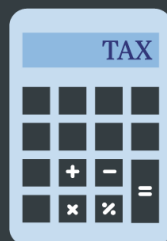


# Bird & Bird

## Italian DST is now live – Highlights



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DST has been in force in Italy since 1 January 2020 (see article 1, par. 35-50 of Law n. 145/2018, as modified by art. 1, par. 678 of Law n. 160/2019 - "DST Law").

On 15 January 2020, the Italian Revenue Agency released the final implementation rules ("Regulations") after having launched a public consultation in December on the draft version of the Regulations among the business and tax community ("Draft regulations"). Such consultation was concluded on 31 December 2020 and more than 40 comments were submitted.

The Regulations have the scope of clarifying the general framework and provide interpretation of certain issues that were raised following the publication of the DST law. However, as a general comment, it should be noted that not all existing doubts, including those raised by the tax community, have been solved and certain open questions still need to be answered. The Italian Revenue Agency announced the issuance of a Circular Letter that is expected to indicate more.

Due to the very close deadlines and the need to take care of a number of preliminary formalities, with a Law Decree (see Law Decree no. 3 of 14 January 2021) the payment and filing obligations have been postponed by one month with respect to original and ordinary deadline for the first year of DST application (i.e. 16 March 2021 for the payment and 30 April 2021 for the filing).

Italy now appears to be ready for the actual collection of DST, despite the investigation started against Italy by the United States Trade Representative (USTR), citing discrimination against US companies and unreasonable tax policies.

The Highlights of the Regulations are the following:

## 1. General comments

The Regulations confirm (already included in the Draft Regulations) that all DST taxpayers shall have to request an Italian fiscal code. Despite the

possibility to appoint a designated entity as head of the DST group, between Italian resident/established and non-resident companies, such formality remains burdensome and excessively formalistic, taking into account that among DST subjects there are many multinational groups with several companies which are required to comply with DST rules and obligations.

The main issues deriving from the unilateral introduction of DST have not been addressed. In particular, DST could breach the Constitutional principle of taxable capacity as it applies on gross revenues (irrespective of the actual profits earned by the company or at group level). In addition, it does not respect the non-discrimination principle, since it applies only to a specific industry.

Moreover, a main concern is the computation of DST based on a cash basis principle instead of an accrual principle. Such calculation will not ease the procedure of DST computation within multinational groups and will need a specific accounting report for DST purposes.

It is unclear what will happen in case of acquisition and disposal of an entity belonging to the group during the calendar year, including the liability of the group and that of any Italian based company, irrespective of the fact that it is a DST taxpayer or the designated entity.

## 2. Definitions

The Regulations do provide specific definitions to identify the methodology for DST application. No significant changes have been included to the Draft Regulations.

It offers a broad definition of **Digital Content**, which includes any data provided in digital format, like software programs, app, video, audio, games, etc. irrespective of if the access to such data takes place through download or streaming. The final version of the Regulations replaced the concept of "music" with "audio" to broaden the notion of digital content.

The same broad definition is also applied to the notion of **Digital Interface**, qualifying it as any software (including web sites or app), through which the digital services are rendered by the DST subjects and indicate that it is **multilateral** when allowing users to be in contact, also facilitating the direct supply of goods and services, implying that the interface is acting as intermediary.

The Regulations confirm that **Taxable Revenues** have to be computed based on the calendar year on a cash basis (not on an accrual basis) and includes among the Revenues those deriving from the "vehiculation" *i.e.* the specific service provided for the web platforms which transfer on third parties web sites or hosts targeted advertising and receive a remuneration. No attention has been paid to the DST liability in the case of transfer of advertising on a third-party website, with revenue share ramification along the chain.

No changes were included to the notion of **User**, which is considered as any individual connecting through a device to a digital interface to make use of the digital services. The nexus with Italian territory is created for the purpose of DST application when the **User** enjoys digital services through a device located on Italian territory.

### 3. Perimeter of application and taxable basis

The Regulations reiterate that DST applies on the supply of digital services, clearly excluding the remuneration paid for the direct supply of goods and services ordered through the web site of the supplier, as well as the direct supply of goods and services in the context of a digital intermediations service. Financial services are out of scope.

The Regulations do not include particular novelty with respect to the taxable basis, confirming that the 3% DST shall apply to all revenues collected in the calendar year by each of the DST subjects, considering the amount gross of the costs for the supply of the digital services, but net of VAT and other indirect taxes.

Intercompany transactions do not fall within the DST scope.

The methodology to calculate DST has not been affected by any change in the final version of the Regulations, remaining the following:

**a Advertising services:** revenues include both those from the publishing of advertisement on third parties web sites as well as those from advertisement directly hosted on a certain web site. DST is applied in the following ratio with respect to messages appearing on a certain Digital Interface:

*advertising messages of users located in Italy/total messages*

**b Intermediation and marketplace services:** revenues are only those paid by the users of the digital interface, net of the consideration paid for the sale of the goods and services. DST applies in the following ratio:

*transactions concluded by users located in Italy/total number of the transactions*

It would be enough that one of the users is located in Italy to have the transaction included in the calculation.

**c Data transmission:** revenues are those from the transmission for consideration of the data obtained from the activity of the users on the digital interfaces. DST applies in the following ratio, considering the data sold and transmitted:

*number of users located in Italy/entire amount of the users*

Any excess DST paid can be asked for refund in the DST return or, in absence of it, by means of a specific request of refund to the competent tax office.

No indications are provided, however, on the possible impact of the cancellation of the transactions or the conversion of a transaction on the DST computation and consequent DST refund.

### 4. DST Formalities

Regulations focus on the specific formalities and requirements to compute, pay the tax and file the DST return, which appear to be extremely burdensome from an administrative perspective.

As of today, in order to proceed with the actual payment and filing of DST return, the payment code, the DST Form and related instructions still need to be approved with a separate set of rules.

It is possible in the case of Group Companies to appoint a Designated Company, which may comply with all the DST formalities (*i.e.* payment and DST

return) on behalf of the affiliate entities, based on the data and information provided by each entity.

The Regulations provide that the Designated Company could be a DST subject, primarily chosen among those residents or established in Italy. The final version of the Regulations extends the possibility to appoint a not resident DST subject, differing from the Draft Regulations.

Irrespective of the appointment of a Designated entity, each of the entities of the group should have or obtain a fiscal code in Italy in case they are not resident or established in Italy. However, the Designated entity may take care of this formality on behalf of those entities.

The calculation of DST must be done separately for each entity which remains jointly responsible for the correct payment and the filing obligations.

In case of the presence of an affiliate entity of the Group in Italy, the latter will be in any event responsible for the DST payment of the other entities of the Group, even if it is not a DST subject.

In case the non-resident entity is in a non-cooperative Country, a representative shall have to be appointed in Italy.

## 5. Accounting obligations

Regulations provide that DST subjects will have to track the Taxable Revenues and ratio calculation on a monthly basis. Such accounting information will be included in a specific “Analytical Spreadsheet” and supplemented by an “Explanatory Note”, both to be stored on a digital support that guarantee that data cannot be modified and kept within the filing date of the DST return and is provided in case of a specific request from the Tax Authorities.

## 6. First year of application

For the first year of application, DST payment shall be due by 16 March 2021 (instead of 16 February 2021) and DST filing return shall be due by 30 April 2021 (instead of 30 March 2021).

# Contacts

**Gaetano Salvioli**

Partner

Tel: +390230356000

[gaetano.salvioli@twobirds.com](mailto:gaetano.salvioli@twobirds.com)

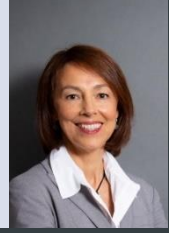


**Giuliana Polacco**

Senior Counsel

Tel: +390230356000

[giuliana.polacco@twobirds.com](mailto:giuliana.polacco@twobirds.com)



**Annarita De Carne**

Senior Associate

Tel: +390230356000

[annarita.decarne@twobirds.com](mailto:annarita.decarne@twobirds.com)



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