

Proposal for a COUNCIL DIRECTIVE laying down rules relating to the corporate taxation of a significant digital presence COM (2018)147 -
Amended and adopted version - MEUC Humboldt University,
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CHAPTER I

SUBJECT MATTER, DEFINITIONS AND SCOPE

Article 1 Subject matter

This Directive lays down rules extending the concept of a permanent establishment, as it applies for the purposes of corporate tax in each Member State, so as to include a significant digital presence through which a business is wholly or partly carried on. This Directive also establishes certain principles for attributing profits to or in respect of a significant digital presence for corporate tax purposes.

Article 2 Scope

This Directive applies to entities irrespective of where they are resident for corporate tax purposes, whether in a Member State or in a third country.

However, in the case of entities that are resident for corporate tax purposes in a third country with which the particular Member State in question has a convention for the avoidance of double taxation, this Directive applies only if that convention includes provisions similar to Articles 4 and 5 of this Directive in relation to the third country and those provisions are in force.

Article 3 Definitions

For the purposes of this Directive, the following definitions shall apply:

- (1) 'corporate tax' means one of the corporate taxes listed in Annex I or a similar tax subsequently introduced;
 - (2) 'digital interface' means any software, including a website or a part thereof and applications, including mobile applications, accessible by users;
 - (3) 'Internet Protocol (IP) address' means a series of digits assigned to networked devices to facilitate their communication over the internet;
 - (4) 'user' means any natural or private juridical person.
- (5) 'digital services' means services which are delivered over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology, including in particular:
- (a) the supply of digitised products generally, including software and changes to or upgrades of software;

- (b) services providing or supporting a business or personal presence on an electronic network such as a website or a webpage;
- (c) services automatically generated from a computer via the internet or an electronic network, in response to specific data input by the recipient;
- (d) the transfer for consideration of the right to put goods or services up for sale on an internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated from a computer;
- (e) Internet Service Packages (ISP) of information in which the telecommunications component forms an ancillary and subordinate part, in other words packages going beyond mere internet access and including other elements such as content pages giving access to news, weather or travel reports, playgrounds, website hosting, access to online debates or any other similar elements;
- (f) the services listed in Annex II.

Digital services shall not include the services listed in Annex III or the sale of goods or other services which is facilitated by using the internet or an electronic network.

(4) 'revenues' means proceeds of sale and of other transactions, net of value added tax and other taxes and duties collected on behalf of government agencies, whether of a monetary or non-monetary nature, including proceeds from disposals of assets and rights, interest, dividends and other profits distributions, proceeds of liquidations, royalties, subsidies and grants, gifts received, compensations and ex-gratia payments. Revenues shall also include non-monetary gifts made by a corporate taxpayer. Revenues shall not include equity raised by a corporate taxpayer or debt repaid to it;

(5) 'entity' means any legal person or legal arrangement that carries on business through either a company or a structure that is transparent for tax purposes;

(6) 'tax period' means a corporate tax year, calendar year or any other applicable period for corporate tax purposes;

(7) 'associated enterprise' means an entity that is related to the particular entity in question in one or more of the following ways:

(a) one of them participates in the management of the other by being in a position to exercise a significant influence over the other;

(b) one of them participates in the control of the other through a holding, directly or indirectly, in the other that exceeds 20% of the voting rights;

(c) one of them participates in the capital of the other through a right of ownership, directly or indirectly, in the other that exceeds 20% of the capital.

If more than one entity participates in the management, control or capital of the same entity in one or more of the ways specified in points (a) to (c), all of those entities shall be regarded as associated enterprises of each other too.

If the same entity participates in the management, control or capital of more than one entity

in one or more of the ways specified in points (a) to (c), all of those entities shall be regarded as associated enterprises of each other too.

In case of indirect participations, fulfillment of the criteria set out in points (b) and (c) shall be determined by multiplying the percentages rates of holding through the successive tiers. An entity holding more than 50% of the voting rights shall be deemed to hold 100%.

CHAPTER II

SIGNIFICANT DIGITAL PRESENCE

Article 4 Significant digital presence

1. For the purposes of corporate tax, a permanent establishment shall be taken to exist if a significant digital presence exists through which a business is wholly or partly carried on.
2. Paragraph 1 shall be in addition to, and shall not affect or limit the application of, any other test under Union or national law for determining the existence of a permanent establishment in a Member State for the purposes of corporate tax, whether specifically in relation to the supply of digital services or otherwise.
3. A 'significant digital presence' shall be considered to exist in a Member State in a tax period if the business carried on through it consists wholly or partly of the supply of digital services through a digital interface and one or more of the following conditions is met with respect to the supply of those services by the entity carrying on that business, taken together with the supply of any such services through a digital interface by each of that entity's associated enterprises in aggregate:
 - (a) the proportion of total revenues obtained in that tax period and resulting from the supply of those digital services to users located in that Member State in that tax period exceeds EUR 3 500 000;
 - (b) the number of users of one or more of those digital services who are located in that Member State **in that tax period exceeds 75 000**;
 - (c) the number of business contracts for the supply of any such digital service that are concluded in that tax period by users located in that Member State exceeds 3 000.
4. With respect to using digital services, a user shall be deemed to be located in a Member State in a tax period if the user uses a device in that Member State in that tax period to access the digital interface through which the digital services are supplied.
5. With respect to concluding contracts for the supply of digital services:
 - (a) a contract shall count as a business contract if the user concludes the contract in the course of carrying on business;
 - (b) a user shall be deemed to be located in a Member State in a tax period if the user is resident for corporate tax purposes in that Member State in that tax period or the user is resident for corporate tax purposes in a third country but has a permanent establishment in that Member State in that tax period.
6. The Member State where a user's device is used shall be determined by reference to the Internet Protocol (IP) address of the device or, if more accurately, any other method of geolocation.

7. The proportion of total revenues referred to in paragraph 3(a) shall be determined in proportion to the number of times that devices are used in that tax period by users located anywhere in the world to access the digital interface through which the digital services are supplied.

8. A significant digital presence' shall not be considered to exist for an entity if it meets the Directive's requirements for the existence of a 'significant digital presence' before the first day of the year following the adoption of the Directive in every member state.

Article 5

Profits attributable to or in respect of the significant digital presence

1. The profits that are attributable to or in respect of a significant digital presence in a Member State shall be taxable within the corporate tax framework of that Member State only.
2. The profits attributable to or in respect of the significant digital presence shall be those that the digital presence would have earned if it had been a separate and independent enterprise performing the same or similar activities under the same or similar conditions, in particular in its dealings with other parts of the enterprise, taking into account the functions performed, assets used and risks assumed, through a digital interface.
3. For the purposes of paragraph 2 the determination of profits attributable to or in respect of the significant digital presence shall be based on a functional analysis. In order to determine the functions of, and attribute the economic ownership of assets and risks to, the significant digital presence, the economically significant activities performed by such presence through a digital interface shall be taken into account. For this purpose, activities undertaken by the enterprise through a digital interface related to data or users shall be considered economically significant activities of the significant digital presence which attribute risks and the economic ownership of assets to such presence.
4. In determining the attributable profits under paragraph 2, due account shall be taken of the economically significant activities performed by the significant digital presence which are relevant to the development, enhancement, maintenance, protection and exploitation of the enterprise's intangible assets.
5. The economically significant activities performed by the significant digital presence through a digital interface include, inter alia, the following activities:
 - (a) the collection, storage, processing, analysis, deployment and sale of user-level data;
 - (b) the collection, storage, processing and display of user-generated content;
 - (c) the sale of online advertising space;
 - (d) the making available of third-party created content on a digital marketplace;
 - (e) the supply of any digital service not listed in points (a) to (d).
6. In determining the attributable profits under paragraphs 1 to 4, taxpayers shall use

the profit split method unless the taxpayer proves that an alternative method based on internationally accepted principles is more appropriate having regard to the results of the functional analysis. The splitting factors may include expenses incurred for research, development and marketing as well as the number of users and data collected per Member State.

CHAPTER III FINAL PROVISIONS

Article 6 Review

1. The Commission shall evaluate the implementation of this Directive five years after its entry into force and report to the Council thereon.
2. Member States shall communicate to the Commission all information necessary for evaluating the implementation of this Directive.

Article 7 Distribution between Member States

The resulting tax income based on the significant digital presence is to be levied in the Member State of the significant digital presence. The tax income is to be distributed between the Member state in which corporate tax income results from an entity's significant digital presence and the Member State in which the entity has a place of corporation, 70 % and 30 % respectively in the first 5 years after the proposal is in effect and shift annually to a maximum of 83% and 17% afterwards, provided the European Council confirms this decision, so member states have time to find new models of business.

Article 8

Committee on the taxation of the digital economy

1. An advisory committee on the taxation of the digital economy, called the 'DigiTax Committee', is set up.
2. The DigiTax Committee shall consist of representatives of the Member States and of the Commission. The chair of the Committee shall be a representative of the Commission. Secretarial services for the Committee shall be provided by the Commission.
3. The DigiTax Committee shall adopt its own rules of procedure.
4. The DigiTax Committee shall examine questions on the application of this Directive, as raised by the chair of the Committee, whether on the chair's own initiative or at the request of the representative of a Member State, and shall inform the Commission of its conclusions.

Article 9

Limitation of data collected from users

The data that may be collected from the users for the purposes of applying this Directive shall be limited to data indicating the Member State in which the users are located, without allowing for identification of the user.

Article 10
Transposition

1. Member States shall adopt and publish, by 31 December 2019 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately inform the Commission thereof.

They shall apply those provisions from 1 January 2020 with respect to tax periods beginning on or after that date.

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. Member States shall determine how such reference is to be made.

2. 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.

Article 10 Entry into force

This directive shall enter into force on 01.01.2022 only in case that no agreement will be found on OECD level before that time.

Article 11 Addressees

This Directive is addressed to the Member States. Done at Brussels and Berlin.