Bird & Bird & Digital Services Tax

Overview of the progress of implementation by EU Member States

For several years there have been efforts at international, EU and national levels to reform taxation to ensure that profits are taxed where economic value is created. Most recently this work has centred on and shifted further towards the digital economy, but it has its roots in the scrutiny of tax planning strategies used by multinationals that operate across multiple jurisdictions.

At an international level, work has revolved around the Organisation for Economic Co-operation and Development (OECD) which in 2013 launched its Base Erosion and Profit Shifting (BEPS) Action Plan with a process aimed at countering certain strategies used by multinationals to reduce their tax burden. On 9th October 2019 the OECD published its 'unified approach' for public consultation, with the aim of arriving at a consensus, so as to develop a solution for its final report to the G20 in November 2020 in Saudi Arabia.

At EU level, the European Commission has also been trying to address the tax strategies of multinationals through a proposed harmonised set of rules to tax companies rather than leaving it to individual EU Member States.

Despite attempts to reach an agreement, EU Member States have been unable to reach a compromise on their own proposals and the European Commission has since conceded that it will wait for progress at OECD level and revisit its proposals later in 2020 if no progress is made. The COVID-19 pandemic has also severely impacted this timetable.

This deadlock has led several EU Member States to introduce their own initiatives for national taxes on digital companies which would include 'sunset clauses' and expire if an agreement is reached at international or EU level. Such initiatives may potentially lead to double taxation and differing views of the transactions covered, and have also increased tensions at the global political level.

On 23 June 2020 Margrethe Vestager, the European Commission Executive Vice President, said that the EU will continue to press ahead with its own DST legislation, as it is unlikely that an anticipated global agreement will be reached in the next few months. This is in response to a letter dated 12 June 2020 whereby the US suspended its talks with a number of European countries whilst threatening retaliatory measures if those countries went ahead with their 'unilateral' digital service taxes. The talks were aimed at developing a coordinated multilateral agreement on how to tax digital companies globally. These talks had reached an 'impasse' according to Steven Mnuchin, the US Treasury secretary. Mr Mnuchin said that the US was unable to agree even on an interim basis, and would resume talks later on in the year to enable countries to focus on 'far more important matters', namely coronavirus, in the meantime as these discussions were a 'distraction'.

On 25 June, France, Spain, Italy and the UK responded to the US. In contrast to Ms Vestager, they offered to limit the scope of the proposed tax, conceding in a reply to Mr Mnuchin that they 'would considerably ease the task of achieving a consensus-based solution and make a political agreement within reach this year'. This includes a 'phased approach', initially limiting the levy to 'automated digital service' companies, and therefore potentially excluding the likes of Amazon and eBay where physical goods are bought and sold.

On 18 June 2020, the OECD addressed Mr Mnuchin's letter and urged all parties to remain 'engaged in the negotiation towards the goal of reaching a global solution by year end', citing the risks associated with an uncoordinated group of unilateral initiatives, including 'trade tensions' and potentially a 'trade war'.

The suspension of the talks follows an announcement on 2 June 2020 by the United States Trade Representative (USTR) that it would be launching investigations into digital taxes adopted or being considered by ten countries[1], citing discrimination against US companies and unreasonable tax policies. Further to this, on 10 July 2020, the USTR announced the intention to impose further tariffs on French

[1] USTR targets countries that have implemented DST legislation (Austria, India, Indonesia, Italy, Turkey, and the UK) as well as some that just proposal such tax (Brazil, Czech Republic, and Spain).

goods valued at $1.3 billion in response to France's digital services tax, amounting to 25% of additional duties on French imports such as cosmetics and handbags.[2]

The points under discussion between the EU and US are the two pillars that the OECD have proposed as a compromise. Pillar One focuses on profit allocation and nexus rules applicable to business profits in market/user jurisdictions where there is an 'active and sustained participation of a business in the economy of that jurisdiction through activities in, or remotely directed at, that jurisdiction'. It is based on eleven 'building blocks', grouped into three main components: a new taxing right for market jurisdictions over a share of residual profit calculated at a multinational group (or segment) level ("Amount A"); a fixed return for certain baseline marketing and distribution activities taking place physically in a market jurisdiction, in line with the arm's length principle ("Amount B"); and processes to improve tax certainty through effective dispute prevention and resolution mechanisms. Therefore the work of the OECD is not limited to digital and technology multinational groups, as it also embraces other business sectors which are not digital, but have expanded local markets through digitalization. The OECD has anticipated that Pillar One and Pillar Two will apply to both Automated Digital Services and Consumer Facing Businesses. Pillar Two focuses on ensuring that large internationally operating businesses pay a minimum level of tax based on a global minimum tax rate, for baseline activities regardless of the jurisdictions where they carry out their operations, or the location of their headquarters. The US stated that the second pillar remains on track to be concluded by the end of the year, but without agreement on both pillars it's unlikely that there will be support from the European countries.

The two pillars have since been discussed by the G20 Finance Ministers and Central Bank Governors who met on 18 July 2020. In this meeting they reiterated the OECD's commitment to cooperating to reach 'a global and consensus-based solution' with a report on the Inclusive Framework, with a blueprint to be issued for each pillar. These Blueprints have been published. The G20 'remain committed to further progress on both Pillars to overcome remaining differences' and they reaffirmed their commitment to provide a solution this year. Comments on the Blueprints are invited by 14 December 2020, with virtual public consultations to be held mid-January 2021. The aim is to conclude the process by mid-2021. Whilst progress is being made, the lack of political agreement to date certainly makes the timetable ambitious.

As mentioned above, irrespective and in parallel with the OECD work, national Governments and Revenue Agencies have developed and introduced their own rules, also with the aim of putting pressure to the Global discussions. As a result, Austria, Belgium, Czech Republic, France, Hungary, Italy, Poland, Slovenia, Spain and UK have proposed, announced or already implemented some form of a digital services tax. As of May 2020 twenty-two countries have either enacted or proposed some form of DST, Our analysis is aimed at providing an overview of the measures that some key Member States are introducing. Please see below for a detailed table setting out the current position for each country.

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Country	Rate	*Status*	Brief overview
EU	3%	*On hold (12 March 2019)*	Targets businesses with annual worldwide revenues of €750 million and EU revenues of €50 million derived from the selling of advertising space, digital intermediary activities like online marketplaces, and sales of user collected data.
OECD		*Blueprints for Pillars One and Two have been released, and the public consultation meetings will be held in mid-January 2021.*	The OECD is focusing on delivering a longer-term "consensus-based" international solution addressing the fundamental issues. They have released the blueprints for Pillars One, which focuses on profit allocation and nexus rules applicable to businesses profits, and Pillar Two, which focuses on establishing a global minimum income tax rate.
UK	2%	*Implemented*	Targets businesses that generate at least £500m of global revenue and over £25m of UK revenue from social media platforms, search engines and online marketplaces.
France	3%	*Approved and on hold, liabilities still accruing*	Targets businesses that make €750m of global revenue and €250m of domestic revenue from online marketplaces, digital advertising and transmission of personal data. Suspension of collection of the tax until the end of 2020 pending OECD progress.
Italy	3%	*Proposed*	Targets businesses that would make €750m in global revenue and €5.5m in domestic revenue from online advertising, transmission of user data and provision of a digital interface allowing users to interact
Austria	5%	*Proposed*	Tax on internet advertising revenue for all businesses with global revenues of at least €750m and domestic revenues of at least €10m. Additional measures relating to VAT on imports from non-EU countries and taxation of online sharing platforms are envisaged to complement the tax
Czech Republic	7%	*Announced*	Targets businesses with global revenue of €750m or more, and that meet a certain yet to be established domestic revenue threshold from targeted advertising on a digital interface, use of multilateral digital interfaces, and sale of data collected about users of digital services
Poland	3%	*Indicated*	Taxation based on virtual permanent establishment or taxable digital

			presence in Poland established based on three thresholds - revenue, users, and digital contracts. The tax is expected to target revenue from online advertising, sale of data generated from user-provided information, and from other digital services

Spain	3%	*Proposed*	To apply as an indirect tax to businesses with an annual worldwide revenue of €750m or more during the previous calendar year and domestic revenue of at least €3m from online advertising, intermediation, and transfer of user data
Belgium	3%	*Proposed*	Targets businesses with a global revenue of €750m or more and a total taxable revenue in the EU of €50m or more. Taxation of revenues from three main activities: publishing online advertisements directed at users of a digital platform; selling of user data; offering digital platforms that expedite the interaction between users and the transfer of goods and services between users.
Hungary	7.5%	*Implemented*	Targets media content providers with a global tax revenue of 100m HUF (€305.326). Taxation of digital advertising revenues from three categories: the entity publishes advertisements for others, for itself, or the entity obtains advertising from a media content provider based in Hungary.
Slovenia	-	*Announced*	The Slovenian Ministry of Finance announced a proposal to introduce tax on digital services. The Ministry of Finance will initiate the preparation of regulations for implementation of digital services tax. The presentation of the legislative proposal is expected to be before April 1, 2020, and the adoption by September 1, 2020. No further details have been published yet.
Turkey	*7.5%*	*Implemented.* *As of March 2020, taxpayers of DST have submitted their first DST returns.*	Targets businesses with total worldwide revenue of at least €750 million and domestic revenue of at least TRY 20 million (approximately €3.137 million). Taxation of: - Digital advertising services—including advertising control and performance measurement services, data transmission and management related to users, and technical services for the presentation of advertising; - Sales of any audio, visual or digital content—including computer programs, applications, music, video, video games, in-game applications, etc., via a digital platform as well as services provided for listening, watching, playing or recording or using such content by use of electronic devices; and - Services for the provision and operation of a digital platform by which users may interact with each other—including services to sell or facilitate the sale of a goods or services among these users. Intermediary services provided by a digital platform to "the digital service providers" for the services noted above can also be subject to DST in Turkey.

For more detailed analysis, please click on the relevant country report below:

UK
Italy
France

Spain
Poland

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