**SPECIAL LEGISLATIVE PROCEDURE – Consultation**

**Follow up to the European Parliament legislative resolution 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 (DST)**

**1. Rapporteurs:** Paul TANG (S&D / NL)

**2. Reference numbers:** 2018/0073 (CNS) / A8 0428/2018 / P8\_TA-PROV(2018)0523

**3. Date of adoption of the resolution:** 13 December 2018

**4. Legal basis:** Article 113 of the Treaty on the Functioning of the European Union

**5. Competent Parliamentary Committee:** Committee on Economic and Monetary Affairs (ECON)

**6. Commission's position:**

The amendments tabled by the Parliament go beyond the original Commission proposal. For this reason the Commission, in general, gives no support to such amendments.

**Amendments 1, 2, 4, 5 and 32 on recitals clarifying the problem definition**

Amendments to recitals 1, 2, 3, 5 and 41 further explain the problem definition, with a focus on the role of users as creators of value for companies and how that aspect is not taken into account in the current corporate taxation framework. Amendments also clarify the links between DST and the proposal for a significant digital presence, the proposal for a Common Consolidated Corporate Tax Base (CCCTB), and the work by the OECD and other international organisations.

*Commission’s position*: the Commission could support.

**Amendment 3 on the taxation of digital revenues vs traditional revenues**

The amendment proposes a new recital 2a which emphasises that digital businesses face an effective tax rate of only 9.5% compared to 23.2% for traditional business models.

*Commission’s position*: the Commission should not support. One of the general objectives of the proposal is for the tax framework to capture all factors creating value for businesses, so that they can compete under the same conditions. Right now, there seems to be an uneven playing field because value creation by users, which is typical of digital companies, is not properly reflected under corporate tax rules. That may indeed lead to lower effective tax rates for digital businesses compared to traditional businesses. However, as explained in section 2.2.2 of the impact assessment accompanying this proposal, to a certain extent such lower effective tax rates for digital businesses may simply reflect the difference in business structure.

**Amendment 6 including a reference to Article 116 TFEU**

The amendment to recital 6 indicates that the interim solution should be temporary and advocates for the introduction of a sunset clause. Moreover, it establishes that if no comprehensive solution has been agreed by 31 December 2020, the Commission should consider a proposal based on Article 116 of the TFEU (ordinary legislative procedure).

*Commission’s position:* the Commission should not support, as also indicated in respect of Amendment 52 (which proposes to introduce the sunset clause in the legal text). The Commission understands the spirit of the amendment, shares its objective and fully agrees that the DST is only an interim solution which should stop applying once a comprehensive solution is agreed at international level. The Commission is ready to employ Article 116 TFEU should the specific necessity arise. Having said that, the Commission is committed to explore moving towards qualified majority voting on certain tax matters as set out in its Communication adopted on 15 January.

**Amendment 7**

The amendment to recital 7 includes a reference to DST taxing the supply of online content, and specifies that DST taxable services not only rely on user value creation, but also on the use of intangible assets.

*Commission’s position:* the Commission should not support. While the Commission agrees with the statement that intangible assets are one of the main characteristics of digital business models, the objective scope of DST was determined on the basis of the factor user value creation. Moreover, the reference to supply of online content which enlarges the scope of the Commission’s proposal is not acceptable.

**Amendment 8**

This amendment mainly proposes to delete from recital 9 that it is the revenues obtained from the processing of user input that should be taxed, not the user participation in itself. It also specifies that DST applies to digital services by suppliers “with no or a very limited physical presence”.

*Commission’s position:* the Commission should not support, because that sentence clarifies an essential element of DST which is the participation of users should not in itself constitute a taxable event and only the monetisation of such user participation should be subject to taxation. Moreover, it seems not necessary to refer to the fact that the services are provided remotely, given that DST would also apply to domestic supplies of services from providers that are physically established within the Union*.*

**Amendment 13**

This amendment proposes to clarify that digital companies tend to invest less in buildings and machinery than regular companies do.

*Commission’s position: t*he Commission should not support. While it is true that digital businesses have a specific business structure, it does not seem necessary to bring up that point after recital 15 (which defines “digital content”).

**Amendment 17**

The amendment proposes to delete from recital 23 reference to the proposal for a CCCTB, which already made use of the EUR 750 000 000 threshold. Moreover, it includes a reference to digital services “heavily relying on mobile intangible and/or digital assets”.

*Commission’s position:* the Commission should not support. Reference to other Union initiatives making use of the same threshold seems relevant. Moreover, as explained in the recital, companies of a certain scale captured through the first threshold heavily rely on extensive user networks, large user traffic, and the exploitation of a strong market position. The link to intangibles or digital assets seems less relevant, given that these aspects are not specific to companies of a large scale (but rather specific to digital companies).

**Amendment 18 on the deduction of DST as a cost**

The amendment to recital 27 replaces “it is expected that Member States will allow” the deduction of DST as a cost from the corporate income tax base in their territory, with “a future Union wide common solution will have to be found” on allowing the deduction of DST as a cost.

*Commission’s position:* the Commission should not support. The treatment of costs of a taxable person for the purposes of corporate income tax rules is currently regulated under national legislation on that matter. The recitals of a Directive adopted based on Article 113 TFEU (concerning turnover taxes, excise duties and other forms of indirect taxation) should not prescribe the adoption of future legislation in the field of corporate income taxes, especially where such an obligation is not laid down in the legal text.

**Amendment 23 on the recital about the processing of personal data**

The amendment on recital 34 is much more specific than the modifications included in amendment 39. It indicates that the Member States shall be informed of the method used to determine the location of users, and specific reference is made to the principles of necessity and proportionality.

*Commission’s position:* the Commission should not support, given that the amendments do not seem to be necessary clarifications but rather state what follows from the application of the rules.

**Amendment 24**

The amendment replaces “the DST rate should be set at 3%, which achieves an appropriate balance…” with “the DST rate set at 3% is to achieve an appropriate balance…”

*Commission’s position:* although the Commission would not object to the proposed wording, it does not see the need for it.

**Amendments 9-12, 14-16, 19, 20, 22, and 26 - 31 on recitals reflecting amendments on the legal text**

These amendments to the recitals mirror the amendments by the Parliament on the legal text of the proposal, which will be dealt with below.

*Commission’s position:* the Commission should not support. Given that it is proposed that the Commission, in general, should not support the amendments to the legal text below, the amendments reflecting such changes in the recitals should also be rejected.

**Amendments 33-36 on broadening the definition of taxable services by including processing of data and the supply of digital content**

These amendments on Article 3 seek to enlarge the scope of the tax by including the revenues obtained from the provision of digital content. Moreover, it is proposed that the reference in the original proposal to “transmission of data” for consideration – which is one of the taxable services – is replaced with a reference to the “processing of data”. In turn, processing of data is defined in an amendment to Article 2 in a very broad way as any operation or set of operations performed on personal data (such as collection, recording, organisation and structuring).

*Commission’s position:* the Commission should not support. Accepting the proposed amendments and in particular including in the scope of DST the provision of digital content would mean enlarging the scope of the DST beyond the activities which are considered being heavily reliant on user value creation for a business, which is the characteristic underpinning the objective scope of the Commission’s proposal. According to the amendment and the reference to data processing, not only the sale of data would be taxed, but also the mere collection and use of data, which is not one of the policy objectives of the DST directive, as explained in recital 17 of the Commission’s proposal. It is also useful to note that, after the ECOFIN Council of 4 December and following the joint declaration made by France and Germany, the Council is expected to continue technical discussions on the basis of a narrower scope of the proposal which would only cover advertising services. Therefore the Council is clearly going in the opposite direction than the Parliament.

**Amendment 37 on the definition of taxable person**

The amendments on Article 4 maintain the twofold condition for becoming a taxable person subject to DST. However, while the worldwide revenues threshold is kept at EUR 750 000 000, the Parliament suggests to lower the Union taxable revenues threshold from EUR 50 000 000 to EUR 40 000 000.

*Commission’s position:* the Commission should not support. The second threshold, which refers to Union taxable revenues and the digital footprint of businesses in the Union, better achieves its objective to protect enterprises starting and developing their digital businesses and start-ups and scale-up by means of the level set out in the Commission’s proposal.

**Amendment 38 on the place of taxation**

The amendments on Article 5 set out the place of taxation rules in respect of the provision of digital content added in Article 3 by the European Parliament.

*Commission’s position:* the Commission should not support. As explained under the Commission’s position in relation to amendments to Article 3 (amendments on broadening the definition of taxable services by including the supply of digital content) the Commission does not agree to enlarge the scope of DST. Amendments on Article 5 would only be necessary if there was support for broadening the scope of taxable services.

**Amendment 39 on the processing of personal data**

The amendment on Article 5(6) is intended to ensure the application of Regulation 2016/679 on the processing of personal data.

*Commission’s position:* the Commission could support, given that this amendment is in line with the policy objective (as laid down in recital 34 of the Commission’s proposal).

**Amendment 41 on the tax rate**

The amendment on Article 8 keeps the tax rate at 3%, but proposes the following linguistic change: “The DST rate shall be set at 3%”.

*Commission’s position:* although the Commission would not object to the proposed wording, it does not see the need for it.

**Amendment 42 imposing audit obligations on the Commission**

The amendment on Article 10(3) seeks to establish that the Commission shall every three years carry out an audit of the DST return in certain circumstances.

*Commission’s position:* the Commission should not support, given that it is clearly not within the Commission’s competences to perform tax audit. This lies within the competences of the Member States' tax administrations*.*

**Amendments 43 and 44 on the Member State of identification**

The amendment on Article 13 proposes a new rule as regards the Member State of identification of a taxable person. In particular, it is suggested that if a taxable person ceases to be liable in a Member State of identification chosen under Article 10(3)(b), the taxable person could keep that same Member State of identification for two consecutive tax periods. If after two consecutive tax periods, the taxable person is not liable again in that Member State of identification, then the taxable person shall change according to the rules in Article 10.

*Commission’s position:* the Commission should not support. Even if the Commission understands that the amendment seeks to simplify the administrative obligations for taxable persons, the amended rules could lead to situations where a jurisdiction is acting as a Member State of identification for taxable persons without DST liability therein, which would generate a cost for that jurisdiction.

**Amendment 45 on the period for DST return amendments**

The amendment on Article 17(2) proposes that DST return amendments should be submitted within 2 years of the date on which the initial return was required, compared to the Commission’s proposal where the deadline was of 3 years.

*Commission’s position:* the Commission should not support, given that 3 years seems a more reasonable period for submitting amendments, which balances the need to limit in time such a possibility but gives some leeway to taxable persons to correct their returns.

**Amendment 46 on adoption of national measures on penalties and sanctions**

The amendment on Article 18(3) proposes to specify that the Member States will have the obligation to adopt measures “including penalties and sanctions” to prevent tax evasion, avoidance and abuse with respect to DST.

*Commission’s position:* the Commission should not support. The possibility to adopt national anti-avoidance measures in respect of DST should remain an option for the Member States, given that such measures should answer specific concerns which are difficult to anticipate at this moment in time. Moreover, it does not seem necessary to include any reference to penalties and sanctions, given that Article 18(4) already clarifies that national rules on 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 apply. It must also be kept in mind that the Member States retain discretion for the setting up of such rules.

**Amendment 47 calling for public country-by-country reporting of DST paid**

The amendment on Article 18(5) says that the Commission should amend the Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings in order to include DST information in country-by-country reporting standards.

*Commission’s position:* the Commission should not support. The administrative provisions included in the latest compromise text already guarantee that the relevant information is available for Member States.

**Amendments 48 and 49 on exchanges of information**

The amendment on Article 20 establishes a mandatory exchange of information based on Directive 2011/16/EU on administrative cooperation.

*Commission’s position:* the Commission does not have any objections to the spirit of this amendment but does not think that it is needed as it is already clarified in the proposal.

**Amendments 40, 50 and 51, on the introduction of a review clause and reporting obligations for Member States**

Amendment 50 provides for the obligation on the side of the Commission to assess the application of the Directive and to present a report after two years, accompanied if necessary by needed proposals focusing in particular on:

rate, and its possible increase from 3% to 5% (with the introduction of a tax allowance);

the scope of the DST, and the possibility to tax “online retail” (goods or services contracted via digital platforms);

the amount of tax paid in each Member State;

the type of digital activities within the scope of this directive;

the potential DST-related tax planning practices;

the cooperation between the Member States, and

the overall impact on the internal market taking into account potential distortion of competition.

Amendment 51 proposing a new Article 24(b) seeks to establish that the Member States report DST information to the Commission on a yearly basis. In addition, amendment 40 to Article 5 establishes that the Commission shall review the application of the DST with a view in particular to including a possible dispute resolution mechanism.

*Commission’s position:* the Commission should not support. The provisions included in the latest compromise text already include a review clause calling for a Commission report assessing the progress made on the revisions to the international corporate tax standards to address the challenges arising from digitalisation agreed at the level of the Organisation for Economic Co-operation and Development (OECD). The Commission is in any case entitled to monitor and evaluate the implementation of DST and, subject to its right of initiative, propose amendments in any of the specific points indicated by the European Parliament. Therefore, there is no need for such an explicit and detailed review clause. While the Commission would not object the reporting by Member States, it does not seem necessary to establish such an obligation given that exchanges of information between the Commission and Member States can also take place upon request.

**Amendment 52 on the introduction of a sunset clause**

The amendment states that DST is a temporary measure indicating the temporary nature of DST, and that it is only applicable in the wait of a permanent solution agreed at global level. Consequently, DST Directive is to expire with the adoption of any of the following:

1. the Council directive on the corporate taxation of a significant digital presence;
2. the Council directives on a Common Consolidated Corporate Tax Base and Common Corporate Tax Base; or
3. a directive implementing a political agreement reached in international fora such as the OECD or the United Nations.

*Commission’s position*: the Commission should not support. While the Commission understands the spirit of the amendment, shares its objective and fully agrees that the DST is only an interim solution which should stop applying once a comprehensive solution is agreed at international level, the current wording of the sunset clause included in the latest compromise text drawn up by the Austrian Presidency constitutes a more balanced link between the interim measure to be applied at Union level and possible global solutions.