in sub-section (1) of section 165A, shall be paid by every e-commerce operator to the credit of the Central Government for the quarter of the financial year ending with the date specified in column (2) of the Table below by the due date specified in the corresponding entry in column (3) of the said Table:

TABLE

Serial number	**Due date of the financial year**	**Date of ending of the quarter of financial year**
(1)	**(3)**	
30th June	7th July	
30th September	7th October	

31st December	7th January	
31st March	31st March.]	

Furnishing of statement.

(1) Every [*assessee or e-commerce operator*] shall, within the prescribed time after the end of each financial year, prepare and deliver or cause to be delivered to the Assessing Officer or to any other authority or agency authorised by the Board in this behalf, a statement in such form, verified in such manner and setting forth such particulars as may be prescribed, in respect of all [specified services or e-commerce supply or services, as the case may be,] during such financial year.

(2) An [*assessee or e-commerce operator*] who has not furnished the statement within the time prescribed under sub-section (1) or having furnished a statement under sub-section (1), notices any omission or wrong particular therein, may furnish a statement or a revised statement, as the case may be, at any time before the expiry of two years from the end of the financial year in which the [specified services was provided or e-commerce supply or services was made or provided or facilitated].

(3) Where any [*assessee or e-commerce operator*] fails to furnish the statement under sub-section (1) within the prescribed time, the Assessing Officer may serve a notice upon such [*assessee or e-commerce operator*] requiring him to furnish the statement in the prescribed form, verified in the prescribed manner and setting forth such particulars, within such time, as may be prescribed.

Processing of statement.

(1) Where a statement has been made under section 167 by the [*assessee or e-commerce operator*], such statement shall be processed in the following manner, namely:—

(i) the equalisation levy shall be computed after making the adjustment for any arithmetical error in the statement;

(ii) the interest, if any shall be computed on the basis of [*sum deductible or payable, as the case may be,*] as computed in the statement;

(iii) the sum payable by, or the amount of refund due to, the [*assessee or e-commerce operator*] shall be determined after adjustment of the amount computed under clause (b) against any amount paid under sub-section (2) of [*section 166 or section 166A*] or section 170 and any amount paid otherwise by way of tax or interest;

(iv) an intimation shall be prepared or generated and sent to the [*assessee or e-commerce operator*] specifying the sum determined to be payable by, or the amount of refund due to, him under clause (c); and

(v) the amount of refund due to the [*assessee or e-commerce operator*] in pursuance of the determination under clause (c) shall be granted to him:

Provided that no intimation under this sub-section shall be sent after the expiry of one year from the end of the financial year in which the [*statement or revised statement*] is furnished.

(2) For the purposes of processing of statements under sub-section (1), the Board may make a scheme for centralised processing of such statements to expeditiously determine the tax payable by, or the refund due to, the [*assessee or e-commerce operator*] as required under that sub-section.

Rectification of mistake.

(1) With a view to rectifying any mistake apparent from the record, the Assessing Officer may amend any intimation issued under section 168, within one year from the end of the financial year in which the intimation sought to be amended was issued.

(2) The Assessing Officer may make an amendment to any intimation under sub-section (1), either suo motu or on any mistake brought to his notice by the [*assessee or e-commerce operator*].

(3) An amendment to any intimation, which has the effect of increasing the liability of the [*assessee or e-commerce operator*] or reducing a refund, shall not be made under this section unless the Assessing Officer has given notice to the [*assessee or e-commerce operator*] of his intention so to do and has given the [*assessee or e-commerce operator*] a reasonable opportunity of being heard.

(4) Where any such amendment to any intimation has the effect of enhancing the sum payable or reducing the refund already made, the Assessing Officer shall make an order specifying the sum payable by the [*assessee or e-commerce operator*] and the provisions of this Chapter shall apply accordingly.

Interest on delayed payment of equalisation levy.

Every [*assessee or e-commerce operator*], who fails to credit the equalisation levy or any part thereof as required under [*section 166 or section 166A*] to the account of the Central Government within the period specified in that section, shall pay simple interest at the rate of one per cent of such levy for every month or part of a month by which such crediting of the tax or any part thereof is delayed.

Penalty for failure to deduct or pay equalisation levy.

Any [*assessee or e-commerce operator*] who—

(a) fails to deduct the whole or any part of the equalisation levy as required under section 166; or

[(aa) fails to pay the whole or any part of the equalisation levy as required under section 166A; or]

(b) having deducted the [*equalisation levy referred to in sub-section (1) of section 165*], fails to pay such levy to the credit of the Central Government in accordance with the provisions of sub-section of that section, shall be liable to pay,—

(i) in the case referred to in clause (a), in addition to paying the levy in accordance with the provisions of sub-section (3) of that section, or interest, if any, in accordance with the provisions of section 170, a penalty equal to the amount of equalisation levy that he failed to [deduct;

(ia) in the case referred to in clause (aa), in addition to the levy in accordance with the provisions of that section, or interest, if any, in accordance with the

provisions of section 170, a penalty equal to the amount of equalisation levy that he failed to pay; and]

(ii) in the case referred to in clause (b), in addition to paying the levy in accordance with the provisions of sub-section (2) of that section and interest in accordance with the provisions of section 170, a penalty of one thousand rupees for every day during which the failure continues, so, however, that the penalty under this clause shall not exceed the amount of equalisation levy that he failed to pay.

Penalty for failure to furnish statement.

Where an [*assessee or e-commerce operator*] fails to furnish the statement within the time prescribed under sub-section (1) or sub-section (3) of section 167, he shall be liable to pay a penalty of one hundred rupees for each day during which the failure continues.

Penalty not to be imposed in certain cases.

(1) Notwithstanding anything contained in section 171 or section 172, no penalty shall be imposable for any failure referred to in the said sections, if the [*assessee or e-commerce operator*] proves to the satisfaction of the Assessing Officer that there was reasonable cause for the said failure.

(2) No order imposing a penalty under this Chapter shall be made unless the [*assessee or e-commerce operator*] has been given a reasonable opportunity of being heard.

Appeal to Commissioner of Income-tax (Appeals).

(1) An [*assessee or e-commerce operator*] aggrieved by an order imposing penalty under this Chapter, may appeal to the Commissioner of Income-tax (Appeals) within a period of thirty days from the date of receipt of the order of the Assessing Officer.

(2) An appeal under sub-section (1) shall be in such form and verified in such manner as may be prescribed and shall be accompanied by a fee of one thousand rupees.

(3) Where an appeal has been filed under sub-section (1), the provisions of sections 249 to 251 of the Income-tax Act shall, as far as may be, apply to such appeal.

Appeal to Appellate Tribunal.

(1) An [*assessee or e-commerce operator*] aggrieved by an order made by the Commissioner of Income-tax (Appeals) under section 174 may appeal to the Appellate Tribunal against such order.

(2) The Commissioner of Income-tax may, if he objects to any order passed by the Commissioner of Income-tax (Appeals) under section 174, direct the Assessing Officer to appeal to the Appellate Tribunal against such order.

(3) An appeal under sub-section (1) or sub-section (2) shall be filed within sixty days from the date on which the order sought to be appealed against is received by the [*assessee or e-commerce operator*] or by the Commissioner of Income-tax, as the case may be.

(4) An appeal under sub-section (1) or sub-section (2) shall be in such form and verified in such manner as may be prescribed and, in the case of an appeal filed under sub-section (1), it shall be accompanied by a fee of one thousand rupees.

(5) Where an appeal has been filed before the Appellate Tribunal under sub-section (1) or sub-section (2), the provisions of sections 253 to 255 of the Income-tax Act shall, as far as may be, apply to such appeal.

Punishment for false statement.

(1) If a person makes a false statement in any verification under this Chapter or any rule made thereunder, or delivers an account or statement, which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable with imprisonment for a term which may extend to three years and with fine.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under sub-section (1) shall be deemed to be non-cognizable within the meaning of that Code.

Institution of prosecution.

No prosecution shall be instituted against any person for any offence under section 176 except with the previous sanction of the Chief Commissioner of Income-tax.

Application of certain provisions of Income-tax Act.

The provisions of [sections 119 120], 131, 133A, 138, 156, Chapter XV and sections 220 to 227, 229, 232, 260A, 261, 262, 265 to 269, 278B, 280A, 280B, 280C, 280D, 282 and 288 to 293 of the Income-tax Act shall so far as may be, apply in relation to equalisation levy, as they apply in relation to income-tax.

Power to make rules.

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the time within which and the form and the manner in which the statement shall be delivered or caused to be delivered or furnished under section 167;

(b) the form in which an appeal may be filed and the manner in which it may be verified under sections 174 and 175;

(c) any other matter which is to be, or may be, prescribed.

(3) Every rule made under this Chapter shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Power to remove difficulties.

(1) If any difficulty arises in giving effect to the provisions of this Chapter, the Central Government may, by order published in the Official Gazette, not inconsistent with the provisions of this Chapter, remove the difficulty:

Provided that no such order shall be made after the [31st day of March, 2022].

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

India income tax Act (ITA) coordination with EL statute

CHAPTER III
INCOMES WHICH DO NOT FORM PART OF TOTAL INCOME

Incomes not included in total income.

In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included—

(1) […]

(2) (*50*) any income arising from any specified service provided on or after the date on which the provisions of Chapter VIII of the Finance Act, 2016 comes into force 35[*or arising from any e-commerce supply or services made or provided or facilitated on or after the 1st day of April, 2021*] and chargeable to equalisation levy under that Chapter. *Explanation*.—For the purposes of this clause, "specified service" shall have the meaning assigned to it in clause (*i*) of section 164 of Chapter VIII of the Finance Act, 2016.

1.6 Italian DST

"[…]

35. The tax on digital services is established.

35-*bis*. The tax is applied on the revenues deriving from the provision of services under par. 37, realized by the subjects under par. 36, during the calendar year.

36. The digital service tax applies to the subjects performing a business activity that, on a standalone basis or at group level, during the calendar year before the one referred to under par. 35-*bis*, jointly realize:

a) a total amount of revenues on a worldwide basis not lower than €750 million;

b) an amount of revenues deriving from digital services, as indicated by paragraph 37, realized in the Italian territory not lower than €5.5 million.

37. The tax is applied on the revenues deriving from the provision of the following services:

a) the placement of advertisement on a digital interface, targeting the users of that interface;

b) the provision of a multilateral digital interface that allows users to contact and interact with each other, also to the purpose of facilitating the direct supply of goods or services;

c) the transmission of data collected about users and generated through the use of a digital interface.

37-*bis*. Shall not be considered digital services under par. 37:

a) The direct provision of goods and services in the context of a digital intermediation service;

b) The supply of goods or services ordered through the website of the supplier of those services and goods, when the supplier is not acting as an intermediary;

c) The provision of a digital interface whose main or exclusive scope is the provision by the entity that manages the interface to the users of the same interface of: digital content, communication services, or payment services;

d) The provision of a digital interface used to manage:

1. The interbank settlement systems provided by the consolidated act under the legislative decree dated September 1, 1993, no. 385, or settlement /delivery of financial instruments;

2. Negotiation platform or systems of the systematic internalisers under the art. 1, par. 5-octies, lett. c), of the consolidated act under the legislative decree dated February 24, 1998, no. 58;

3. Consultation activities in participating financial instruments and in case they facilitate the granting of loans, the intermediation services in the participating financial instruments;

4. The wholesale negotiation locations under the art. 61, par. 1, lett. e), of the consolidated act under the legislative decree dated February 24 1998, no. 58;

5. Central counterparties under the art. 1, par. 1, lett. w-quinquies), of the consolidated act under the legislative decree dated February 24, 1998, no. 58;

6. Central repository under the art. 1, par. 1, lett. w-septies), of the consolidated act under the legislative decree dated February 24, 1998, no. 58;

7. The other connection systems whose activity is subject to authorization and the provision of services is subject to the supervision of an authority in order to assure the transparency, the safety and quality of the transactions concerning financial instruments, saving products or other financial activities;

e) The sales of data by the subjects indicated under d);

f) The activities concerning the organization and management of telematics platforms for the exchange of electric energy, gas, environmental certificates and fuels as well as the transmission of data therein collected or any other connected activity.

38. The revenues deriving from the services under par. 37 rendered to subjects that under article 2359 of the civil code are considered controlled, controlling or controlled by the same controlling entity are not taxable.

39. The taxable revenues are considered gross of costs and net of VAT and other indirect taxes.

39-*bis*. The revenues deriving from the provision of services under par. 37, lett.b), include all the sums paid by the users of the multilateral digital interface excluding those referring to the supply of goods/provision of services that from an economic standpoint represent independent operations from the access and use of the taxable service.

39-*ter*. The revenues deriving from the provision of a digital interface that facilitate the sales of products subject to excess duty are excluded, according to art. 1, par. 1, of Council Directive 2008/118/CE, dated December 16, 2008, on the general regime for excise duties and repealing Directive 92/12/CEE, when they have a direct and inseparable link with the volume of the value of those sales.

40. The fiscal years is the calendar year. Revenues are considered as taxable in a certain fiscal year if the user of a taxable service is located in the Italian territory in that fiscal year. A user is considered located in Italy if:

a) In the case of the services under par. 37, lett. a), the advertising in question appears on the user's device when the device is used in Italy in that tax period to access a digital interface;

b) In the case of the services under par. 37, lett. b), if:

1) The service involves a multilateral digital interface that facilitates the corresponding supply of goods or services directly between users, the

user uses a device in Italy in that tax period to access the digital interface and concludes a transaction on that interface during that tax period; or

2) If the service involves a multilateral digital interface of a type that does not fall under the preceding paragraph, the user has an account for the whole or part of that tax period which allows him to access the digital interface and this account has been opened using a device in Italy;

c) In the case of the services under par. 37, lett. c), the data generated by a user who used a device in Italy to access a digital interface, during that current tax period or a previous tax period, are transmitted during that tax period.

40-*bis.* The device is considered to be located in Italy with reference mainly to the Internet protocol address (IP) of the device itself or to other geolocation system, in compliance with data privacy rules.

40-*ter*. When a taxable service under par. 73 is provided in Italy during a calendar year according to par. 40, the total amount taxable revenues is equal to the total worldwide revenues from digital services multiplied per percentage representing the amounts of services connected to the Italian territory. This percentage is equal to:

a) for the services under par. 37, lett. a), to the proportion of advertisements placed on a digital interface based on data relating to a user who consults this interface while being located in Italy;

b) for the services under par. 37, lett. b), when:

1) the service involves a multilateral digital interface that facilitates the corresponding supply of goods or services directly between users: to the proportion of operations of delivery of goods or provision of services for which one of the users of the digital interface is located in Italy;

2) the service involves a multilateral digital interface of a type that does not fall under the preceding paragraph: to the proportion of users holding an account which has been opened in Italy and allowing the access to all or part of the services available from the interface and that have used this interface during the calendar year concerned;

c) for the services under par. 37, lett. c), the proportion of users for whom all or part of the data sold were generated or collected during the consultation of a digital interface, when these users were located in Italy;

41. The tax due is obtained by applying the 3% tax rate on the amount of taxable revenues realized by the taxpayer during the calendar year.

42. Taxable persons are required to pay the Digital Services Tax yearly by February 16 of the year following the one referred to under par. 35-*bis*. The same taxable persons are required to submit the annual tax return of the amount of taxable services provided by March 31 of the same year. For the companies belonging to the same group, for the compliance with the obligations connected to the Digital Services Tax is named a single entity of the group.

43. Non-resident entities, which do not have a permanent establishment in Italy or a VAT number, but in the course of a calendar year fulfil the conditions for the application of

the digital service tax, must request an identification number for the digital service tax purposes to the Italian Revenue Agency. The request is made based on the indications provided by the guidelines of the Director of the Revenue Agency provided by par. 46. Non-resident entities, which do not have a permanent establishment in Italy, located in non- EU Countries or EES Countries with which Italy has not signed an agreement for the administrative cooperation against evasion and tax fraud and an agreement for the mutual assistance in tax credits collection, have to name a fiscal representative for the compliance with the payment and return obligations connected to the Digital Services Tax. The entities resident in Italy that are part of the same group of the aforementioned entities, are jointly responsible with these latter for complying with the obligations connected to the digital service tax.

44. The provisions on litigation, penalties, assessment and collection in relation to VAT apply in relation to the digital service tax, as far as compatible.

44-*bis*. Taxpayers have to keep specific accounting records to detect monthly the information concerning revenues from the taxable services as well as the monthly data used to calculate the proportion under par. 40-*ter*. In relation to the monies monthly collected, it has to be specified if they are in a currency different from Euro and the related exchange in Euro. The sums received in a currency other than the euro are converted by applying the last exchange rate published on the EU Law Journal available the first day of the month during which the sum are collected.

[*45. With the decree of the Minister of economy and finance, together with the Minister of economic development, consulted the Communications Regulatory Authority, the Data Protection Authority and the Agency for the digital Italy, to be issued by four months after the entering into force of this law, are established the implementation provisions of the digital service tax.*] **Repealed**

46. With one or more provisions of the Director of the Revenue Agency are defined the implementing measures for applying the provision on the digital service tax.

47. The provisions relating to the digital services tax shall apply from January 1, 2020.

[…]

49-*bis*. The paragraphs from 35 to 49 of the art. 1 of the Law no. 145/2018 will be repealed when the provisions deriving from the agreements reached at international level on the taxation of digital economy will be effective."

1.7 Spanish DST

OFFICIAL GAZETTE OF PARLIAMENT
CONGRESS OF DEPUTIES
XIV LEGISLATURE
February 28, 2020

BILL ON THE TAX ON CERTAIN DIGITAL SERVICES

Statement of Purpose

I

The global economy is rapidly acquiring a digital character and, as a result of this, new ways of doing business have emerged. Digital business models are largely based on the ability to carry out remote, even cross-border, activities, with little or no physical presence, the importance of intangible assets and the value of data and end-users' contributions to creating value. However, current international tax rules are based primarily on a physical presence and were not designed to handle business models based primarily on intangible assets, data and knowledge. Therefore, they do not take into account the business models on which companies can provide digital services in a country without being physically present in that country, come up against difficulties in preventing intangible assets delocalizing to low-tax or no-tax jurisdictions, nor do they recognize the role that users play in generating value for the most digitized companies through providing data or generating content or as components of the networks on which many digital business models are based. All of the above leads to a disconnect between the place where value is created and the place where companies are taxed. This shows that current corporate tax rules are no longer appropriate for taxing the revenue generated by digitalization of the economy, when this is closely linked to value created by data and users, and these rules need to be reviewed.

II

The process of reviewing these standards has been ongoing for years at international level. Thus, the Organization for Economic Cooperation and Development (OECD) and the G20 have recently placed important on the Base Erosion and Profit Shifting (BEPS) plan, especially its Report on Action 1 addressing the tax challenges of the digital economy dated October 5, 2015, as well as the Interim Report on tax challenges arising from digitalization dated March 16, 2018. At European Union level, the European Commission's Communication "A fair and efficient tax system in the European Union for the Digital Single Market", adopted on September 21, 2017, and the package of proposals for Directives and a Recommendation to achieve fair and efficient taxation of the digital economy, presented on March 21, 2018 have been adopted. All these efforts are also a prime illustration of the global concern surrounding this issue. Given the global scope of the problem of taxation related to certain e-business models, there is international consensus that the best strategy would be to find a solution at global level, i.e. within the OECD. Such a solution could take the form of revising the concept of a permanent (digital) establishment, which would make it possible to allocate the share of the company's profits corresponding to the value arising from data and user contributions, to the country in which those data and users originate or are to be found. However, since adopting and implementing these agreed measures at international and multilateral level could take a long time, a number of countries have begun to adopt unilateral measures to try to address this problem. Both the

global agreement and the adoption of unilateral measures are legitimate solutions envisaged in the above mentioned G20/OECD Interim Report on tax challenges arising from digitalization.

European Union Member States have not been oblivious to this trend of adopting unilateral measures, and several have adopted measures already or have measures along these lines in the process of being adopted. Furthermore, on March 21, 2018, at the request of the Council, the European Commission itself presented a proposal for a Directive on the common system of a digital services tax on revenue from the provision of certain digital services, one of the main objectives of which is to correct the inadequate allocation of taxation rights that arises due to current international tax rules' lack of recognition of users' contribution to creating value for businesses in the countries in which they operate. The European Commission's proposal, consisting of an indirect tax on the supply of certain digital services, was finally rejected as the required unanimity for its approval was not reached. On the other hand, as long as the challenges derived from the digitalization of the economy are global and affect all countries, it was agreed to move the debate to the OECD and Inclusive Framework level due to their higher representativeness. However, the Tax on Certain Digital Services regulated in this Law foresees the conclusion of discussions related to it within the international forums. A long time has passed since international debates on this matter began without it having been possible to adopt any practical solutions in this regard, together with grounds based on social pressure, tax justice and the sustainability of the tax system, which means that, following the path paved by other countries, a unilateral solution must be adopted allowing Spain immediately to exercise the tax rights that legitimately correspond to it in its territory, as the data and contributions of users that create value for the company come from this country. Likewise, works within the OECD have been recently restarted in order to adapt the international tax system to the digitalization of the economy through the reassignment of tax rights to market countries or territories when there is an involvement in the economic activity without needing a physical presence, so creating a new nexus. Therefore, as indicated in the reports on digital economy issued by the OECD, setting up of this tax is conceived as a transitional measure until the entry into force of the new legislation aimed at incorporating the internationally agreed solution.

III

The purpose of the Tax on Certain Digital Services is the provision of certain digital services. In particular, these are digital services in relation to which there is a user participation that constitutes a contribution to the value creation process of the company providing the services, and through which the company monetizes those user contributions. In other words, the services covered by this tax are those that could not exist in their current form without user involvement. The role played by the users of these digital services is unique and more complex than that traditionally adopted by a customer of an offline service. By focusing on the services provided, without taking into account the characteristics of the service provider, including its economic capacity, the Tax on Certain Digital Services is not a tax on income or wealth, and therefore is not included in double taxation agreements, as established in the aforementioned G20/OECD Interim Report on tax challenges arising from digitalization. It therefore takes the form of a tax that is indirect in nature, and which is otherwise compatible with Value Added Tax.

However, special rules are laid down for entities belonging to a group. Thus, in order to determine whether an entity exceeds the thresholds and is therefore treated as a taxpayer, the thresholds should be applied in relation to the amounts applicable to the whole group.

VI

Only supplies of digital services which may be considered to be in any way linked to the territory in which the tax is levied will be subject to the tax, which will be understood to be the case where there are users of those services located in that territory. This is precisely what establishes the link justifying the existence of the tax. To consider users as being located in the territory where the tax is applied, a series of specific rules are established for each of the digital services, which are based on the place where the devices of those users have been used, which have been located, in general, from the Internet protocol (IP) addresses of those users. This is unless other means of demonstrating this are used, in particular, other tools for establishing the geolocation of devices. Any processing of personal data carried out in the context of the Tax on Certain Digital Services must be carried out in accordance with the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and Organic Law 3/2018 of December 5 on the Protection of Personal Data and the Guarantee of Digital Rights.

VII

The tax base for the tax will be the amount of the revenue, excluding, where applicable, Value Added Tax or other equivalent taxes, obtained by the taxpayer for each of the digital services subject to the tax provided in the territory in which the tax is applicable. In order to calculate the base, rules are established to levy tax exclusively on the proportion of the revenue that corresponds to users located in the territory where the tax is applied in relation to the total number of users. The tax will be levied at the rate of 3 per cent, accrual will be for each taxable service provided, and the settlement period will be quarterly.

VIII

This Law consists of sixteen articles and four final provisions. The first final provision includes the legislative authority under which the law is approved, which is none other than that provided for in the Constitution, according to which the State has exclusive competence in matters of general taxation.

IX

In accordance with the provisions of Law 39/2015 of October 1, 2015 on Common Administrative Procedures for State Administrations, this Law has been drawn up in accordance with the principles of necessity, effectiveness, proportionality, legal certainty, transparency and efficiency. In this way, the principles of necessity and effectiveness are met. In particular, since the new rule regulates the adoption of a unilateral measure consisting of the ex novo creation of a tax, it must be adopted by means of a rule with the force of law, without having considered other non-binding alternatives. The new law is the ideal instrument, in terms of effectiveness, to achieve the general economic policy objectives it sets out: to overcome the challenges posed by digitalization of the economy from a tax standpoint, such as correcting the inadequate allocation of tax rights that occurs as a result of current international tax rules' lack of recognition of the contribution of users in creating value for companies in the countries in which they operate. The principle of proportionality is also complied with insofar as the objectives sought have been stringently achieved. With regard to the principle of legal certainty, consistency of the bill with the national legal system has been ensured. Likewise, the greatest efforts have been made in drafting to try to guarantee the same legal certainty in the interpretation and application of the tax regulated therein, despite the challenge posed by the fact that the concepts dealt with are new developments, not only in the scope of our domestic

law, but worldwide. The principle of transparency has been guaranteed, notwithstanding its official publication in the "Official State Gazette", through hearing proceedings and public information on the bill. With regard to the principle of efficiency, an attempt has been made to ensure that the rule results in the lowest possible numbers of administrative charges and indirect costs, encouraging a rational use of public resources. In this respect, the information and documentation requested of taxpayers are indispensable to guarantee minimum oversight of their activity by the Tax Administration. Finally, it has been communicated to the European Commission for the purposes of Article 5.1, in relation to Article 7.4 of Directive (EU) 2015/1535 of the European Parliament and of the Council of September 9, 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services.

Article 1.
Nature and purpose

Pursuant to the provisions established herein, the Digital Services Tax is an indirect tax that is levied, following the rules included in this Law, on the provision of certain digital services where users located in the applicable tax territory participate.

Article 2.
Applicable tax territory

1. The tax is applicable to the entire Spanish territory.

2. The preceding paragraph is understood to be established without prejudice to the local tax regimes and conventions that may be in force historically for the Basque Country and the Region of Navarra ("Territorios Históricos del País Vasco" and the "Comunidad Foral de Navarra").

Article 3.
Treaties and conventions

The provisions of this Act are understood to be established without prejudice to the international treaties and conventions that have formed part of the Spanish legal system, pursuant to article 96 of the Spanish Constitution.

Article 4.
Concepts and definitions

For the purposes of this Act, the following shall apply:

1. **Digital content**: the data supplied in digital form, such as computer programmes, applications, music, videos, texts, games and any other software, other than the data represented by the digital interface itself.

2. **Internet Protocol (IP) address**: a series of digits assigned to networked devices to facilitate their communication over the internet.

3. **Group**: a group of entities, wherein one of them controls or could control one or more of the others, according to the criteria established in article 42 of the Commercial Code, irrespective of their place of residence or whether or not they hold an obligation to prepare consolidated annual financial statements.

4. **Digital interface**: any software, including a website or a part thereof or applications, including mobile applications, or any other means that is accessible to users, and which make digital communication possible.

5. **Digital services**: understood to be exclusively those of online advertising, online intermediation, and data transfer.

6. **Online advertising services**: those that involve placing advertising which is targeted at the users of one's own or a third party's digital interface. When the entity that includes the advertising is not the owner of the digital interface, said entity shall be considered the provider of the advertising service, and not the company that owns the interface.

7. **Online intermediation services**: those that make multi-sided digital interfaces available to users (interfaces that make it possible to interact with different users at the same time), which facilitates the provision of the underlying goods and services between users directly or allows them to find other users, in order to interact with them.

8. **Data transfer services**: those that transfer with consideration, including the sale or the assignment, of data collected regarding users, which was generated from such users' activities on digital interfaces.

9. **User**: any person or entity that uses a digital interface.

10. **Targeted advertisement**: any form of commercial digital communication with the purpose of promoting a product, service or brand, targeted to users of a digital interface based on data collected from themselves. It is considered that all advertisement is "targeted advertisement", unless proven otherwise.

11. **Regulated financing services**: financing services to whose rendering is authorized a regulated financing entity.

12. **Regulated financing entity**: financing service supplier subject to an authorization, or registry, and supervision on the application of any national law or harmonization measure for regulating the financing services adopted by the European Union, including those financing servicer suppliers subject to supervision according to law non adopted by the European Union which, in virtue of a legal act of the European Union, is considered equivalent to the measures of the European Union.

Article 5.
Taxable revenue / taxable event

Any revenue obtained by the taxpayers defined in article 8 from their provision of digital services in the applicable tax territory shall be subject to DST.

Article 6.
Non-taxable events

Revenue arising from the following activities is not subject to DST:

a) the sale of goods or services that are contracted online via the website of the person that supplies such goods or services, if said supplier does not work as an intermediary;

b) the delivery of the underlying goods or services between users, within the context of an online intermediation service;

c) the rendering of online intermediation services, when the unique or main reason of those services supply by the entity that makes the digital interface available, is to supply users with digital contents or to supply them communication or payment services;

d) the rendering of regulated financing services by regulated financing entities;

e) the rendering of data transfer services, if they are carried out by regulated financing entities;

f) the rendering of digital services, when they are carried out between entities which belong to the same group with a stake, direct or indirect, of 100 per cent.

Article 7.
Place of supply of digital services

1. The rendering of digital services shall be understood to have been carried out in the applicable tax territory when any user is located in said tax territory, irrespective of whether or not the user has actually paid a consideration that forms part of the revenues generated by said service.

2. A user will be understood to be located in the relevant tax territory:

   a) For online advertising services, when the device on which the relevant advertising appears is located in said tax territory at the time the advertising appears.

   b) For online intermediation services where the underlying goods or services are delivered directly to the user, when the underlying transaction performed by the user is carried out on the digital interface of a device that is located in the tax territory at the time the transaction is concluded. In the remaining online intermediation services, when the account that permits the user to access the digital interface has been opened using a device that is located in the tax territory at the time the account is opened.

   c) For data transfer services, when the transferred data is generated by a user through a digital interface that they accessed using a device that is located in the tax territory at the time the data is generated.

3. For the purpose of determining the place where the digital services are rendered, the following shall not be taken into account:

   a) the place where the underlying goods or services are delivered, in cases of online intermediation services where delivery exists;

   b) the place from which any payment is made that is related to a digital service.

4. For the purpose of this article, it shall be assumed that a user's specific device is located at the place indicated by the IP address of such device, unless it can be proven otherwise that the device's place and the IP address are different, by any other legal means that law permits, in particular, by using other geo-localization instruments.

5. Data which could be collected from users with the purpose of applying this Act will be limited to those which allow the localization of the users' devices in the applicable tax territory.

Article 8.
Taxpayers / taxable persons

1. Legal persons and the entities stipulated under article 35.4 of General Taxation Act 58/2003, dated 17 December, that exceed the following two thresholds in the first day of the relevant tax period shall be deemed "taxpayers" subject to DST:

    a) a net turnover that exceeds EUR 750 million in the prior relevant calendar year; and

    b) a total digital services revenue (from providing the digital services that are subject to DST) in excess of EUR 3 million, once the rules set out in article 10 have been applied for the previous calendar year.

    If the business started in the immediate preceding year, the above amounts should be calculated for the entire year.

2. When the amounts referred to in paragraph 1 above are given in a currency that is not the euro, said amounts shall be converted into euros using the exchange rate published in the latest Official Journal of the European Union that is available for the calendar year in question.

3. In cases of entities that form part of a corporate group, the amounts given as thresholds in paragraph 1 above shall apply to the group as a whole. For these purposes:

    a) the threshold of paragraph 1.a) will be the same as the one of the Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, which states the country-by-country report, and in the equivalent international laws adopted in application of Action 13 of the Base Erosion and Profit Shifting Project of the OECD and G-20 (BEPS, as per English acronyms) related to documentation on transfer pricing and country-by-country;

    b) the threshold of paragraph 1.b) will be calculated without eliminating the rendering of digital services subject to this tax carried out by entities of the same group. If the group exceeds said thresholds, every entity in the group shall be deemed a taxpayer, to the extent that they generate taxable revenue and irrespective of the amount of revenue they finally obtain according to paragraph b) above.

Article 9.
Accrual

The tax shall be accrued when the taxable transactions are performed or executed.

Notwithstanding the foregoing, for those taxable transactions that generate payments prior to completion of the taxable event, the DST shall be accrued when all or part of the relevant price has actually been collected in relation to the amounts effectively received.

Article 10.
Taxable base

1. Taxable base shall include revenues obtained by the taxpayer for each of the digital services subject to the DST and which the taxpayer carried out within the applicable tax territory (net of any Value Added Tax or other equivalent taxes, if such exist). When

rendering digital services between entities of the same group, the taxable base shall be the fair-market value of such services.

2. For the purpose of calculating the taxable base for DST, the following rules shall be taken into account:

   a) In the case of online advertising services, total revenue obtained shall be multiplied by the ratio that represents the number of times the advertising appears in the devices located in the applicable tax territory divided by the number of total times that said advertising appeared in any device, regardless of where the relevant device is located.

   b) In the case of online intermediation services that facilitate the delivery of the underlying goods or services directly between users, the total revenue obtained shall be multiplied by the ratio that represents the number of users located in the applicable tax territory divided by the total number of users that participate in said service, regardless of their location. The taxable base of the remaining online intermediation services shall be calculated as the total revenue obtained directly from the users, when the accounts allowing access to the digital interface were opened by a device that was located in the applicable tax territory at the time of its opening. For the purpose of the preceding paragraph, it is irrelevant the chronological moment when the relevant account was opened.

   c) In the case of data transfer services, the total revenue obtained shall be multiplied by the ratio that represents the number of users in the applicable tax territory who generated the data divided by the number of users that generated said data, regardless of their location. For the purpose of the preceding paragraph, it is irrelevant the chronological time when the transferred data was collected.

3. If the amount of the taxable base is unknown during the tax assessment period, the taxpayer shall establish a provisional amount by applying reasoned criteria that bears in mind the entire period in which the digital service revenue was generated, notwithstanding the later regularisation of said amount via the self-tax assessment for the tax assessment period, once the actual value for the revenue is known. The regularisation shall be carried out within a maximum period of four (4) years from the date the DST become payable pursuant to the relevant transaction.

4. When the taxable base is calculated incorrectly, the taxpayer shall correct it in accordance with General Taxation Act 58/2003, dated 17 December and the regulations that develop said Act.

5. The taxable base shall be calculated using the direct estimation method. The only exceptions admitted are those established in the regulations regarding the indirect estimation method for tax bases.

Article 11.
Tax rate

The DST rate is 3 per cent.

Article 12.
Tax due

The amount of DST payable shall be obtained by multiplying the taxable base by the DST rate.

Article 13.
Formal obligations

1. Taxpayers of the DST are subject to the following requirements, with the limits, terms and conditions that will be established by regulations:

    a) Filing tax returns related to the start, amendment and cessation of the business that is subject to the DST.

    b) Request the Administration for a tax identification number, in addition to notifying it and evidencing it in those cases established by law.

    c) Request the Administration for registration in the relevant company registry created for the DST.

    d) Keeping the registers that will be stipulated by regulations.

    e) Periodically filing, or filing at the request of the Administration, the information related to the taxpayer's digital services.

    f) Appointing a representative for the purpose of complying with the requirements that this Act establishes, when the taxpayer does not have a permanent establishment in the European Union, unless they are established in a country where there are mutual assistance instruments that are similar to those established by the EU.

    The taxpayer, or its representative, shall be required to inform the Tax Administration of said appointment, duly evidencing the authority bestowed, prior to the end of the filing period for transactions subject to the DST.

    g) During the statute of limitations established in General Taxation Act 58/2003, dated 17 December, for keeping ll receipts and documents that evidence the transactions subject to the DST. In particular, the taxpayer must keep all means of evidence that allow them to identify the place where the taxed digital service took place.

    h) Translating to Spanish (or to any other official language), when required to do so by the Tax Administration, for the purpose of monitoring the taxpayer's tax situation, all invoices, contracts or other documents that evidence the digital services rendered and which are understood to have taken place in the territory applicable to the DST.

    i) Establishing the systems, mechanisms or agreements which allow to determine the localization of the user's devices within the applicable tax territory

2. Likewise, taxpayers of the DST will be obliged to fulfil with any other formal requirement which could be established by the tax law.

Article 14.
Tax management

The tax assessment period is a calendar quarter. Taxpayers shall file their self-tax assessments and pay the tax due at the place, in the form and within the periods stipulated by order of the head person of the Ministry of Finance.

Article 15.
Offences and fines

1. Notwithstanding the special provisions set out in this article, any tax offences related to the DST shall be classified and fined in accordance with the General Taxation Act 58/2003, dated 17 December and with any other laws that are generally applicable.

2. For the purposes of the DST, the failure to comply with the obligation referred to article 13.1.i) of this Act, shall be deemed a "serious tax offence". The foregoing is punishable by a fine amounting of 0.5 per cent of the net turnover in the prior calendar year, as established in article 8 of this Act, with a minimum of EUR 15,000 and a maximum of EUR 400,000, for each calendar year in which the above-commented failure happens.

3. The amount of the fine that must be paid for the offence mentioned herein may be reduced, pursuant to the provisions of article 188.3 of General Taxation Act 58/2003, dated 17 December.

Article 16.
Jurisdiction

Once the tax administration channels have been exhausted, the Court for Administrative Disputes shall be the only jurisdiction with authority to judge disputes of fact and law between the Tax Administration. and taxpayers, in relation to any matter stipulated in this Act.

Unique transitory provision: Determination of thresholds

During the period covered between the date of entry into force of this Act and the following December 31, for the purposes of determining the fulfilment of the threshold which relates to article 8.1.b) of this Act, the full amount of the income derived from supplies of digital services subject to the tax will be taken into account from the entry into force of this Act until the ending of the filing period annualized.

First final provision. Competency title

The current Act is made under the exclusive competence of the State in General Finance field mentioned in article 149.1.14º of the Spanish Constitution.

Second final provision. Regulatory development and execution

The Government may issue any regulations as are necessary for the development and execution of this Act.

Third final provision. Amendment of the General Budget Act

The General Budget Act may:

a) Amend the quantitative thresholds which determine the taxpayer status.

b) Amend the tax rate.

c) Introduce and amend the precise regulations in order to fulfil the obligations derived from the Community Law.

d) Amend the non-taxable events.

Fourth final provision. Self-assessments and payments corresponding to second and third quarters of the year 2020

During the year 2020, the filing of self-assessments corresponding to the second and third quarter periods, as well as the payment of the respective tax due, will not be required, in any event, before December 20.

Fifth final provision. Entry into force

The present law will entry into force after three months since its publication in the Spanish Official Gazette.

Madrid,

MINISTER OF FINANCE

[Signature]

María Jesús Montero Cuadrado

1.8 Turkish DST

LEGISLATIVE PROPOSAL ON AMENDING THE LAW ON DIGITAL SERVICE TAX AND SOME TAX LAWS

PART ONE
SUBJECT OF TAX, DEFINITIONS, TAXPAYER AND TAX LIABLE, EXEMPTIONS

Subject of Tax

ARTICLE 1

(1) Revenue earned from following services provided in Turkey is subject to digital service tax.

a) All digital advertisement services (including advertisement control and performance measurement services, data transmission and management services concerning users and technical services concerning the presentation of the advertisement),

b) Selling any audible, visual or digital content (including computer software, applications, audio, video, games, game applications and alike) through digital environment and services provided in digital environment for listening to, watching and playing these content in digital environment or recording or using them in electronic devices,

c) Services provided for creating and operating digital environments in which users may interact with each other (including services which allows or facilitates selling products or services between users).

(2) Intermediation services provided in the digital environment with regard to services listed in the first paragraph are also subject to digital service tax.

Definitions

ARTICLE 2

(1) The following terms shall denote the respective definitions in the enforcement of this Law:

a) Digital environment: Any environment where online activities are carried out without being physically present

b) Digital service providers: Those providing services stated in Article 1 of the Law,

c) Earning the revenue: Revenue becomes definite in terms of its nature and amount,

d) Providing the service in Turkey: Service is provided in Turkey, service is made use of in Turkey, service is realized for those who are in Turkey and the service is used in Turkey ("using" means that the fee of the service is paid in Turkey or if the fee is paid in abroad, it is transferred to the accounts of the payer in Turkey or to the accounts of the person for whom the payment is made, or deducted from the profit of the same persons. In so far as, if the digital advertisement

service is provided to those who are not in Turkey, the service is not deemed to be used in Turkey),

e) Consolidated group in terms of financial accounting: Means all enterprises in the consolidated financial statements as per International Financial Reporting Standards or Turkish Financial Reporting Standards.

Taxpayer and Tax Liable

ARTICLE 3

(1) Digital service providers are liable to pay the digital service tax. The fact whether these providers are full taxpayers as per Income Tax Law No. 193, dated 31 December 1960 and Corporate Tax Law No. 5520, dated 13 June 2006, and whether the said services are carried out through workplaces or permanent representatives in Turkey when service providers are limited taxpayers shall have no affect on digital service tax liability.

(2) If taxpayers do not have residency, workplace, legal and business address in Turkey and in other cases deemed required, Ministry of Treasury and Finance may hold those, who are party to the transactions subject to tax and who act as an intermediary during the transaction and payment, responsible to pay the tax in order to secure the payment of the tax.

Exemptions

ARTICLE 4

(1) Concerning the services stated in Article 1 of the Law, revenue less than TRY 20 million earned in Turkey or revenue less than EUR 750 million or TRY conversion of equivalent foreign currency earned globally during the accounting period before the relevant accounting period are exempt from digital service tax.. In case the taxpayer is a member of a consolidated group in terms of financial accounting, the total revenue of the group regarding the services subject to tax shall be taken into account in the application of these terms.

(2) In case both amounts mentioned in the first paragraph are exceeded, the exemption ceases and the digital service tax liability starts from the fourth taxation period following the tax period in which the limit is exceeded. In determining whether the said amounts are exceeded, the cumulative revenue obtained in the relevant accounting period as of the end of the quarterly periods of the accounting period shall be taken into consideration.

(3) Tax exemption for revenue amounts which are below any of the amounts stated in the first paragraph for two consecutive accounting periods, starts again from the following accounting period.

(4) The President is authorized to reduce the amounts stated in the first paragraph up to zero separately or together or to triple them according to the types of services subject to tax.

(5) The Ministry of Treasury and Finance is authorized to introduce notification and certification obligations for the determination and application of the exemption and to determine the procedures and principles regarding the application of the article. In this

context, those who do not fulfill their notification and certification obligations in due course of time and full measure are given an additional 30 days to fulfill their obligations. Those who fail to fulfill their notification and certification obligations in full measure and within the given time period cannot benefit from the exemption mentioned in this article.

(6) The revenues obtained from the following service made in the digital environment are exempt from the digital service tax and the revenues obtained from these services are not taken into consideration in determining the amounts stated in the first paragraph.

a) Services for which Treasury shares are paid in accordance with Article 37 of the Telegraph and Telephone Law dated 4/2/1924 and No. 406,

b) Services for which special communication tax is collected in the scope of Article 39 of the Expense Law dated 13/7/1956 and No. 6802,

c) Services within the scope of Article 4 of Banking Law dated 19/10/2005 and No. 5411,

d) Sales of products developed as a result of R&D activities in R&D centers defined in Article 2 of the Law on Supporting Research, Development and Design Activities dated 28/2/2008 and No. 5746, and services provided exclusively on these products,

e) Payment services within the scope of Article 12 of the Law on Payment and Securities Settlement Systems, Payment Services and Electronic Money Institutions dated 20/6/2013 and No. 6493.

(7) Exceptions and exemptions relating to digital service tax shall be regulated only by adding provisions to or amending this Law. The provisions of the exceptions or exemptions in other Laws are invalid in respect of this type of tax.

PART TWO
TAX BASE, RATE AND CALCULATION

ARTICLE 5

(1) The base of the digital service tax is the revenue obtained due to the services included in the tax subject during the relevant taxation period. If the revenue is calculated in foreign currency, the foreign currency is converted to Turkish currency according to the foreign exchange buying rate of the Central Bank of Republic of Turkey which is valid on the date of receipt.

(2) No expense, cost and tax deduction is made from the tax base. Digital service tax is not presented separately in invoices and invoices substitutes.

(3) The rate of digital service tax is 7,5%.

(4) Digital service tax is calculated by applying the ratio to the tax base. No deduction is made in tax calculated in this way.

(5) The President is authorized to reduce this rate up to 1% separately or together based on service types and to increase this rate up to twice.

PART THREE
TAXATION PERIOD, DECLARATION OF THE TAX, ASSESSMENT, PAYMENT AND TAX SECURITY

ARTICLE 6

(1) Taxation period for the digital service tax is the monthly periods of a calendar year. However, the Ministry of Treasury and Finance is authorized to determine the taxation period as three month instead of monthly periods according to the operation volume of taxpayers.

(2) Digital service tax is assessed based on the declaration of the taxpayer. In cases where Article 3, paragraph 2 of the Law is applied, this declaration is made by those who are obliged to withhold the tax.

(3) Taxpayers and those responsible for tax withholding are obliged to submit the digital service tax returns until the end of the month following the taxation period.

(4) If the service provider is registered for value added tax, digital service tax is assessed by the related tax office. If there is no registration, it shall be assessed by the tax office to be determined by the Ministry of Treasury and Finance.

(5) Digital service tax is assessed on behalf of the real or legal person who is the taxpayer or the tax liable. In ordinary partnerships, the tax is assessed on behalf of any one of the partners as joint responsibility for the payment of the tax.

(6) Taxpayers who are obliged to submit tax returns and those who are obliged to withhold tax shall pay the digital service tax of one taxation period within the declaration submission period.

(7) Digital service tax paid by digital service taxpayers may be considered as an expense in the determination of the net profit which shall be the base for the income and corporate income tax.

(8) Ministry of Treasury and Finance is authorized to determine the form and content of the digital service tax return and its annexes, to determine the assessment location upon the application of the taxpayer or as ex officio by taking into consideration the necessities of the activities, to enable the submission of returns by the taxpayer or tax liable solely for periods in which taxable services are provided, to determine the principle and procedures of the declaration of the tax, payment period and collection, to fulfil the notification and documentation obligations and determine their principles and procedures.

Tax Security

ARTICLE 7

(1) In case of failure to submit declarations and fulfill the payment obligations with regard to taxes in the scope of Tax Procedural Law dated 4/1/1961 and No. 213 by digital

service providers or their authorized representatives in Turkey in the scope of this Law, notices can be delivered to fulfill these obligations, by notification methods specified in Law No 213, electronic mail or all other communication tools using the information obtained from communication tools on internet pages, field names, IP addresses and similar sources to the digital service providers or their authorized representatives in Tukey and such cases shall be announced through the website of the Directorate of Revenue Administration

(2) In case these obligations are not fulfilled within thirty days after the notice, it is decided by the Ministry of Treasury and Finance to block the access to the services provided by these digital service providers until such time that the obligations are fulfilled Ministry of Treasury and Finance, and the decision is delivered to the Information Technologies and Communication Authority in order to be communicated to the access providers. The necessary actions shall be taken by the access providers within twenty four hours after the notification of the blocking decision.

(3) The principles and procedures regarding the application of this article shall be determined by the Ministry of Treasury and Finance by obtaining the opinion of the Ministry of Transportation and Infrastructure.

1.9 UK DST

Introduction

1. Digital services tax: introduction

(1) A tax (to be known as "digital services tax") is charged in accordance with this Part on UK digital services revenues arising to a person in an accounting period.

(2) The Commissioners for Her Majesty's Revenue and Customs (in this Part referred to as "the Commissioners") are responsible for the collection and management of digital services tax.

(3) In this Part—

(a) sections 2 to 6 define "UK digital services revenues" and other key expressions;

(b) sections 7 to 12 contain the charge to digital services tax;

(c) sections 13 to 17 impose a duty to file returns and other reporting requirements;

(d) sections 18 to 21 define groups and related concepts;

(e) sections 22 to 25 define accounting periods, the meaning of revenues arising, and other accounts-related concepts;

(f) sections 26 to 32 contain supplementary and general provisions.

Digital services revenues, UK digital services revenues etc

2. Meaning of "digital services revenues"

(1) This section applies for the purposes of this Part.

(2) The "digital services revenues" of a group for a period are the total amount of revenues arising to members of the group in that period in connection with any digital services activity of any member of the group.

(3) Where revenues arise in connection with a digital services activity and anything else, the revenues are to be treated as arising in connection with the activity to such extent as is just and reasonable.

3. Meaning of "UK digital services revenues"

(1) This section applies for the purposes of this Part.

(2) A group's "UK digital services revenues" for a period are so much of its digital services revenues for that period as are attributable to UK users.

(3) Revenues are attributable to UK users so far as—

(a) in the case of online advertising revenues, the advertising is intended to be viewed by UK users;

(b) in any other case, the revenues arise in connection with UK users.

(4) But all online marketplace revenues that—

(a) arise in connection with a transaction to which a UK user is a party, or

(b) arise in connection with—

(i) the sale of an interest in premises or land in the United Kingdom,

(ii) the provision of accommodation in the United Kingdom, or

(iii) the sale of services, goods or other property relating to anything within sub-paragraph (i) or (ii),

are treated as attributable to UK users.

(5) Where, other than in a case within subsection (4)—

(a) online advertising revenues arise and the advertising is intended to be viewed by UK users and others, or

(b) other revenues arise in connection with UK users and others,

the revenues are to be treated as attributable to UK users to such extent as is just and reasonable.

(6) In subsection (4)(b)(iii) the reference to the sale of goods or other property includes hiring it.

(7) In this section—

"**online advertising revenues**" means revenues arising in connection with the provision or facilitation of online advertising;

"**online marketplace revenues**" means revenues arising in connection with an online marketplace.

4. Meaning of "digital services activity" etc.

(1) This section applies for the purposes of this Part.

(2) "**Digital services activity**" means providing—

(a) a social media platform,

(b) an internet search engine, or

(c) an online marketplace.

(3) "**Social media platform**" means an online platform that meets the following conditions—

(a) the main purpose, or one of the main purposes, of the platform is to promote interaction between users (including interaction between users and content on the platform provided by other users);

(b) the platform enables content to be shared with other groups of users (or with other users).

(4) "**Online marketplace**" means an online platform that meets the following conditions—

(a) the main purpose, or one of the main purposes, of the platform is to facilitate the sale by users of particular things;

(b) the platform enables users to sell particular things on the platform to other users, or to advertise or otherwise offer to other users particular things for sale.

(5) In subsection (4)—

(a) "thing" means any services, goods or other property;

(b) any reference to the sale of a thing includes hiring it.

(6) A reference to providing a social media platform, internet search engine or online marketplace (a "relevant activity") includes carrying on any associated online advertising business; and a reference to a social media platform, internet search engine or online marketplace is to be read accordingly.

(7) In subsection (6) "associated online advertising business", in relation to a relevant activity, means a business operated on an online platform that—

(a) facilitates the placing of online advertising, and

(b) derives significant benefit from its connection with the relevant activity.

(8) See also section 6 (online financial marketplaces).

5. Meaning of "UK user"

In this Part "UK user" means any person who it is reasonable to assume—

(d) in the case of an individual, is normally in the United Kingdom;

(e) in any other case, is established in the United Kingdom.

6. Online financial marketplaces

(1) In this Part any reference to an online marketplace excludes an online marketplace if—

(a) it is provided by a financial services provider, and

(b) more than half of the relevant revenues arise in connection with the provider's facilitation of the trading or creation of financial assets.

(2) "**Financial services provider**" means—

(a) an authorised person within the meaning of the Financial Services and Markets Act 2000,

(b) a recognised investment exchange within the meaning of that Act,

(c) a payment service provider within the meaning of the Payment Services Regulations 2017 (S.I. 2017/752), or

(d) a person who does a corresponding activity in a territory outside the United Kingdom and is entitled to do the activity under the law of the territory.

(3) In this section—

"**corresponding activity**" means an activity that corresponds to an activity that a person is entitled to do in the United Kingdom by virtue of being a person within subsection (2)(a), (b) or (c);

"**financial asset**" means—

(a) a financial asset within the meaning of the applicable account standards, or

(b) a contract of insurance as defined by section 64 of FA 2012;

"**relevant revenues**" means revenues arising to the financial services provider in connection with the online marketplace.

Charge to DST

7. Meaning of "the threshold conditions"

(1) For the purposes of this Part "the threshold conditions", in relation to a group, for an accounting period are—

(a) that the total amount of digital services revenues arising in that period to members of the group exceeds £500 million, and

(b) that the total amount of UK digital services revenues arising in that period to members of the group exceeds £25 million.

(2) But if the duration of the accounting period is less than a year, the amounts mentioned in subsection (1)(a) and (b) are proportionately reduced.

8. Charge to DST

(1) This section applies where the threshold conditions are met in relation to a group for an accounting period.

(2) Each person who was a member of the group in the accounting period (a "relevant person") is liable to digital services tax in respect of UK digital services revenues arising in that period.

(3) To find the liability of a relevant person to digital services tax in respect of the accounting period, take the following steps.

Step 1

Find the total amount of UK digital services revenues arising to members of the group in the accounting period.

Step 2

Deduct £25 million from the amount found under step 1.

Step 3

Calculate 2% of the amount calculated under step 2.

The result is "the group amount".

Step 4

The relevant person's liability to digital services tax in respect of the accounting period is the appropriate proportion of the group amount.

(4) In this section "the appropriate proportion" means such proportion of the total amount of UK digital services revenues arising to members of the group in the accounting period as is attributable to the relevant person.

(5) If the duration of the accounting period is less than a year, the sum mentioned in step 2 of subsection (3) is proportionately reduced.

(6) This section is subject to section 9 (alternative basis of charge).

9. Alternative basis of charge

(1) This section applies if a valid claim under this section in respect of an accounting period has been included in the group's DST return for that period (whether as originally made or by amendment).

(2) A claim under this section is valid if it specifies the categories of revenues in relation to which it applies (or specifies that it applies in relation to all categories).

(3) For this purpose, the categories of revenues are—

(a) revenues arising in connection with any social media platform;

(b) revenues arising in connection with any internet search engine;

(c) revenues arising in connection with any online marketplace.

(4) To find the liability of a relevant person to digital services tax in respect of the accounting period, take the following steps (instead of the steps set out in section 8(3)).

Step 1

Find the total amount of UK digital services revenues arising to members of the group in the accounting period.

Step 2

Apportion the total amount found under step 1 between the 3 categories of revenues.

Step 3

For each category of revenues, the "net revenues" is the amount by which the amount of revenues apportioned under step 2 exceeds the relevant proportion of £25 million.

"The relevant proportion" is—

$$\frac{R}{TR}$$

where—

(a) R is the amount of revenues apportioned under step 2 to the category, and

(b) TR is the total amount found under step 1.

Step 4

For each specified category of revenues, calculate the operating margin.

"The operating margin" is—

$$\frac{R - E}{R}$$

where—

(a) R has the same meaning as in step 3, and

(b) E is the amount of relevant operating expenses of the group that are recognised in the accounting period (as to which, see section 10).

If R does not exceed E, the operating margin is nil.

Step 5

For each specified category of revenues, the taxable amount is 0.8 x the operating margin x the net revenues.

For any other category of revenues, the taxable amount is 2% of the net revenues.

Step 6

Add together the taxable amounts calculated under step 5.

The result is "the group amount".

Step 7

The relevant person's liability to digital services tax in respect of the accounting period is the appropriate proportion of the group amount.

(5) If the duration of the accounting period is less than a year, the sum mentioned in step 3 of subsection (4) is proportionately reduced.

(6) In this section—

"**the appropriate proportion**" has the meaning given by section 8;

"**relevant person**" has the same meaning as in section 8;

"**specified**", in relation to a category of revenues, means a category of revenues specified in the claim.

10. Section 9: meaning of "relevant operating expenses"

(1) This section supplements section 9.

(2) The "relevant operating expenses" of a group, in relation to a specified category of revenues, means any expenses of a member of the group attributable to the earning of UK digital services revenues of the specified kind, except excluded expenses.

(3) "Excluded expenses" means any expenses—

(a) in respect of interest (or anything equivalent, from a commercial perspective, to interest),

(b) attributable to the acquisition of a business or part of a business,

(c) occurring otherwise than in the normal course of business,

(d) resulting from a change in the valuation of any tangible or intangible asset, or

(e) in respect of any tax (arising under the law of any territory).

(4) Where expenses are attributable to—

(a) the earning of UK digital services revenues of the specified kind, and

(b) anything else,

the expenses are to be treated as expenses within subsection (2) to such extent as is just and reasonable.

(5) In this section a reference to UK digital services revenues of the specified kind is to UK digital services revenues that are within the specified category of revenues.

11. Relief for certain cross-border transactions

(1) This section applies if a claim under this section in respect of an accounting period has been included in the group's DST return for that period (whether as originally made or by amendment).

(2) For the purposes of step 1 in section 8(3) or 9(4), disregard 50% of any UK digital services revenues arising to a member of the group in the accounting period in connection with a relevant cross-border transaction.

(3) For the purposes of step 4 in section 9(4), disregard 50% of any relevant operating expenses of a member of the group recognised in the accounting period that result from a relevant cross-border transaction.

(4) "**Relevant cross-border transaction**" means a transaction on an online marketplace provided by a member of the group, where—

(a) a foreign user is a party to the transaction, and

(b) all or part of any revenues arising to a member of the group in connection with the transaction are (or would be) subject to a foreign DST charge.

(5) In this section—

"**foreign user**" means a person who it is reasonable to assume—

(a) in the case of an individual, is normally in a territory outside the United Kingdom;

(b) in any other case, is established in a territory outside the United Kingdom,

and a reference to the foreign user's "territory" is to be read accordingly;

"**foreign DST charge**" means a charge (known by any name) under the law of the foreign user's territory which is similar to digital services tax.

12. When DST is due and payable

Digital services tax in respect of an accounting period is due and payable on the day following the end of 9 months from the end of the accounting period.

Duty to submit returns etc

13. Meaning of "the responsible member"

(1) In this Part any reference to "the responsible member" of a group, at any time, is a reference to the following person—

(a) if at that time a nomination under subsection (2) is in force, the person nominated;

(b) otherwise, the parent of the group.

(2) The parent of a group may nominate a person to be "the responsible member" of the group if—

(a) the person is a member of the group,

(b) the person is a company, and

(c) the parent agrees in writing to provide the person with everything the person may reasonably require in order to comply with—

(i) any obligation imposed by or under this Part, or

(ii) any other obligation imposed on the person in connection with any digital services tax liability of any member of the group.

(3) A nomination is in force from the time it is made until any of the following events occurs—

(a) the parent nominates another person;

(b) the person nominated ceases to be a member of the group or ceases to be a company;

(c) an officer of Revenue and Customs or the parent revokes the nomination.

(4) An officer of Revenue and Customs may revoke a nomination only if the officer has reason to believe that the person nominated—

(a) is not being provided with anything the person reasonably requires in order to comply with an obligation of a kind mentioned in subsection (2)(c), or

(b) is not complying with any such obligation.

(5) An officer of Revenue and Customs revokes a nomination by notifying the parent and the nominated person of the revocation.
The revocation has effect when the notification is issued.

(6) Any nomination, or revocation of a nomination, must be in writing.

14. Continuity of obligations etc. where change in the responsible member

(1) This section applies if at any time ("the relevant time") a person ("the new responsible member") becomes the responsible member of a group in place of another person ("the old responsible member").

(2) The relevant obligations and liabilities of the new responsible member include any relevant obligations and liabilities of the old responsible member as respects the group.

(3) Anything done as respects the group by or in relation to the old responsible member, before the relevant time, is treated as having been done by or in relation to the new responsible member.

(4) Anything done by HMRC in relation to the old responsible member as respects the group, before the end of the day the change is notified, is treated for all relevant purposes as done by or in relation to the new responsible member.

(5) Anything (including any proceedings) relating to the group that, at any time during the period beginning with the relevant time and ending with the day the change is notified, is in the process of being done in relation to the old responsible member may be continued in relation to the new responsible member.

(6) Accordingly, any reference in an enactment or other instrument to the responsible member of the group is to be read, so far as necessary for the purposes of giving effect to any of subsections (2) to (5), as being or including a reference to the new responsible member.

(7) In this section—

(a) any reference to an act includes an omission;

(b) "notified": any reference to the day the change is notified is to the day on which an officer of Revenue and Customs receives notification, in accordance with section 16, that the new responsible member has become the responsible member of the group;

(c) "relevant obligations and liabilities" means any obligations or other liabilities relating to digital services tax;

(d) "relevant purposes" means any purposes relating to digital services tax.

(8) Nothing in this section—

(a) prevents HMRC or anyone else, after the relevant time, from imposing any penalty, exercising any other power, or doing anything else, in relation to the old responsible member in respect of anything done before the relevant time,

(b) enables HMRC or anyone else to impose a penalty on the new responsible member solely in respect of anything done before the relevant time, or

(c) affects the validity of anything done before the relevant time.

15. Duty to notify HMRC when threshold conditions are met

(1) This section applies—

(a) in relation to the first accounting period of a group in respect of which the threshold conditions are met, and

(b) where a direction under section 17 has been given in respect of a group, in relation to the first relevant accounting period in respect of which the threshold conditions are met.

In paragraph (b) "relevant accounting period" means the accounting period specified in the direction or any subsequent accounting period.

(2) The responsible member must provide specified information to HMRC.

(3) The information must be provided in the specified way.

(4) The information must be provided before the end of the period of 90 days from the end of the accounting period.

(5) In subsections (2) and (3) "specified" means specified in a notice published by an officer of Revenue and Customs.

16. Duty to notify HMRC of change in relevant information

(1) This section applies where section 15 applies or has applied in relation to a group.

(2) If at any relevant time there is a change in relevant information relating to the group, the responsible member must notify HMRC of that change.

(3) The notification must be given in the specified way.

(4) The notification must be given before the end of the period of 90 days beginning with the day on which the change occurs.

(5) In subsection (3) "specified" means specified in a notice published by an officer of Revenue and Customs.

(6) In this section—

"**relevant information**" means information of a kind specified under section 15;

"**relevant time**" means any time—

(a) after the time when the information is provided under section 15 or (if earlier) the last time by which the information may be provided in accordance with that section, and

(b) before the giving of a direction under section 17 in relation to the group.

17. Duty to file returns

(1) This section applies where the threshold conditions are met in relation to a group for an accounting period.

(2) The responsible member must deliver a DST return—

(a) for the accounting period, and

(b) for each subsequent accounting period, subject to subsection (3).

(3) An officer of Revenue and Customs may, on the application of the responsible member, direct that the duty to deliver a DST return does not apply in relation to an accounting period specified in the direction or subsequent accounting periods.

(4) Such a direction may be given only if it appears to the officer that the threshold conditions will not be met in relation to the group for any accounting period beginning with the specified accounting period.

(5) Nothing in a direction under subsection (3) prevents the further application of this section to the group, in any subsequent accounting period in which the threshold conditions are met.

(6) Schedule 1 contains provision about DST returns, enquiries, assessments etc.

Groups, parents and members

18. Meaning of "group", "parent" etc.

(1) In this Part "group" means—

(a) any entity which—

(i) is a relevant entity (see section 19), and

(ii) meets condition A or B (see subsections (2) and (3)), and

(b) each subsidiary (if any) of the entity mentioned in paragraph (a).

(2) Condition A is that the entity—

(a) is a member of a GAAP group, and

(b) is not a subsidiary of an entity that—

(i) is a relevant entity, and

(ii) itself meets condition A.

(3) Condition B is that the entity is not a member of a GAAP group.

(4) In this Part—

(a) references to the "parent" of a group are to the entity mentioned in subsection (1)(a);

(b) references to a "member" of a group are to an entity mentioned in subsection (1)(a) or (b);

(c) "subsidiary" has the meaning given by the applicable accounting standards.

(5) In this section "GAAP group" means a group within the meaning of the applicable accounting standards.

(6) For the meaning of "the applicable accounting standards" see section 25.

19. Section 18: meaning of "relevant entity"

(1) In section 18 "relevant entity" means—

(a) a company, or

(b) an entity the shares or other interests in which are listed on a recognised stock exchange and are sufficiently widely held.

(2) Shares or other interests in an entity are "sufficiently widely held" if no participator in the entity holds more than 10% by value of all the shares or other interests in the entity.

(3) The following are not relevant entities—

(a) the Crown;

(b) a Minister of the Crown;

(c) a government department;

(d) a Northern Ireland department;

(e) a foreign sovereign power.

(4) In this section—

(a) "participator" has the meaning given by section 454 of CTA 2010;

(b) "recognised stock exchange" has the meaning given by section 1137 of CTA 2010;

(c) the reference to shares or other interests being listed on a recognised stock exchange is to be read in accordance with section 1137 of CTA 2010.

(5) For the meaning of "company" see section 32.

20. Continuity of a group over time

(1) In this Part, this section applies for the purpose of determining whether a group at any time (Time 2) is the same group as a group at any earlier time (Time 1).

(2) The group at Time 2 is the same group as the group at Time 1 if and only if the entity that is the parent of the group at Time 2—

(a) was the parent of the group at Time 1, and

(b) was the parent of a group at all times between Time 1 and Time 2.

21. Treatment of stapled entities

(1) This section applies where two or more entities—

(a) would, apart from this section, be the parent of a group, and

(b) are stapled to each other.

(2) This Part applies as if—

(a) the entities were subsidiaries of another entity (the "deemed parent"), and

(b) the deemed parent were within section 18(1)(a) (conditions for being the parent of a group).

(3) For the purpose of this section an entity (A) is "stapled" to another entity (B) if, in consequence of the nature of the rights attaching to the shares or other interests in A (including any terms or conditions attaching to the right to transfer the interests), it is necessary or advantageous for a person who has, disposes of or acquires shares or other interests in A also to have, dispose of or acquire shares or other interests in B.

Accounting periods, accounts etc

22. Accounting periods and meaning of "a group's accounts"

(1) This section applies for the purposes of this Part.

(2) A group's first accounting period—

(a) begins with 1 April 2020, and

(b) ends with the first accounting reference date to occur after that date or, if earlier, with 31 March 2021.

This is subject to subsection (4) (rule for groups coming into existence after 1 April 2020).

(3) Any other accounting period of a group—

(a) begins immediately after the end of the previous accounting period, and

(b) ends with the first accounting reference date to occur after it begins or, if earlier, one year after it begins.

(4) In the case of a group formed after 1 April 2020, its first accounting period—

(a) begins with the date on which it is formed, and

(b) ends with the first accounting reference date to occur after that date or, if earlier, one year after it begins.

(5) In this section "accounting reference date" means the date to which the group's accounts are made up.

(6) Any reference to a group's accounts is to—

(a) the consolidated accounts of the group's parent and its subsidiaries, or

(b) the parent's accounts (if the parent is the only member of the group throughout the period in question).

23. Apportionment of revenues or expenses to accounting period

(1) This section applies if a group's period of account does not coincide with an accounting period.

(2) The revenues or expenses of a period of account may be apportioned to the parts of that period falling within different accounting periods

(3) The apportionment must be made by reference to the number of days in the periods concerned.

24. Meaning of revenues arising, or expenses recognised, in a period

(1) In this Part any reference to revenues arising to members of a group in a period, or to expenses of members of a group recognised in a period, is to be interpreted as follows.

(2) For any period of account of the group—

(a) if the group's accounts for the period are produced in accordance with the applicable accounting standards, the reference is to revenues (however described) or expenses recognised in the income statement (or in profit and loss) for that period;

(b) otherwise, the reference is to revenues or expenses that would be recognised in the income statement (or in profit and loss) in the group's accounts produced in accordance with IAS for the period if such accounts were produced.

(3) If the group does not produce accounts for any period ("the relevant period") in an accounting period, the reference is to revenues or expenses that would be recognised in the income statement (or in profit and loss) in the group's accounts produced in accordance with IAS for the relevant period if such accounts were produced.

25. Meaning of "the applicable accounting standards" etc

(1) This section applies for the purposes of this Part.

(2) "The applicable accounting standards", in relation to a group, means—

(a) for any period for which the group's accounts are produced in accordance with UK GAAP, UK GAAP;

(b) for any period for which the group's accounts are produced in accordance with US GAAP, US GAAP;

(c) for any period for which the group's accounts are produced in accordance with a standard approved by an officer of Revenue and Customs for the purposes of this paragraph, that standard;

(d) otherwise, IAS.

(3) "UK GAAP"—

(a) means generally accepted accounting principles in relation to accounts of UK companies (other than accounts prepared in accordance with IAS) that are intended to give a true and fair view, and

(b) has the same meaning in relation to persons other than companies, and companies that are not UK companies, as it has in relation to UK companies.

"UK companies" here means companies incorporated or formed under the law of a part of the United Kingdom.

(4) "US GAAP" means United States Generally Accepted Accounting Principles.

(5) "IAS" means—

(a) International Accounting Standards,

(b) International Financial Reporting Standards, and

(c) related interpretations,

issued or adopted, from time to time, by the International Accounting Standards Board.

(6) HMRC must publish any approval given for the purposes of subsection (2)(c).

Supplementary

26. Anti-avoidance

(1) Any tax advantage that would (apart from this section) arise from relevant avoidance arrangements is to be counteracted by the making of such adjustments as are just and reasonable.

(2) The adjustments (whether or not made by an officer of Revenue and Customs) may be made by way of an assessment, the modification of an assessment, amendment or disallowance of a claim, or otherwise.

(3) Arrangements are "relevant avoidance arrangements" if their main purpose, or one of their main purposes, is to enable a person to obtain a tax advantage.

(4) But arrangements are not "relevant avoidance arrangements" if the obtaining of any tax advantage that would (apart from this section) arise from them can reasonably be regarded as consistent with—

(a) any principles on which the provisions of this Part that are relevant to the arrangements are based (whether expressed or implied), and

(b) the policy objectives of those provisions.

(5) In this section—

"arrangements" include any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable);

"tax" means digital services tax (and "tax advantage" is to be construed accordingly);

"tax advantage" includes—

(a) avoidance or reduction of a charge to tax or an assessment to tax,

(b) repayment or increased repayment of tax,

(c) avoidance of a possible assessment to tax, and

(d) deferral of a payment of tax or advancement of a repayment of tax.

27. Notice requiring payment from other group members

(1) This section applies where any DST liability relating to a group for an accounting period is unpaid at the end of the period of 3 months after the relevant date.

(2) A designated officer may give a notice (a "payment notice") to a relevant person requiring that person, within 30 days of the giving of the notice, to payall unpaid DST liabilities relating to the group for the accounting period.

(3) A payment notice must state—

(a) the amount of any digital services tax, penalty or interest that remains unpaid,

(b) the date any digital services tax or penalty first became payable, and

(c) the relevant person's right of appeal.

(4) A payment notice may not be given more than 3 years and 6 months after the relevant date.

(5) In this section "the relevant date" means—

(a) in relation to any digital services tax or interest on digital services tax—

(i) in relation to an amount of digital services tax determined under Part 5 of Schedule 1 (HMRC determinations), the date on which the determination was issued;

(ii) in relation to an amount of digital services tax under a self assessment in a case where the DST return was delivered after the filing date, the date on which the return was delivered;

(iii) in any other case, the date the digital services tax became due and payable;

(b) in relation to any penalty, the day on which notification of the penalty was issued.

(6) A payment notice may be given anywhere in the world, to any relevant person (whether or not resident in the United Kingdom).

(7) Schedule 2 makes further provision about payment notices.

(8) In this section—

"designated officer" means an officer of Revenue and Customs who has been designated by the Commissioners for the purposes of this Part;

"DST liability", in relation to a group for an accounting period, means—

(a) a liability of a relevant person to digital services tax in respect of that period or to interest on any such digital services tax, or

(b) a penalty imposed on a relevant person in respect of anything done (or not done) in connection with digital services tax in respect of the accounting period;

"the filing date" has the same meaning as in Schedule 1;

"relevant person" means any person who was a member of the group in the accounting period.

28. Interest on overdue DST

(1) Digital services tax carries interest at the applicable rate from the date when the tax becomes due and payable until payment.

(2) This applies even if the date when the tax becomes due and payable is—

(a) a Saturday or Sunday,

(b) Good Friday, Christmas day, a bank holiday or other public holiday, or

(c) a day specified in an order made under section 2 of the Banking and Financial Dealings Act 1971 (power to suspend financial dealings).

(3) In this section "the applicable rate" means the rate applicable under section 178 of FA 1989.

29. Interest on overpaid DST etc.

(1) Where a payment in respect of a person's digital services tax liability for an accounting period is made before the due date, the payment carries interest at the applicable rate from the date the payment is made until the due date.

(2) Where a repayment of digital services tax paid by a person for an accounting period falls to be made, the repayment carries interest at the applicable rate—

(a) from the due date or, if later, the date the digital services tax was paid, and

(b) until the order for repayment is issued.

(3) Where a repayment of digital services tax is a repayment of tax paid by a person on different dates, it is to be treated so far as possible as a repayment of tax paid on a later (rather than an earlier) date among those dates.

(4) Where—

(a) interest has been paid to a person under this section,

(b) there is a change in the person's assessed liability,

(c) the change does not correct (wholly or in part) an error made by an officer of Revenue and Customs, and

(d) as a result of the change (and in particular not as a result of an error in the calculation of interest) it appears to an officer of Revenue and Customs that some or all of the interest ought not to have been paid,

the interest that ought not to have been paid may be recovered from the person.

(5) For the purposes of subsection (4)(b) there is a change in a person's assessed liability if (and only if)—

(a) an assessment, or an amendment of an assessment, of the amount of digital services tax payable by the person for the accounting period in question is made, or

(b) an HMRC determination of that amount is made,

whether or not any previous assessment or determination has been made

(6) In this section—

"the applicable rate" has the same meaning as in section 28;

"the due date", in relation to an accounting period, means the date digital services tax for the accounting period becomes due and payable;

"error" includes—

(a) any computational error, and

(b) the allowance of a claim that ought not to have been allowed;

"HMRC determination" means a determination under Part 5 of Schedule 1.

30. Minor and consequential amendments

Schedule 3 contains minor and consequential amendments.

31. Review of DST

(1) The Treasury must, before the end of 2025, conduct a review of digital services tax and prepare a report of the review.

(2) The Treasury must lay a copy of the report before Parliament.

General

32. Interpretation of Part

In this Part—

"**CTA 2010**" means the Corporation Tax Act 2010;

"**accounting period**" has the same meaning as in section 22;

"**the applicable accounting standards**" has the meaning given by section 25;

"**the Commissioners**" has the meaning given by section 1;

"**company**" has the meaning given by section 1121(1) of CTA 2010;

"**digital services activity**" has the meaning given by section 4;

"**digital services revenues**" has the meaning given by section 2;

"**group**" has the meaning given by section 18;

"**group's accounts**" has the meaning given by section 22;

"**HMRC**" means Her Majesty's Revenue and Customs;

"**IAS**" has the meaning given by section 25;

"**member**" has the meaning given by section 18;

"**parent**" has the meaning given by section 18;

"**the responsible member**" has the meaning given by section 13;

"**subsidiary**" has the meaning given by section 18;

"**the threshold conditions**" has the meaning given by section 7;

"**UK digital services revenues**" has the meaning given by section 3;

"**UK GAAP**" has the meaning given by section 25;

"**UK user**" has the meaning given by section 5;

"**US GAAP**" has the meaning given by section 25.

SCHEDULES

SCHEDULE 1 **Section 17**

RETURNS, ENQUIRIES, ASSESSMENTS AND APPEALS

PART 1
INTRODUCTION

1. (1) References in this Schedule—

(a) to the delivery of a DST return are to the delivery of a return by a responsible member for an accounting period where the return complies with the requirements of paragraph 2(2);

(b) to the filing date, in relation to a DST return, are to the last day of the period within which the return must be delivered.

(2) In this Schedule—

"**tax**" means digital services tax;

"**tribunal**" means the First-tier Tribunal, or where determined by or under Tribunal Procedure Rules, the Upper Tribunal.

PART 2
DST RETURNS

DST returns

2. (1) A DST return for an accounting period must be delivered before the end of one year from the end of the accounting period.

(2) A DST return must—

(a) be in the specified form,

(b) contain specified information,

(c) contain an assessment ("a self-assessment") of the total amount payable by relevant persons by way of digital services tax for the accounting period to which the return relates, and

(d) include a declaration by the responsible member that the return is, to the best of the responsible member's knowledge, correct and complete.

(3) In this paragraph—

(a) "relevant person" has the same meaning as in section 8;

(b) "specified" means specified in a notice published by an officer of Revenue and Customs.

Amendment of return by responsible member

3. (1) This paragraph applies where a DST return has been delivered.

(2) The responsible member may amend the DST return by notice to an officer of Revenue and Customs.

(3) The notice must—

(a) be in a specified form, and

(b) contain specified information.

(4) In this paragraph "specified" means specified in a notice published by an officer of Revenue and Customs.

(5) No amendment may be made under this paragraph more than 12 months after the filing date.

Failure to deliver return: flat-rate penalty

4. (1) A person who is required to file a DST return and fails to do so by the filing date is liable to a penalty under this paragraph. The person may also be liable to a penalty under paragraph 5 (tax-related penalties).

(2) The penalty is—

(a) £100, if the return is delivered within 3 months after the filing date;

(b) £200, in any other case.

(3) The amounts are increased to £500 and £1000 (respectively) for a third successive failure.

(4) For this purpose, a "third successive failure" occurs where—

(a) the duty under section 17 (duty to file returns) applies in relation to a group for 3 successive accounting periods,

(b) a person was liable to a penalty under this paragraph in respect of each of the first 2 accounting periods, and

(c) a person is liable to a penalty under this paragraph in respect of the third accounting period.

Failure to deliver return: tax-related penalties

5. (1) A person who is required to file a DST return for an accounting period and fails to do so within 18 months from the end of that period is liable to a penalty under this paragraph.

This is in addition to any penalty under paragraph 4 (flat-rate penalty).

(2) The penalty is—

(a) 10% of the unpaid tax, if the return is filed within 2 years from the end of the accounting period;

(b) 20% of the unpaid tax, in any other case.

(3) The "unpaid tax" means the total amount of tax payable by members of the group for the accounting period which remains unpaid on the date when the liability to the penalty under this paragraph arises.

PART 3
DUTY TO KEEP AND PRESERVE RECORDS

Duty to keep and preserve records

6. (1) This paragraph applies in relation to a group for an accounting period if the responsible member is required by section 17 to deliver a DST return for that period.

(2) The responsible member must—

(a) keep such records as may be needed to enable it to deliver a correct and complete the DST return, and

(b) preserve those records in accordance with this paragraph.

(3) The records must be preserved until the end of the relevant day.

(4) In this paragraph "relevant day" means—

(a) the sixth anniversary of the end of the accounting period, or

(b) such earlier day as may be specified (and different days may be specified for different cases).

(5) The records required to be kept and preserved under this paragraph include records of all receipts and expenses relating to digital services activities.

(6) In this paragraph "specified" means specified in a notice published by the Commissioners.

Preservation of information etc.

7. The duty under paragraph 6 to preserve records may be satisfied—

(a) by preserving them in any form and by any means, or

(b) by preserving the information contained in them in any form and by any means,

subject to any conditions or exceptions specified in a notice published by the Commissioners.

Failure to keep and preserve records: penalty

8. (1) A person who fails to comply with paragraph 6 in relation to an accounting period is liable to a penalty not exceeding £3,000, subject to the following exception.

(2) No penalty is incurred if an officer of Revenue and Customs is satisfied that any facts which the officer reasonably requires to be proved, and which would have been proved by the records, are proved by other documentary evidence provided to the officer.

PART 4
ENQUIRY INTO RETURN

Notice of enquiry

9. (1) An officer of Revenue and Customs may enquire into a DST return if the officer gives notice to the responsible member of the officer's intention to do so within the time allowed.

(2) The time allowed is—

(a) if the return was delivered on or before the filing date, up to the end of the period of 12 months after the filing date;

(b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered;

(c) if the return is amended under paragraph 3, up to and including the quarter day next following the first anniversary of the day on which the return was amended.

The quarter days are the 31st January, 30th April, 31st July and 31st October.

(3) A return that has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under paragraph 3.

(4) A notice under this paragraph is referred to as a "notice of enquiry".

Scope of enquiry.

10. (1) An enquiry extends to anything contained in the return, or required to be contained in the return, including anything that relates—

(a) to the question of whether tax is chargeable in respect of the accounting period, or

(b) to the amount of tax so chargeable.

This is subject to the following exception.

(2) If the notice of enquiry is given as a result of an amendment of the return under paragraph 3—

(a) at a time when it is no longer possible to give notice of enquiry under paragraph 9(2)(a) or (b), or

(b) after an enquiry into a return has been completed,

the enquiry into the return is limited to matters which the amendment relates or that are affected by the amendment.

Amendment of self-assessment during enquiry to prevent loss of tax

11. (1) If at a time when an enquiry is in progress into a DST return an officer of Revenue and Customs forms the opinion—

(a) that the amount stated in the self-assessment contained in the return as the amount of tax payable is insufficient, and

(b) that unless the assessment is immediately amended there is likely to be a loss of tax to the Crown,

the officer may by notice in writing to the responsible member amend the assessment to make good the deficiency.

(2) In the case of an enquiry that under paragraph 10(2) is limited to matters arising from an amendment of the return, sub-paragraph (1) above applies only so far as the deficiency is attributable to the amendment.

(3) For the purposes of this paragraph the period during which an enquiry is in progress is the whole of the period—

(a) beginning with the day on which notice of enquiry is given, and

(b) ending with the day on which the enquiry is completed.

Amendment of return by responsible member during enquiry

12. (1) This paragraph applies if a DST return is amended under paragraph 3 (amendment by responsible member) at a time when an enquiry is in progress into the return.

(2) The amendment does not restrict the scope of the enquiry but may be taken into account (together with any matters arising) in the enquiry.

(3) While the enquiry is in progress, so far as the amendment affects the amount stated in the self-assessment as the amount of tax payable, it does not take effect in relation to any matter to which the amendment relates or which is affected by the amendment.

(4) An amendment whose effect is deferred under sub-paragraph (3) takes effect as follows—

(a) if the conclusions in a closure notice state either—

(i) that the amendment was not taken into account in the enquiry, or

(ii) that no amendment of the return is required arising from the enquiry, the amendment takes effect when the closure notice is issued;

(b) in any other case, the amendment takes effect as part of the amendments made by the closure notice.

(5) For the purposes of this paragraph the period during which an enquiry is in progress is the whole of the period—

(a) beginning with the day on which notice of enquiry is given, and

(b) ending with the day on which the enquiry is completed.

Referral of questions to the tribunal during enquiry

13. (1) At any time when an enquiry is in progress into a DST return any question arising in connection with the subject-matter of the enquiry may be referred to the tribunal for determination.

(2) Notice of referral must be given—

(a) jointly by the responsible member and an officer of Revenue and Customs,

(b) to the tribunal.

(3) More than one notice of referral may be given under this paragraph in relation to an enquiry.

(4) For the purposes of this paragraph the period during which an enquiry is in progress is the whole of the period—

(a) beginning with the day on which notice of enquiry is given, and

(b) ending with the day on which the enquiry is completed.

Withdrawal of notice of referral

14. An officer of Revenue and Customs or the responsible member may withdraw a notice of referral under paragraph 13.

Effect of referral of enquiry

15. (1) While proceedings on a referral under paragraph 13 are in progress in relation to an enquiry—

(a) no closure notice may be given in relation to the enquiry, and

(b) no application may be made for a direction to give such a notice.

(2) For the purposes of this paragraph proceedings on a referral are in progress where—

(a) notice of referral has been given,

(b) the notice has not been withdrawn, and

(c) the questions referred have not been finally determined.

(3) For the purposes of sub-paragraph (2)(c) a question referred is finally determined when—

(a) it has been determined by the tribunal, and

(b) there is no further possibility of the determination being varied or set aside (disregarding any power to grant permission to appeal out of time).

Effect of determination

16. (1) The determination of a question referred to the tribunal under paragraph 13 is binding on the parties to the referral in the same way, and to the same extent, as a decision on a preliminary issue in an appeal.

(2) The determination must be taken into account by an officer of Revenue and Customs—

(a) in reaching the officer's conclusions on the enquiry, and

(b) in formulating any amendments of the return required to give effect to those conclusions.

(3) The question determined may not be reopened on an appeal, except to the extent that it could be reopened if it had been determined as a preliminary issue in that appeal.

Completion of enquiry

17. (1) An enquiry under paragraph 9 is completed when an officer of Revenue and Customs by notice (a "closure notice") informs the responsible member that the enquiry is complete and states the conclusions reached in the enquiry.

(2) A closure notice must either—

(a) state that in the opinion of an officer of Revenue and Customs no amendment of the return is required, or

(b) make the amendments of the return required to give effect to the conclusions stated in the notice.

(3) A closure notice takes effect when it is issued.

Direction to complete enquiry

18. (1) The responsible member may apply to the tribunal for a direction that an officer of Revenue and Customs give a closure notice within a specified period.

(2) The tribunal hearing the application must give a direction unless satisfied that HMRC have reasonable grounds for not giving a closure notice within a specified period.

(3) Any application under sub-paragraph (1) is to be subject to the relevant provisions of Part 5 of the Taxes Management Act 1970 (see, in particular, section 48(2)(b) of that Act).

PART 5
HMRC DETERMINATIONS

Determination of tax chargeable if no return delivered

19. (1) This paragraph applies where—

(a) a DST return must be filed for an accounting period, but

(b) no return is delivered by the end of the filing date.

(2) An officer of Revenue and Customs may make a determination (an "HMRC determination") to the best of the officer's information and belief of the total amount payable by relevant persons by way of digital services tax for the accounting period.

(3) Notice of the determination—

(a) must state the date on which it is issued, and

(b) must be served on the responsible member.

(4) No HMRC determination may be made more than 3 years after the filing date.

(5) In this section "relevant person" has the same meaning as in section 8.

Determination to have effect as a self-assessment

20. (1) An HMRC determination has effect for enforcement purposes as if it were a self-assessment (within the meaning of paragraph 2(2)).

(2) In sub-paragraph (1) "for enforcement purposes" means for the purposes of provisions of this Part providing for—

(a) tax-related penalties,

(b) anti-avoidance,

(c) collection and recovery of DST, and

(d) interest on overdue DST.

(3) Nothing in this paragraph affects any liability to a penalty for failure to deliver a return.

Determination superseded by actual self-assessment

21. (1) If, after an HMRC determination has been made a DST return is delivered for the accounting period, the self-assessment included in the return supersedes the determination.

(2) Sub-paragraph (1) does not apply to a return delivered—

(a) more than 3 years after the day on which the power to make the determination first became exercisable, or

(b) more than 12 months after the date of the determination, whichever is the later.

(3) Where—

(a) proceedings have been begun for the recovery of any tax charged by an HMRC determination, and

(b) before the proceedings are concluded the determination is superseded by a self-assessment,

the proceedings may be continued as if they were proceedings for the recovery of so much of the tax charged by the self-assessment as is due and payable and has not been paid.

(4) Where—

(a) action is being taken under Part 1 of Schedule 8 to the Finance (No 2) Act 2015 (enforcement of deduction from accounts) for the recovery of an amount ("the original amount") of tax charged by an HMRC determination, and

(b) before that action is concluded, the determination is superseded by a self-assessment,

that action may be continued as if it were action for the purposes of the recovery of so much of the tax charged by the self-assessment as is due and payable, has not yet been paid and does not exceed the original amount.

PART 6
HMRC ASSESSMENTS

Assessments where loss of tax discovered

22. (1) If, in respect of an accounting period of a group, an officer of Revenue and Customs discovers that—

(a) an amount of tax that ought to have been assessed has not been assessed, or

(b) an assessment to tax is or has become insufficient,

the officer may make an assessment (a "discovery assessment") in the amount or further amount which ought in the officer's opinion to be charged in order to make good to the Crown the loss of tax.

(2) This is subject to the restrictions in paragraph 23.

Restrictions on assessments

23. (1) If a DST return has been delivered in respect of the accounting period, the power to make a discovery assessment—

(a) may only be made in the two cases specified in sub-paragraphs (2) and (3) below, and

(b) may not be made in the circumstances specified in sub-paragraph (5) below.

(2) The first case is where the situation mentioned in sub-paragraph (1) of paragraph 22 was brought about carelessly or deliberately on the part of—

(a) the responsible member,

(b) another member of the group, or

(c) a person acting on behalf any of those persons.

(3) The second case is where an officer of Revenue and Customs, at the time the officer—

(a) ceased to be entitled to give a notice of enquiry into the return, or

(b) completed an enquiry into the return, could not have been reasonably expected, on the basis of the information made available to the officer before that time, to be aware of the situation mentioned in sub-paragraph (1) of paragraph 22.

(4) For this purpose information is regarded as made available to the officer of Revenue and Customs if—

(a) it is contained in a DST return delivered by the responsible member,

(b) it is contained in any documents produced or information provided by the responsible member for the purposes of an enquiry into any such return, or

(c) it is information the existence of which, and the relevance of which as regards the situation mentioned sub-paragraph (1) of paragraph 22—

(i) could reasonably be expected to be inferred by the officer of Revenue and Customs from information falling within paragraphs (a) or (b) above, or

(ii) are notified in writing to an officer of Revenue and Customs by the responsible member or another person acting on that person's behalf.

(5) No discovery assessment may be made if—

(a) the situation mentioned sub-paragraph (1) of paragraph 22 is attributable to a mistake in the return as to the basis on which the tax liability ought to have been calculated, and

(b) the return was in fact made on the basis or in accordance with the practice generally prevailing at the time it was made.

Time limits for assessments

24. (1) The general rule is that no assessment may be made more than 4 years after the end of the accounting period to which it relates.

(2) An assessment in a case involving a loss of tax brought about carelessly by a member of the group (or a person acting on their behalf) may be made at any time not more than 6 years after the end of the accounting period to which it relates.

(3) An assessment in a case involving a loss of tax—

(a) brought about deliberately by a member of the group (or a person acting on their behalf), or

(b) attributable to a failure by the responsible member to comply with an obligation under section 15,

may be made at any time not more than 20 years after the end of the accounting period to which it relates.

Assessment procedure

25. (1) Notice of an assessment must be served on the responsible member.

(2) The notice must state—

(a) the tax due,

(b) the date on which the notice is issued, and

(c) the time within which any appeal against the assessment must be made.

(3) After notice of the assessment has been served, the assessment may not be altered except in accordance with the express provisions of this Part 7 of this Schedule.

PART 7
APPEALS AGAINST HMRC DECISIONS ON TAX

Right of appeal

26. (1) An appeal may be brought against—

(a) an amendment of a DST return under paragraph 11 (amendment during enquiry to prevent loss of tax);

(b) a conclusion stated or amendment made by a closure notice (see paragraph 17);

(c) an HMRC determination under paragraph 19 (determination of tax chargeable if no return delivered);

(d) a discovery assessment (see paragraph 22).

(2) Any such appeal is to be brought by the responsible member ("the appellant").

(3) If an appeal under sub-paragraph (1)(a) against an amendment of a self assessment is made while an enquiry is in progress none of the steps mentioned in paragraph 29(2)(a) to (c) may be taken in relation to the appeal until the enquiry is completed.

Notice of appeal

27. (1) Notice of appeal under paragraph 26 must be given—

(a) in writing,

(b) within 30 days after the specified date,

(c) to HMRC.

(2) In sub-paragraph (1) "specified date" means—

(a) in relation to an appeal under paragraph 26(1)(a), the date on which the notice of amendment was issued;

(b) in relation to an appeal under paragraph 26(1)(b), the date on which the closure notice was issued;

(c) in relation to an appeal under paragraph 26(1)(c), the date on which the HMRC determination was issued;

(d) in relation to an appeal under paragraph 26(1)(d), the date on which the notice of assessment was issued.

(3) The notice of appeal must specify the grounds of appeal.

Late notice of appeal

28. (1) This paragraph applies in a case where—

(a) notice of appeal may be given to HMRC under this Schedule, but

(b) no notice is given before the relevant time limit.

(2) Notice may be given after the relevant time limit if—

(a) HMRC agree, or

(b) where HMRC do not agree, the tribunal gives permission.

(3) HMRC must agree to notice being given after the relevant time limit if the appellant has requested in writing that HMRC do so and HMRC are satisfied—

(a) that there was reasonable excuse for not giving the notice before the relevant time limit, and

(b) that the request has been made without unreasonable delay.

(4) If a request of the kind mentioned in sub-paragraph (3) is made, HMRC must notify the appellant whether or not HMRC agree to the request.

(5) In this paragraph "relevant time limit", in relation to notice of appeal, means the time before which the notice must be given (disregarding this paragraph).

Steps that may be taken following notice of appeal

29. (1) This paragraph applies if notice of appeal has been given to HMRC.

(2) In such a case—

(a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see paragraph 30),

(b) HMRC may notify the appellant of an offer to review the matter in question (see paragraph 31), or

(c) the appellant may notify the appeal to the tribunal.

(3) This paragraph does not prevent the matter in question from being dealt with in accordance with paragraph 37(1) and (2) (settling of appeals by agreement).

Right of appellant to require review

30. (1) If the appellant notifies HMRC that it requires them to review the matter in question, HMRC must—

(a) notify the appellant of HMRC's view of the matter in question within the relevant period, and

(b) review the matter in question in accordance with paragraph 32.

(2) Sub-paragraph (1) does not apply if—

(a) the appellant has already given a notification under this paragraph in relation to the matter in question,

(b) HMRC have given a notification under paragraph 33 in relation to the matter in question, or (c) the appellant has notified the appeal to the tribunal.

(3) In this paragraph "the relevant period" means—

(a) the period of 30 days beginning with the day on which HMRC receive the notification from the appellant, or

(b) such longer period as is reasonable.

Offer of review by HMRC

31. (1) Sub-paragraphs (2) to (5) apply if HMRC notify the appellant of an offer to review the matter in question.

(2) The notification must include a statement of HMRC's view of the matter in question.

(3) If the appellant notifies HMRC within the acceptance period that it accepts the offer, HMRC must review the matter in question in accordance with paragraph 32 (nature of review).

(4) If the appellant does not accept the offer in accordance with sub-paragraph (3)—

(a) HMRC's view of the matter in question is treated as if it were contained in a settlement agreement (see paragraph 37(1)); but

(b) paragraph 37(3) (right to withdraw from agreement) does not apply in relation to that notional agreement.

(5) Sub-paragraph (4) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal.

(See paragraph 35 for the circumstances in which the appellant may do so after accepting HMRC's offer of a review).

(6) HMRC may not take the action mentioned in sub-paragraph (1) at any time if before that time—

(a) HMRC have given a notification under this paragraph in relation to the matter in question,

(b) the appellant has given a notification under paragraph 30 in relation to the matter in question, or

(c) the appellant has notified the appeal to the tribunal.

(7) In this paragraph "acceptance period" means the period of 30 days beginning with the date of the document by which HMRC notify the appellant of the offer to review the matter in question.

Nature of review

32. (1) This paragraph applies if HMRC are required by paragraph 30 or 31 to review the matter in question.

(2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.

(3) For the purpose of sub-paragraph (2), HMRC must, in particular, have regard to steps taken before the beginning of the review—

(a) by HMRC in deciding the matter in question, and

(b) by any person in seeking to resolve disagreement about the matter in question.

(4) The review must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them.

(5) The review may conclude that HMRC's view of the matter in question is to be—

(a) upheld,

(b) varied, or

(c) cancelled.

(6) HMRC must notify the appellant of the conclusions of the review and their reasoning within—

(a) the period of 45 days beginning with the relevant day, or

(b) such other period as may be agreed.

(7) In sub-paragraph (6) "relevant day" means—

(a) in a case where the appellant required the review, the day when HMRC notified the appellant of HMRC's view of the matter in question,

(b) in a case where HMRC offered the review, the day when HMRC received notification of the appellant's acceptance of the offer.

(8) If HMRC do not give notice of the conclusions of the review within the period specified in sub-paragraph (6), the review is treated as having concluded that HMRC's view of the matter in question is upheld.

(9) If sub-paragraph (8) applies, HMRC must notify the appellant of the conclusions which the review is treated as having reached.

Effect of conclusions of review

33. (1) If HMRC give notice of the conclusions of a review (see paragraph 32)—

(a) the conclusions are to be treated as if they were contained in a settlement agreement (see paragraph 37(1)), but

(b) paragraph 37(3) (withdrawal from agreement) does not apply in relation to that notional agreement.

(2) Sub-paragraph (1) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal (see paragraphs 34 and 35).

Notifying appeal to tribunal after appellant has required review

34. (1) Where HMRC have notified an appellant under paragraph 30(1)(a) of their view of a matter to which an appeal under paragraph 26 relates, the appellant—

(a) may not notify the appeal to the tribunal before the beginning of the post-review period;

(b) may notify the appeal to the tribunal after the end of that period only if the tribunal gives permission.

(2) Except where sub-paragraph (3) applies, the post-review period is the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with paragraph 32(6).

(3) If the period specified in paragraph 32(6) ends without HMRC having given notice of the conclusions of the review, the post-review period is the period that—

(a) begins with the day following the last day of the period specified in paragraph 32(6), and

(b) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with paragraph 32(9).

Notifying appeal to tribunal after HMRC have offered review

35. (1) Where HMRC have offered to review the matter to which a notice of an appeal under paragraph 26 relates, the right of the appellant at any time to notify the appeal to the tribunal depends on whether or not the appellant has accepted the offer at that time.

(2) If the appellant has accepted the offer, the appellant—

(a) may not notify the appeal to the tribunal before the beginning of the post-review period;

(b) may notify the appeal to the tribunal after the end of that period only if the tribunal gives permission.

(3) In this paragraph "post-review period" has the same meaning as in paragraph 34.

Interpretation of paragraphs 29 to 35

36. (1) In paragraphs 29 to 35—

(a) "matter in question" means the matter to which an appeal relates;

(b) a reference to a notification is to a notification in writing.

(2) In paragraphs 29 to 35, a reference to the appellant includes a person acting on behalf of the appellant except in relation to—

(a) notification of HMRC's view under paragraph 30(1)(a),

(b) notification by HMRC of an offer of review (and of their view of the matter) under paragraph 31,

(c) notification of the conclusions of a review under paragraph 32(6) or (9).

(3) But if a notification falling within any of the paragraphs of sub-paragraph (2) is given to the appellant, a copy of the notification may also be given to a person acting on behalf of the appellant.

Settling of appeals by agreement

37. (1) In relation to an appeal of which notice has been given under paragraph 26, "settlement agreement" means an agreement in writing between the appellant and an officer of Revenue and Customs that is—

(a) entered into before the appeal is determined, and

(b) to the effect that the decision appealed against should be upheld without variation, varied in a particular manner or discharged or cancelled.

(2) Where a settlement agreement is entered into in relation to an appeal, the consequences are to be the same (for all purposes) as if, at the time the agreement was entered into, the tribunal had decided the appeal and had upheld the decision without variation, varied it in that manner or discharged or cancelled it, as the case may be.

(3) Sub-paragraph (2) does not apply if, within 30 days beginning with the date on which the settlement agreement was entered into, the appellant gives notice in writing to HMRC that it wishes to withdraw from the agreement.

(4) Sub-paragraphs (1) to (3) have effect as if, at the date of the appellant's notification, the appellant and an officer of Revenue and Customs had agreed that the decision under appeal should be upheld without variation.

Assessments and self-assessments

38. (1) This paragraph applies where an appeal under paragraph 26 has been notified to the tribunal.

(2) If the tribunal decides that the appellant is overcharged by a self-assessment or any other assessment, the assessment must be reduced accordingly, but otherwise the assessment is to stand good.

(3) If it appears to the tribunal that the appellant is undercharged to tax by a self-assessment or any other assessment, the assessment must be increased accordingly.

Tribunal determinations

39. The determination of the tribunal in relation to any proceedings under this Part of this Schedule is to be final and conclusive except as otherwise provided in—

(a) sections 9 to 14 of the Tribunals, Courts and Enforcement Act 2007, or

(b) this Part of this Act.

Payment of tax where appeal has been determined

40. (1) Where a party to an appeal to the tribunal under paragraph 26 makes a further appeal, tax is to be payable or repayable in accordance with the determination of the tribunal or court (as the case may be), even though the further appeal is pending.

(2) But if the amount charged by the assessment is altered by the order or judgment of the Upper Tribunal or court, then—

(a) if too much tax has been paid, the amount overpaid must be refunded, with any interest allowed by the order or judgment, and

(b) if too little tax has been charged, the amount undercharged is due and payable at the end of the 30 days beginning with the date on which HMRC issue to the other party a notice of the total amount payable in accordance with the order or judgment.

SCHEDULE 2 **Section 27**

DST PAYMENT NOTICES

Introduction

1. (1) This Schedule applies where a payment notice has been given to a person ("the recipient").

(2) In this Schedule—

"**DST liability**", "**payment notice**" and "**relevant person**" have the same meaning as in section 27;

"**relevant liability**" means any DST liability in relation to the group for the accounting period.

Payment notice: effect

2. (1) For the purposes of the recovery from the recipient of any unpaid digital services tax, penalty or interest (including interest accruing after the date of the payment notice) the recipient is treated as if—

(a) any relevant liability of a person other than the recipient were a liability of the recipient ("the deemed liability"),

(b) the deemed liability became due and payable when the relevant liability became due and payable, and

(c) any payments made in respect of the relevant liability were made in respect of the deemed liability.

(2) Nothing in this paragraph gives the recipient a right to appeal against any assessment, determination or other decision giving rise to a relevant liability (or against the deemed liability).

Payment notice: appeals

3. (1) The recipient may appeal against the notice, within the period of 30 days beginning with the date on which it is given, on the ground that the person is not a relevant person.

(2) Where an appeal is made, anything required by the notice to be paid is due and payable as if there had been no appeal.

Payment notices: effect of making payment etc

4. (1) If the recipient pays any amount in pursuance of the notice the recipient may recover that amount from the taxpayer.

(2) In calculating the recipient's income, profits or losses for any tax purposes—

(a) a payment in pursuance of the notice is not allowed as a deduction, and

(b) the reimbursement of any such payment is not regarded as a receipt.

(3) Any amount paid by the recipient in pursuance of the notice is to be taken into account in calculating—

(a) the amount unpaid, and

(b) the amount due by virtue of any other payment notice relating to the amount unpaid.

(4) Similarly, any payment by the taxpayer of any of the amount unpaid is to be taken into account in calculating the amount due by virtue of the payment notice (or by virtue of any other payment notice relating to the amount unpaid).

SCHEDULE 3

DIGITAL SERVICES TAX: MINOR AND CONSEQUENTIAL AMENDMENTS **Section 30**

FA 1989

1. (1) Section 178(2) of FA 1989 (setting of interest rates) is amended as follows.

(2) Omit the "and" at the end of paragraph (u).

(3) After paragraph (v) insert—

"(w) sections 28 and 29 of the Finance Act 2020."

FA 2007

2. (1) Schedule 24 to FA 2007 (penalties for errors) is amended as follows.

(2) In paragraph 1, in the table after the entry relating to accounts in connection with ascertaining liability to corporation tax insert—

"Digital services tax	DST return under paragraph 2 of Schedule 1 to FA 2020."

FA 2008

3. FA 2008 is amended as follows.

4. (1) Schedule 36 (information and inspection powers) is amended as follows.

(2) In paragraph 63(1) after paragraph (cb) insert—

"(cc) digital services tax,".

5. (1) Schedule 41 (penalties for failure to notify etc) is amended as follows.

(2) In paragraph 1, in the table after the entry relating to diverted profits tax insert—

"Digital services tax	Obligation under section 15 of FA 2020 (obligation to notify HMRC when threshold conditions for digital services tax are met)."

(3) In paragraph 7 after sub-paragraph (4A) insert—

"(4B) In the case of a relevant obligation relating to digital services tax and an accounting period, the potential lost revenue is so much of any digital services tax to which P is liable in respect of the 35

 accounting period as by reason of the failure is unpaid 12 months after the end of the accounting period."

2. List of SVTDG Members

10x Genomics, Inc.
Accenture
Activision Blizzard
Adobe
Advanced Micro Devices, Inc
Agilent Technologies, Inc.
Aimmune Therapuetics
Airbnb, Inc.
Align Technology, Inc.
Alphabet Inc.
Amazon
Analog Devices
Ancestry
Apple
Applied Materials
Aptiv
Arista Networks Inc.
Atlassian
Auth0, Inc.
Autodesk
Bio-Rad Laboratories
BMC
Broadcom Inc.
Cadence Design Systems, Inc.
Chegg
Cirrus Logic
Cisco Systems, Inc.
Confluent
CrowdStrike Holdings, Inc.
Cypress Semiconductor
Dell
Dolby Laboratories, Inc.
Dropbox, Inc.
eBay
Electronic Arts
Expedia Group, Inc.
Facebook
FireEye
Fitbit, Inc.
Flex
Fortinet
Genentech
Genesys
Getaround
Gigamon Inc.
Gilead Sciences, Inc.
GLOBALFOUNDRIES U.S. Inc.
GlobalLogic
GoPro Inc.
Hewlett-Packard Enterprise
HP Inc.
Indeed.com
Informatica
Ingram Micro
Intel
Intuit Inc.
Intuitive Surgical
Jazz Pharmaceuticals
Keysight Technologies, Inc.
KLA
Kraken
Lam Research
LiveRamp
Marvell
Maxim Integrated
Mentor Graphics
Microsoft
NetApp, Inc
Netflix
NortonLifeLock
NVIDIA Corporation
Oracle
Palo Alto Networks, Inc.
PayPal
Pure Storage Inc
Qualcomm
RingCentral
Ripple Labs, Inc.
Robinhood
Rubrik
Salesforce
Seagate Technology
ServiceNow
Snap Inc.
Snowflake
Splunk
Stripe
SurveyMonkey
Synopsys, Inc.
The Cooper Companies
The Walt Disney Company
TiVo

Trimble Inc.
Twitter
Uber
Unity Technologies
Velodyne Lidar Inc.
Verifone
Veritas Technologies
Visa
VMware
Western Digital
Workday, Inc.
Xilinx, Inc.
Yelp
Zoom Video Communications, Inc.

3. DSTs and Income Tax Treaties

DSTs as "Covered Taxes" under Tax Treaties

The language of Article 2 in the U.S. Model and the OECD Model as relevant for this issue is identical.[156]

The Technical Explanation to the U.S. Model states that the U.S. Model's Article 2 is based on the OECD Model's Article 2.[157] There is no other relevant guidance under U.S. Model's Technical Explanation and no relevant U.S. cases or rulings. Accordingly, this discussion focuses on the OECD Model, its Commentary and historical works.

OECD Model Tax Convention	United States Model Income Tax Convention
ARTICLE 2 TAXES COVERED 1. This Convention shall apply to taxes on income and on capital imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied. 2. There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation. 3. The existing taxes to which the Convention shall apply are in particular: a) (in State A): ..... b) (in State B): ..... 4. The Convention shall apply also to any identical or substantially similar taxes that are imposed after the date or signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any	ARTICLE 2 TAXES COVERED 1. This Convention shall apply to taxes on income imposed on behalf of a Contracting State irrespective of the manner in which they are levied. 2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of property. 3. The existing taxes to which this Convention shall apply are: a) in the case of _____: b) in the case of the United States: the Federal income taxes imposed by the Internal Revenue Code (which do not include social security and unemployment taxes) and the Federal taxes imposed on the investment income of foreign private foundations. 4. This Convention also shall apply to any identical or substantially similar taxes that are imposed after the date of signature of this Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any

[156]The OECD Model Article 2(1) applies more broadly to "taxes on income and on capital" than that of the U.S. model, which applies only to income. Article 2(2) of the U.S. Model similarly is limited to "income". Furthermore, the US Model neither refers to "movable and immovable" property, nor applies to "taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation", unlike the OECD Model.

[157] Technical Explanation, United States Model Income Tax Convention (2006).

significant changes that have been made in their taxation laws.	significant changes that have been made in their taxation laws or other laws that relate to the application of this Convention.

(a) MTC Article 2 Text

MTC Article 2(1) defines the scope of the MTC, stating that the treaty applies to "taxes on income and on capital" that are "imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied." Critically, Article 2(2) states that "taxes on income and capital" includes "all taxes imposed on total income, on total capital, or on elements of income or of capital,…." Article 2(3) of the MTC provides a non-exhaustive[158] list of taxes covered for each country in force at the time the countries signed the treaty. Article 2(4) is closely connected with Article 2(3) in that Article 2(4) prevents the treaty from becoming obsolete if one or both countries make changes to their respective tax laws that could affect the taxes covered by the treaty. In particular, Article 2(4) provides that, in addition to those taxes specifically enumerated in Article 2(3), the treaty shall apply to all "identical or substantially similar taxes imposed after the date of signature of the Convention."

(b) The Treaty Commentary

The OECD has developed a Commentary on the OECD Model which it recommends that its Member States follow in the application of their tax treaties based on the OECD Model text.[159] The Commentary on Article 2 of the OECD Model supports the "plain meaning" interpretation of Article 2(2) that a DST is a tax on "income or elements of income".

First, the Commentary specifically notes that the OECD Model has avoided usage of the "far too imprecise" term "direct" taxes, in favor of "taxes on income," which suggests that characterization of the DST for other purposes as a "direct" or "indirect" tax is irrelevant to whether it constitutes an "income" tax for tax treaty purposes.[160] Instead, the Commentary repeats the treaty text that the concept of a "tax on income" includes "taxes on total income and on elements of income."[161] Accordingly, the fact that the DST is imposed on receipts from only certain categories of digital activities could simply mean that it is a tax on "elements" of income, which allows it to fall within the definition of covered taxes. One of the arguments the

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[158] The non-exhaustive nature of MTC Article 2(3) is evidenced by its inclusion of the words "in particular."

[159] *See* OECD, *Recommendation of the OECD Council Concerning the Model Tax Convention on Income and on Capital*, C(97)195/FINAL, available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0292. National courts have given the OECD Commentary different levels of precedential weight. This letter does not address those variances in the various relevant jurisdictions.

[160] OECD (2017), *Model Tax on Income and on Capital: Condensed Version 2017*, OECD Publishing, Art. 2 Commentary para 2. Thus, for example, the fact that the French Senate's Finance Committee released a report in May 2019 on the French DST with a section title that reads "An indirect tax on the turnover of the enterprises for the provision of in-scope digital services connected to France," FRENCH SENATE, FINANCE COMMITTEE, Report No. 496, at 46 (May 15, 2019), available in the original French at http://www.senat.fr/rap/l18-496/l18-4961.pdf, would not mean that the DST should not be considered a "tax on income."

[161] Commentary on Article 2 of the OECD Model, para. 3.

EC made as to why the 2018 EC DST should not be considered a tax on income comparable to withholding taxes is that it is applied to a base that is narrower than the general corporate tax base (i.e. because it applies only to revenues from advertising, the provision of an online platform linking users, and the sale or transfer of data).[162] To the extent, however, that a treaty included OECD Model language, including the definition found in Article 2(2), we struggle to see how the breadth (or narrowness) of a tax's base would remove the tax from the definition of a "tax on income", which includes a tax on an element of income.

Second, the Commentary states that the "method of levying the tax is equally immaterial: by direct assessment or by deduction at the source, in the form of surtaxes or surcharges, or as additional taxes".[163] It is worth noting that taxes levied on a gross-receipts tax base are frequently covered taxes under tax treaties. The distributive articles of most tax treaties, such as Articles 10 (Dividends), 11 (Interest), and 12 (Royalties), place limitations on the gross basis final withholding taxes that countries may impose on those categories of income, on the clear understanding that those taxes are covered taxes. This suggests that the fact that the DST is imposed on gross revenues from covered activities does not disqualify it as a tax on income for tax treaty purposes. This feature of the DST is comparable to gross basis taxes many countries impose on various categories of income (e.g. royalties, technical service fees, etc.) which are routinely recognized as income taxes under tax treaties. Commentators are increasingly noting that the same treatment should apply to gross basis taxes on revenues from services or goods in similar circumstances, regardless of whether they are styled as "turnover" taxes or other taxes outside the normal income tax regime, since they are essentially similar to withholding taxes on royalties or technical service fees.[164] Similarly, the Commentary's reference to "additional taxes" confirms that the status of the DST as a tax in addition to the regular corporate income tax of the taxing jurisdiction (for those businesses that are subject to both) also does not disqualify the DST as a tax on income.

Third, the Commentary points out that the listing of taxes at Article 2(3) of the OECD Model is not exhaustive and merely illustrates the principle reflected in the Article's more general definition of taxes on income, by reference to taxes in force at the time of signature:

> This paragraph lists the taxes in force at the time of signature of the Convention. The list is not exhaustive. It serves to illustrate the preceding paragraphs of the Article. In principle, however, it will be a complete list of taxes imposed in each State at the time of signature and covered by the Convention.[165]

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[162] *See, e.g.*, comments of Valère Moutarlier of the EC, reported in *Rethinking Withholding: An Analog Tax for a Digital Age?*, WORLDWIDE TAX DAILY, 2018 WTD 191-15 (Oct. 2, 2018). A similar argument was made by counsel to the U.K. Government with respect to the U.K. Diverted Profits Tax, saying that it was not a tax on "elements of income." *See* January 2015 presentation made at Oxford University's Saïd Business School, available at https://www.youtube.com/watch?v=XNntHAjmASA.

[163] Commentary on Article 2 of the OECD Model, para. 2.

[164] *See, e.g.*, Sagar Wagh, *The Taxation of Digital Transactions in India: The New Equalization Levy*, BULLETIN FOR INTERNATIONAL TAXATION, at 538 et seq., 550 (June 2016); Adolfo Martín Jiménez, *BEPS, the Digital(ized) Economy and the Taxation of Services and Royalties*, UNIVERSIDAD DE CADÍZ, TAX LAW DEPARTMENT WORKING PAPERS, at 28 (Jan. 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3215323.

[165] Commentary on Article 2 of the OECD Model, para. 6.

Finally, the Commentary confirms that Article 2(4) of the OECD Model ensures that taxes enacted after the signature of the treaty, which are identical or substantially similar to the listed taxes and which are imposed in addition to, or in place of, those taxes, will also be covered.[166]

(c) Historic OECD Works

Article 2 and its accompanying Commentary were included in the OECD's first published version of the OECD Model in 1963, and neither the OECD Model's Article 2 text nor the Commentary have materially changed in over 50 years. Although official historic works created during the drafting and adoption process of the OECD Model's text do not carry the same weight in treaty interpretation as the treaty text and commentaries themselves, "which are indisputably the primary resource in interpretation,"[167] these historic works do provide invaluable historical context when interpreting tax treaties.

There is an interesting history to the MTC's avoidance of the term "direct tax" which is relevant to the question of whether the DST could be a covered tax under Article 2. An early predecessor to the MTC, the League of Nations 1927 draft Model, referred specifically to "direct" taxes in its definition of covered taxes.[168] It has been suggested that the rationale for limiting tax treaty coverage to direct taxes was generally based on the notion that instances of double taxation involving indirect taxes (e.g. VAT, sales taxes, turnover taxes, customs duties) were relatively rare (i.e. because those taxes are generally imposed in the country of destination).[169] As early as 1928, however, there was some discussion of whether problems of double taxation relating to turnover taxes should be considered, at least where "the turnover tax was levied directly on the income of taxpayers" rather than on the movement of goods or capital.[170]

When discussions on a model tax convention resumed in the 1950's at the OEEC (the OECD's predecessor), the Delegate from Sweden to the Council of the OEEC urged a study of matters of double taxation involving indirect taxes, arguing that such a study would helpfully clarify the

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[166] Commentary on Article 2 of the OECD Model, para. 7.

[167] Patricia Brandstetter, "*Taxes Covered"*, p. 8 (2010) (e-book); *see also* K. Vogel, *Double Tax Treaties and Their Interpretation*, International Tax & Business Lawyer ("The 'preparatory work' within the meaning of Article 32 [of the Vienna Convention] refers to the materials of an individual treaty, not to the OECD Model or Commentary. In contrast, the preparatory work applicable to an actual agreement, the OECD Model and the Commentary are generally known and easily obtainable. No reason exists, therefore, to refer to these sources only as secondary means of interpretation, as is the case for 'preparatory work' within the meaning of Article 32.")

[168] LEAGUE OF NATIONS, *Draft of a Bilateral Convention for the Prevention of Double Taxation*, Article 1, Report presented by the Committee of Technical Experts on Double Taxation and Tax Evasion (Geneva 1927), available at https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-216-M-85-1927-II_EN.pdf.

[169] Patricia Brandstetter, *The Substantive Scope of Double Tax Treaties - a Study of Article 2 of the OECD Model Conventions,* Doctoral thesis, WU VIENNA UNIVERSITY OF ECONOMICS AND BUSINESS (2010), available at http://epub.wu.ac.at/2019/ (referencing LEAGUE OF NATIONS, *Double Taxation and Tax Evasion, Report and Resolutions*, Submitted by the Technical Experts to the Financial Committee of the League of Nations, Geneva, Note to Part III of the Report (Feb. 7, 1925)).

[170] Brandstetter, *The Substantive Scope of Double Tax Treaties - a Study of Article 2 of the OECD Model Conventions,* Doctoral thesis, WU VIENNA UNIVERSITY OF ECONOMICS AND BUSINESS (2010), available at http://epub.wu.ac.at/2019/ (citing LEAGUE OF NATIONS, FISCAL COMMITTEE, *Report to the Council on the Work of the Third Session of the Committee*, held in Geneva from 29 May to 6 June 1931, C.415.M.171.1931.II.A, Chap. VII. (Double Taxation in regard to the Turnover Tax)).

situation, "as it would show where there was double taxation with regard to indirect taxes and in what cases certain incomes were subject to double taxation in that they were subject to direct taxation in one country and in another country … to an indirect tax."[171] The concern of the Swiss Delegate, as reported by the OEEC's Secretary-General in 1955, was that certain countries were using turnover taxes "to tax precisely those classes of income which are relieved from direct taxation by operation of international Conventions."[172] For example, if two States enter into a double tax convention, the scope of which is limited to direct taxes,

> …income from a sale or grant of incorporeal rights is taxed in the State in which the recipient of that income ins [sic] domiciled. If one of those States imposes a turnover tax on royalties paid by persons domiciled in its territory to grantors in the other State, this constitutes a case or [sic] double taxation since such royalties are subsequently charged in the other State to a direct tax on income. This second imposition of tax is in accordance with the provisions of the Convention. For its part, however, the imposition of an indirect tax at the source in the first state is not specifically contrary to the Convention, since the latter only applies to direct taxes. Nevertheless, to a large extent its [sic] negatives the intended effect of the Convention and leads to a form of double taxation which can only be avoided by a new agreement between the two States.[173]

A committee of technical experts began to examine this issue, and the OEEC's Secretary-General in early 1956 directed them to "make concrete proposals concerning the means of avoiding double taxation on transactions subject to turnover taxes in several member countries and of avoiding double taxation on turnover tax on services."[174] In October 1956, the OEEC's Working Party No. 3, which was composed of delegates from Italy and Switzerland and tasked with defining taxes on income and capital for purposes of the draft predecessor model to the OECD Model,[175] recommended moving away from the direct-indirect tax distinction when circumscribing the scope of a tax convention:

> Conventions applying to taxes on income and capital should…avoid the term "direct taxes"—already a controversial matter in internal law—and use instead the terms "taxes on income, imposed on total income or on the elements of income" and "tax on capital imposed annually on total capital or on the elements of capital."[176]

After this report, the OEEC, and later the OECD, have consistently recommended that taxes be defined in terms of taxes on income and elements of income, rather than direct or indirect taxes. In other words, one can trace the choice of language appearing in the current U.S. and OECD Model Tax Treaties (i.e. "taxes on income," rather than "direct taxes") specifically to the

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[171] OEEC, COUNCIL, *Double Taxation and Tax Evasion*, C/M(55)2 (Prov.), at 21–22, cited at Brandstetter, *supra*, at 55.

[172] OEEC, COUNCIL, *Further Note From the Swiss Delegation Concerning Double Taxation in Relation to Indirect Taxes,* Secretary-General, C(55)88 (Apr. 19, 1955).

[173] *Id*.

[174] OEEC, Secretary-General, *Fiscal Committee: Organisation of the Work of the Committee*, FC(56)1 (May 16, 1956).

[175] *See* OEEC, *Fiscal Committee: List of Working Parties*, TFD/FC/2 (May 24, 1956).

[176] OEEC, *Working Party No. 3 of the Fiscal Committee (Italy-Switzerland): Report on the Listing and Definition of Taxes on Income and Capital (Including Taxes on Estates and Inheritances) Which Should be Covered by Double Taxation Agreements*, FC/WP3(56)1 (Oct. 16, 1956).

desire to ensure that gross basis turnover-type taxes levied directly on the income of taxpayers, as in the case of the DST, would be covered by tax treaties, even if they were otherwise considered "indirect" taxes.

(d) Analysis and Conclusion

In the absence of contrary domestic authority, we believe that a DST should be treated as a covered tax under any treaty which contains text conforming to or substantially similar to the OECD Model Article 2(2) inclusion of taxes on "total income or elements of income". There is no doubt that the DST is imposed on business profits of the affected taxpayers. Even if the tax is imposed on only certain taxpayers, and on certain types of income, that is no reason to conclude that the tax is anything other than a tax on "total income or elements of income". Statements by government representatives that they intend that the tax not be a covered tax under the treaty should have no significance; if the economic elements of the tax are such that it is a tax on income or elements of income, the tax should be regarded as a "covered tax" and the treaty should apply.

Below, please find a chart of the jurisdictions with Covered DSTs reproducing the relevant Taxes Covered Article:

Country	**Relevant Treaty**	**Taxes Covered Article**
Austria	Austria-United States 1996 Income Tax Convention and Notes, Article 2	1. This Convention shall apply to taxes on income imposed on behalf of a Contracting State. 2. The existing taxes to which this Convention shall apply are: a) In the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding social security taxes); b) In Austria: (i) die Einkommensteuer (the income tax); and (ii) die Koerperschaftsteuer (the corporation tax). 3. The Convention shall apply also to any identical or substantially similar taxes which are imposed by a Contracting State after the date of signature of this Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws and shall notify each other of any official published material concerning the application of this Convention, including explanations, regulations, rulings, or judicial decisions. 4. For the purpose of Article 23 (Non-Discrimination), this Convention shall also apply to taxes of every kind and description imposed by a Contracting State or a political subdivision or local authority thereof. For the purpose of paragraphs 1 to 5 of Article 25 (Exchange of Information and Administrative Assistance), this Convention shall also apply to taxes of every kind imposed by a Contracting State.
Brazil	*No Treaty*	*No Treaty*

Czech Republic	Czech Republic-United States 1993 Income and Capital Tax Convention, Article 2	1. The existing taxes to which this Convention shall apply are: a) in the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding the accumulated earnings tax, the personal holding company tax, and social security taxes), and the excise taxes imposed with respect to the investment income of private foundations (hereafter referred to as "U.S. tax"); b) in the Czech Republic: the income taxes imposed by the income tax law and the tax on immovable property (real property tax) (hereinafter referred to as "Czech tax"). 2. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws and of any official published material concerning the application of the Convention, including explanations, regulations, rulings, or judicial decisions
India	India-United States 1989 Income Tax Convention, Article 2	1. The existing taxes to which this Convention shall apply are: (a) in the United States, the Federal income taxes imposed by the Internal Revenue Code (but excluding the accumulated earnings tax, the personal holding company tax, and social security taxes), and the excise taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations (hereinafter referred to as "United States tax"); provided, however, the Convention shall apply to the excise taxes imposed on insurance premiums paid to foreign insurers only to the extent that the risks covered by such premiums are not reinsured with a person not entitled to exemption from such taxes under this or any other Convention which applies to these taxes; and (b) in India: (i) the income tax including any surcharge thereon, but excluding income tax on undistributed income of companies, imposed under the Income-tax Act; and (ii) the surtax (hereinafter referred to as "Indian tax"). Taxes referred to in (a) and (b) above shall not include any amount payable in respect of any default or omission in relation to the above taxes or which represent a penalty imposed relating to those taxes. 2. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The

		competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws and of any official published material concerning the application of the Convention.
Italy	Italy-United States 1999 Income Tax Convention and Final Protocol, Article 2	1. This Convention shall apply to taxes on income imposed on behalf of a Contracting State. 2. The existing taxes to which this Convention shall apply are: (a) in the case of the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding social security taxes), and the Federal excise taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations (hereinafter referred to as "United States tax"); (b) in the case of Italy: (i) the individual income tax (l'imposta sul reddito delle persone fisiche); (ii) the corporation income tax (l'imposta sul reddito delle persone giuridiche); and (iii) the regional tax on productive activities (l'imposta regionale sulle attivita produttive), but only that portion of such tax that is considered to be an income tax pursuant to paragraph 2(c) of Article 23 (Relief from Double Taxation); even if they are collected by withholding taxes at the source (hereinafter referred to as "Italian tax"). 3. The Convention shall apply also to any identical or substantially similar taxes which are imposed by a Contracting State after the date of signature of this Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws and shall transmit to each other any significant official published material concerning the application of this Convention, including explanations, regulations, rulings, or judicial decisions.
Spain	Spain-United States 1990 Income Tax Convention and Final Protocol	1. The existing taxes to which this Convention shall apply are: (a) In Spain: (i) the Income Tax on Individuals (el Impuesto sobre la Renta de las Personas Fisicas), and (ii) the Corporation Tax (el Impuesto sobre Sociedades); (b) in the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding social security contributions), and the excise taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations. The Convention shall, however, apply to the excise taxes imposed on insurance premiums paid to foreign insurers only to the extent that the risks covered by such premiums are not reinsured with a person not entitled to exemption from such taxes

		under this or any other Convention which applies to these taxes. 2. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws and of any official published material concerning the application of the Convention
Turkey	Turkey – United States 1996 Income Tax Agreement	1. This Agreement shall apply to taxes on income imposed on behalf of each Contracting State, irrespective of the manner in which they are levied. 2. The existing taxes to which the Agreement shall apply are, in particular: a) in the case of Turkey: i) the income tax (Gelir Vergisi); ii) the corporation tax (Kurumlar Vergisi); iii) the levy imposed on the income tax and the corporation tax (hereinafter referred to as "Turkish Tax"); b) in the case of the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding the accumulated earnings tax, the personal holding company tax and social security taxes), and the excise taxes imposed with respect to private foundations (hereinafter referred to as "United States Tax"). 3. The Agreement shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Agreement in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws
UK	United Kingdom-United States 2001 Income and Capital Gains Tax Convention, Article 2	1. This Convention shall apply to taxes on income and on capital gains imposed on behalf of a Contracting State irrespective of the manner in which they are levied. 2. There shall be regarded as taxes on income and on capital gains all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of property. 3. The existing taxes to which this Convention shall apply are: a) in the case of the United States: (i) the Federal income taxes imposed by the Internal Revenue Code (but excluding social security taxes); and (ii) the Federal excise taxes imposed on insurance policies issued by foreign insurers and with respect to private foundations;

		b) in the case of the United Kingdom: (i) the income tax; (ii) the capital gains tax; (iii) the corporation tax; and (iv) the petroleum revenue tax. 4. This Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of this Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any changes that have been made in their respective taxation or other laws that significantly affect their obligations under this Convention.

For those treaties that include only text conforming to or substantially similar to OECD Model Article 2(3) and 2(4), the DST would be a covered tax if it is substantially similar or identical to a tax listed in MTC equivalent Article 2(3). All of the Covered DSTs are new taxes imposed in addition to the corporate income tax. There is little guidance in tax treaty jurisprudence as to when a new tax can be regarded as "substantially similar" to a general corporate income tax. We note, however, that the legislative intent in enacting or proposing a DST universally has been to extend the taxing jurisdiction's authority to tax the regular business income of the nonresident service provider that could be subject to the normal corporate income tax, except for the PE nexus limits. Some evidence exists that the rate of DST was calculated to approximate the amount of tax which would be imposed on net income had the nonresident provider been subject to net income taxation in the source country. For example, in a Report to the EU Parliament, Paul Tang explained a proposal to increase the proposed DST rate from 3% to 5% because it would better close the corporate income tax gap between digital and traditional firms:

> The objective of the DST is to close the gap between corporate taxation on digital firms and traditional firms and create a level playing field between them. When setting the rate for this revenue based tax, we therefore should assess the implied profit tax rate. Therefore we need to do two things; set the target rate and a realistic estimate of the profit margins. In its staff working document the European Commission claims that large multinational groups with a digital business model, using tax aggressive tax planning, are not paying any corporate income taxes. The average corporate income tax rate in the EU is 21.3% in 2018, which should therefore be the target for the implied rate of profits of the EU-wide DST. When it comes to the profit margin it is clear from the data available for public traded companies that large multinational groups with a digital business model tend to have a high profit margin. For example Google and Facebook, have a profit margin of up to 40%. When setting the rate of the DST, the assumed profit margin of 15% taken by the European Commission is too conservative. An assumed profit margin of 25% for large digital firms is more in line with reality. When applying these two

> metrics to the DST, we arrive to a rate of 5% on digital turnover in order to tax the implied profits with a 20% tax rate. (5/25 = 20%) [177]

Numerous government officials have stated that the reason a DST is necessary, is that while the targeted digital services suppliers may pay tax in their state of residence, the government of the taxing jurisdiction wishes to ensure that the in-scope providers pay more tax in the taxing state. DSTs, then, represent an effort to extend the taxing jurisdiction of the taxing state to reach business profits of nonresident digital services suppliers which, had the treaty nexus standards been met, would be taxed under the regular corporate income tax.

In many cases, taxes imposed on gross revenue exist which are universally acknowledged to be covered taxes. For example, under the U.S. treaty with India, India is allowed to impose on a limited basis its withholding tax on fees for technical services ("FTS"). Like the DST, that tax is imposed on certain narrowly defined business income items of nonresidents (which, in many cases, will also come within the scope of India's DST, requiring a coordination rule to determine which of the two taxes applies). Like the DST, the tax is imposed on gross revenue, not net income. Like the DST, the tax is imposed on certain income items which the Indian legislature, as a matter of tax policy, considers it important to tax, even though such items are not subject to direct corporate taxation through the normal PE nexus standards. Cases like this, where the tax is imposed solely on nonresidents, and the jurisdiction already imposes gross-based tax on other income types earned by nonresidents, presents a stronger case that the new tax is substantially similar to an existing tax.

Below, please find a chart showing EU Member countries not already represented by the Covered DST countries that have entered into tax treaties with the United States along with the relevant Taxes Covered article, as these countries would be relevant if an EU Directive were approved requiring all EU member states to impose a DST:

[177] Paul Tang, *Report on the proposal for a Council directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services*, Committee on Economic and Monetary Affairs (May 12, 2018).

Country	Relevant Treaty	Taxes Covered Article
Belgium	Belgium-United States 2006 Income Tax Convention and Final Protocol, Article 2	1. This Convention shall apply to taxes on income imposed on behalf of a Contracting State irrespective of the manner in which they are levied. 2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of property. 3. The existing taxes to which this Convention shall apply are: a) in the case of Belgium: i) the individual income tax; ii) the corporate income tax; iii) the income tax on legal entities; and iv) the income tax on non-residents; including the prepayments and the surcharges on these taxes and prepayments; b) in the case of the United States: i) the Federal income taxes imposed by the Internal Revenue Code (but excluding social security taxes); and ii) the Federal excise taxes imposed with respect to private foundations. 4. The Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any changes that have been made in their respective taxation or other laws that significantly affect their obligations under this Convention.
Bulgaria	Bulgaria-United States 2007 Income Tax Convention	1. This Convention shall apply to taxes on income imposed on behalf of a Contracting State irrespective of the manner in which they are levied. 2. There shall be regarded as taxes on income all taxes on total income, or on elements of income, including taxes on gains from the alienation of movable or immovable property, but excluding social security taxes. 3. The existing taxes to which this Convention shall apply are: a) in the case of Bulgaria: i) the personal income tax; and ii) the corporate income tax. b) in the case of the United States: the Federal income taxes imposed by the Internal Revenue
Cyprus	Cyprus-United States 1984 Income Tax	(1) The taxes which are the subject of this Convention are: (a) In the case of the United States, the Federal income taxes imposed by the Internal Revenue Code and the excise

	Convention, Article 1	taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations, but excluding the accumulated earnings tax, the personal holding company tax and the social security taxes (the United States tax). The excise tax imposed on insurance premiums paid to foreign insurers is covered, however, only to the extent that the foreign insurer does not reinsure such risks with a person not entitled to exemption from such tax under this or another convention. (b) In the case of Cyprus, the Income Tax, the Capital Gains Tax and the Special Contribution (the Cypriot Tax). (2) This Convention shall also apply to taxes substantially similar to those covered by paragraph (1) which are imposed in addition to, or in place of, existing taxes after the date of signature of this Convention. (3) For the purpose of Article 7 (Non-Discrimination), this Convention shall also apply to taxes of every kind imposed at the national, state, or local level. For the purpose of Article 28 (Exchange of Information), this Convention shall also apply to taxes of every kind imposed at the national level.
Denmark	Denmark-United States 1999 Income Tax Convention, Article 2	1. The existing taxes to which this Convention applies are: a) in the United States: (i) the Federal income taxes imposed by the Internal Revenue Code (but excluding social security taxes); and (ii) the Federal excise taxes imposed with respect to private foundations; b) in Denmark: (i) the income tax to the State (indkomstskatten til staten); (ii) the municipal income tax (den kommunale indkomstskat); (iii) the income tax to the county municipalities (den amtskommunale indkomstskat); and (iv) taxes imposed under the Hydrocarbon Tax Act (skatter i henhold til kulbrinteskatteloven). 2. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their respective taxation laws or other laws affecting their obligations under the

		Convention, and of any official published material concerning the application of this Convention, including explanations, regulations, rulings, or judicial decisions.
Estonia	Estonia-United States 1998 Income Tax Convention	1. The existing taxes to which the Convention shall apply are: a) in the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding the accumulated earnings tax, the personal holding company tax, and social security taxes), and the excise taxes imposed with respect to the investment income of private foundations (hereafter referred to as "United States tax"); b) in Estonia: the income tax (tulumaks) (but excluding the tax on insurance companies provided in paragraph 35 of the Estonian income tax law), and the local income tax (kohalik tulumaks), (hereafter referred to as "Estonian tax"). 2. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws or other laws affecting their obligations under the Convention, and of any official published material concerning the application of the Convention, including explanations, regulations, rulings, or judicial decisions.
Finland	Finland-United States 1989 Income and Capital Tax Convention, Article 2	1. The existing taxes to which this Convention shall apply are: a) in Finland: (i) the state income and capital tax; (ii) the communal tax; (iii) the church tax; and (iv) the tax withheld at source from non-residents' income; (hereinafter referred to as "Finnish tax"); b) in the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding the accumulated earnings tax, the personal holding company tax, and social security taxes), and the excise taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations (hereinafter referred to as "United States tax"). The Convention shall, however, apply to the excise taxes imposed on insurance premiums paid to

		foreign insurers only to the extent that the risks covered by such premiums are not reinsured with a person not entitled to the benefits of this or any other convention which provides exemption from such taxes. 2. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws and of any significant official published material concerning the application of the Convention, including explanations, regulations, rulings, or judicial decisions.
France	France-United States 1994 Income and Capital Tax Convention, Article 2	1. The taxes which are the subject of this Convention are: (a) in the case of the United States: (i) the Federal income taxes imposed by the Internal Revenue Code (but excluding social security taxes); and (ii) the excise taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations (hereinafter referred to as "United States tax"). The Convention, however, shall apply to the excise taxes imposed on insurance premiums paid to foreign insurers only to the extent that the risks covered by such premiums are not reinsured with a person not entitled to exemption from such taxes under this or any other income tax convention which applies to these taxes; (b) in the case of France, all taxes imposed on behalf of the State, irrespective of the manner in which they are levied, on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, as well as taxes on capital appreciation, in particular: (i) the income tax (l'impot sur le revenu); (ii) the company tax (l'impot sur les societes); (iii) the tax on salaries (la taxe sur les salaires) governed by the provisions of the Convention applicable, as the case may be, to business profits or to income from independent personal services; and (iv) the wealth tax (l'impot de solidarite sur la fortune) (hereinafter referred to as "French tax"). 2. The Convention shall apply also to any identical or substantially similar taxes that are imposed after the date or signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting

		States shall notify each other of any significant changes which have been made in their respective taxation laws and of any official published material concerning the application of the Convention, including explanations, regulations, rulings, or judicial decisions.
Germany	Germany-United States 1989 Income and Capital Tax Convention, Article 2	1. The existing taxes to which this Convention shall apply are: a) In the United States: aa) the federal income taxes imposed by the Internal Revenue Code (but excluding the accumulated earnings tax, the personal holding company tax, and social security taxes); and bb) the excise tax imposed on insurance premiums paid to foreign insurers (hereinafter referred to as "United States tax"). This Convention shall, however, apply to the excise tax imposed on insurance premiums paid to foreign insurers only to the extent that the risks covered by such premiums are not reinsured with a person not entitled to the benefits of this or any other convention that provides exemption from such tax. b) In the Federal Republic of Germany: aa) the income tax (Einkommensteuer); bb) the corporation tax (Koerperschaftsteuer); cc) the trade tax (Gewerbesteuer); and dd) the capital tax (Vermoegensteuer) (hereinafter referred to as "German tax"). 2. This Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of this Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their taxation laws.
Greece	Greece-United States 1950 Income Tax Convention, Article 1	(1) The taxes which are the subject of the prevent Convention are: a) In the case of the United States of America: the Federal income tax, included surtaxes (hereinafter referred to as United States tax). b) In the case of the Kingdom of Greece: the income tax, including the schedular or analytical tax, the complementary

		tax and the professional or business tax (hereinafter referred to as Greek tax). (2) The present Convention shall also apply to any other taxes of a substantially similar character imposed by either Contracting State subsequently to the date of signature of the present Convention.
Hungary	Hungary-United States 1979 Income Tax Convention / Pending Hungary-United States 2010 Income Tax Convention	<u>In Force</u> 1. This Convention shall apply to taxes on income imposed on behalf of each Contracting State. 2. The existing taxes to which this Convention shall apply are: a) In the case of the United States, the Federal income taxes imposed by the Internal Revenue Code and the excise taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations, but excluding the accumulated earnings tax and the personal holding company tax. b) In the case of the Hungarian People's Republic: i) The general income tax, ii) The income tax on intellectual activities, iii) The profit tax, iv) The profit tax on economic associations with foreign participation, v) The enterprises special tax, vi) The levy on dividends and profit distributions of commercial companies, vii) The profit tax on state-owned enterprises, and viii) The contribution to communal development, but only to the extent imposed in respect of income taxes covered by this Convention. 3. The Convention shall apply also to any identical or substantially similar taxes which are imposed by a Contracting State after the date of signature of this Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any changes which have been made in their respective taxation laws and shall notify each other of any official published material concerning the application of this Convention, including explanations, regulations, rulings, or judicial decisions. 4. For the purpose of Article 21 (Non-discrimination), this Convention shall also apply to taxes of every kind and

		description imposed by a Contracting State or a political subdivision or local authority thereof. For the purpose of Article 23 (Exchange of Information), this Convention shall also apply to taxes of every kind imposed by a Contracting State.
		Pending 1. This Convention shall apply to taxes on income imposed on behalf of a Contracting State irrespective of the manner in which they are levied. 2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of movable or immovable property (real property), and taxes on the total amounts of wages or salaries paid by enterprises, but excluding social security and unemployment taxes. 3. The existing taxes to which this Convention shall apply are: a) in the case of Hungary: i) the personal income tax; ii) the corporate tax; iii) the surtax; b) in the case of the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding social security and unemployment taxes), and the Federal excise taxes imposed with respect to private foundations. 4. This Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their taxation laws.
Ireland	Ireland-United States 1997 Income and Capital Gains Tax Convention, Article 2	1. The existing taxes to which this Convention shall apply are: a) in the United States: the Federal income taxes imposed by the Internal Revenue Code of 1986 (but excluding the accumulated earnings tax, the personal holding company tax and social security taxes), and the Federal excise taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations (hereinafter

		referred to as “United States tax”). The Convention shall, however, apply to the Federal excise taxes imposed on insurance premiums paid to foreign insurers only to the extent that the risks covered by such premiums are not reinsured with a person not entitled to the benefits of this or any other convention which provides exemption from these taxes; and b) in Ireland: the income tax, the corporation tax and the capital gains tax (hereinafter referred to as “Irish tax”) 2. This Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their respective taxation laws and of any official published material concerning the application of the Convention, including explanations, regulations, rulings, or judicial decisions.
Latvia	Latvia-United States 1998 Income Tax Convention, Article 2	1. The existing taxes to which this Convention shall apply are: a) in the United States: the Federal income taxes imposed by the Internal Revenue Code of 1986 (but excluding the accumulated earnings tax, the personal holding company tax and social security taxes), and the Federal excise taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations (hereinafter referred to as “United States tax”). The Convention shall, however, apply to the Federal excise taxes imposed on insurance premiums paid to foreign insurers only to the extent that the risks covered by such premiums are not reinsured with a person not entitled to the benefits of this or any other convention which provides exemption from these taxes; and b) in Ireland: the income tax, the corporation tax and the capital gains tax (hereinafter referred to as “Irish tax”) 2. This Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their respective taxation laws and of any official published material concerning the application of the Convention, including explanations, regulations, rulings, or judicial decisions.

Lithuania	Lithuania-United States 1998 Income Tax Convention, Article 2	1. The existing taxes to which the Convention shall apply are: a) in the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding the accumulated earnings tax, the personal holding company tax, and social security taxes), and the excise taxes imposed with respect to the investment income of private foundations (hereafter referred to as "United States tax"); b) in Lithuania: the tax on profits of legal persons (juridiniu asmenu pelno mokestis), and the tax on income of natural persons (fiziniu asmenu pajamu mokestis) (hereafter referred to as "Lithuanian tax"). 2. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws or other laws affecting their obligations under the Convention, and of any official published material concerning the application of the Convention, including explanations, regulations, rulings, or judicial decisions.
Luxembourg	Luxembourg-United States 1996 Income and Capital Tax Convention, Article 2	1. The existing taxes to which this Convention shall apply are: a) in the United States: (i) the Federal income taxes imposed by the Internal Revenue Code (but excluding social security taxes), and (ii) the Federal excise taxes imposed on insurance premiums paid to foreign insurers. The Convention shall, however, not apply to the excise taxes imposed on premiums paid to foreign insurers for reinsurance. The Convention shall apply to the excise taxes imposed on premiums paid to foreign insurers for insurance other than reinsurance only to the extent that the risks covered by such premiums are not reinsured with a person not entitled to exemption from such taxes under an income tax convention that applies to such taxes; b) in Luxembourg: (i) the income tax on individuals, including the surcharge thereon for the benefit of the employment fund (l'impot sur le revenu des personnes physiques, y compris la contribution au fonds pour l'emploi);

		(ii) the corporation tax, including the surcharge thereon for the benefit of the employment fund (l'impot sur le revenu des collectivites, y compris la contribution au fonds pour l'emploi); (iii) the tax on fees of directors of companies (l'impot special sur les tantiemes); (iv) the capital tax (l'impot sur la fortune); and (v) the communal trade tax (l'impot commercial communal). 2. The Convention shall also apply to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their respective taxation laws and of any official published material concerning the application of the Convention, including explanations, regulations, rulings, or judicial decisions.
Malta	Malta-United States 2008 Income Tax Convention	1. This Convention shall apply to taxes on income imposed on behalf of a Contracting State irrespective of the manner in which they are levied. 2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of property. 3. The existing taxes to which this Convention shall apply are: a) in the case of the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding social security and unemployment taxes), and the Federal excise taxes imposed with respect to private foundations; b) in the case of Malta: the income tax. 4. This Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any changes that have been made in their respective taxation or other laws that significantly affect their obligations under this Convention.
The Netherlands	Netherlands-United States 1992 Income Tax Convention, Article 2	1. The existing taxes to which this Convention shall apply are in particular: a) in the Netherlands: • de inkomstenbelasting (income tax),

		• de loonbelasting (wages tax), • de vennootschapsbelasting (company tax), including the government share in the net profits of the exploitation of natural resources levied pursuant to the Mining Act (Mijnbouwwet) hereinafter referred to as "profit share", • de dividendbelasting (dividend tax), (hereinafter referred to as "Netherlands tax") b) in the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding social security taxes), and the excise taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations (hereinafter referred to as "United States tax") The Convention shall, however, apply to the excise taxes imposed on insurance premiums paid to foreign insurers only to the extent that the risks covered by such premiums are not reinsured with a person not entitled to the benefits of this or any other convention which provides exemption from these taxes. 2. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the States shall notify each other of any substantial changes which have been made in their respective taxation laws.
Poland	Poland-United States 1974 Income Tax Convention and Notes / Pending Poland-United States 2013 Income Tax Convention	<u>In Force</u> (1) This Convention shall apply to taxes on income imposed by each Contracting State. (2) The taxes existing at present, to which the Convention applies, are: (a) In the case of the Polish People's Republic: (i) The income tax, (ii) The tax on salaries and wages, and (iii) The equalization tax (surtax), and (b) In the case of the United States of America, the Federal income taxes imposed by the Internal Revenue Code (other than employment taxes imposed by chapters 2 and 21). (3) The Convention shall also apply to any identical or substantially similar taxes which are subsequently imposed in addition to, or in place of, the existing taxes.

		(4) For the purpose of Article 21, this Convention shall also apply to taxes imposed at the national, state, or local level, subject to any limitation contained in paragraph (4) of Article 21. (5) The competent authorities of the Contracting States shall notify each other of any amendments of the tax laws referred to in paragraph (2) and of the adoption of any taxes referred to in paragraph (3) by transmitting the texts of any amendments or new statutes at least once a year.
		<u>Pending</u> 1. This Convention shall apply to taxes on income imposed by a Contracting State irrespective of the manner in which they are levied. 2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of property. 3. The existing taxes to which this Convention shall apply are: a) in the case of Poland: i) the personal income tax, and ii) the corporate income tax, (hereinafter referred to as "Polish tax"); b) in the case of the United States: i) the Federal income taxes imposed by the Internal Revenue Code (but excluding social security and unemployment taxes), and ii) the taxes imposed with respect to private foundations under sections 4940 through 4948 of the Internal Revenue Code, (hereinafter referred to as "United States tax"). 4. This Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their taxation laws.
Portugal	Portugal-United States 1994 Income Tax Convention	1. The existing taxes to which this Convention shall apply are: (a) in Portugal: (i) Personal income tax (Imposto sobre o Rendimento das Pessoas Singulares -- IRS);

	and Final Protocol, Article 2	(ii) Corporate income tax (Imposto sobre o Rendimento das Pessoas Colectivas -- IRC); and (iii) Local surtax on corporate income tax (Derrama), (hereinafter referred to as "Portuguese tax"). (b) in the United States: (i) the Federal income taxes imposed by the Internal Revenue Code (but excluding social security contributions); and (ii) the excise tax with respect to the investment income of private foundations under section 4940 of the Internal Revenue Code, as it may be amended from time to time without changing the general principle thereof, (hereinafter referred to as "United States tax"). 2. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting State shall notify each other of any significant changes that have been made in their respective taxation laws and of any official published material concerning the application of the Convention.
Romania	Romania-United States 1973 Income Tax Convention, Article 1	(1) The taxes which are the subject of this Convention are: (a) In the case of Romania, the income taxes imposed under Romanian law, in particular the income taxes imposed on: (i) wages, salaries, fees, copyrights, and income from any other source received by individuals; (ii) profits of mixed companies; (iii) enterprises other than mixed companies or state enterprises; (iv) agricultural activities; (v) rentals; and (vi) nonresidents. (b) In the case of the United States, the Federal income taxes imposed by the Internal Revenue Code (other than social insurance taxes imposed by chapters 2 and 21). (2) This Convention shall also apply to taxes substantially similar to those covered by paragraph (1) which are imposed in addition to, or in place of, existing taxes after the date of signature of this Convention. (3) For purposes of paragraph (5) of Article 7 (Business Profits), this Convention shall also apply to taxes other than

		income taxes imposed at the national level of a Contracting State on innsurance and reinsurance premiums paid to a resident of the other Contracting State. For the purpose of Article 22 (Nondiscrimination), this Convention shall also apply to taxes of every kind imposed at the national, state, or local level. (4) The competent authorities of the Contracting States shall notify each other of any amendments of the tax laws referred to in paragraph (1) and of the adoption of any taxes referred to in paragraph (2) by transmitting the texts of any amendments or new statutes at least once a year.
Slovakia	Slovakia-United States 1993 Income and Capital Tax Convention, Article 2	1. The existing taxes to which this Convention shall apply are: a) in the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding the accumulated earnings tax, the personal holding company tax, and social security taxes), and the excise taxes imposed with respect to the investment income of private foundations (hereafter referred to as "U.S. tax"); b) in Slovakia: the income taxes imposed by the income tax law, and the tax on immovable property (real property tax) (hereafter referred to as "Slovak tax"). 2. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws and of any official published material concerning the application of the Convention, including explanations, regulations, rulings, or judicial decisions.
Slovenia	Slovenia-United States 1999 Income and Capital Tax Convention, Article 2	1. The existing taxes to which this Convention shall apply are: a) in the United States: (i) the Federal income taxes imposed by the Internal Revenue Code (but excluding social security taxes); and (ii) the Federal excise taxes imposed with respect to private foundations; b) in Slovenia: (i) the tax on profits of legal persons;

		(ii) the tax on income of individuals, including wages and salaries, income from agricultural activities, income from business, capital gains and income from immovable and movable property; and (iii) the assets tax on banks and savings institutions. 2. The Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their respective taxation laws or other laws affecting their obligations under the Convention, and of any official published material concerning the application of the Convention, including explanations, regulations, rulings, or judicial decisions.
Sweden	Sweden-United States 1994 Income Tax Convention, Article 2	1. The existing taxes to which this Convention shall apply are a) in the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding the accumulated earnings tax, the personal holding company tax, and social security taxes), and the excise taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations. The Convention shall, however, apply to the excise taxes imposed on insurance premiums paid to foreign insurers only to the extent that the risks covered by such premiums are not reinsured with a person not entitled to the benefits of this or any other convention which exempts these taxes; and b) in Sweden: i) the national income tax; ii) the withholding tax on dividends; iii) the income tax on non-residents; iv) the income tax on non-resident artistes and athletes; v) for the purpose of paragraph 3 of this Article, the national capital tax; vi) the excise tax imposed on insurance premiums paid to foreign insurers; and vii) the municipal income tax. 2. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the taxes referred to above. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws and of any officially published material of substantial significance concerning the

		application of the Convention, including explanations, regulations, rulings, or judicial decisions. 3. The following persons shall be subject to the Swedish State capital tax only in respect of real property situated in Sweden and movable property attributable to a permanent establishment of such person in Sweden or to a fixed base available to such person in Sweden for the purpose of performing independent personal service; a) a resident of the United States, as determined under Article 4 (Residence), who is a citizen of the United States but not a citizen of Sweden; b) a resident of the United States, as determined under Article 4, whether or not a citizen of the United States, who has been such a resident for three successive years prior to the first taxable year for which the provisions of the Convention have effect, and for each taxable year thereafter; c) a citizen of the United States, who is not a citizen of Sweden, who temporarily visits Sweden for a period not exceeding two years, and who is, or immediately prior to such visit was, a resident of the United States, as determined under Article 4; d) an estate of a person described in subparagraph a), b) or c); or e) a company that is a resident of the United States, as determined under Article 4.