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EU PROPOSAL ON DIGITAL SERVICE TAX IN VIEW OF EU STATE AID LAW

Abstract

This contribution deals with the European Commission's proposal on the taxation of digital services. The main aim of the contribution is to confirm or disprove the hypothesis that the Digital Service Tax constructed in line with the proposition of the European Commission does interfere with EU state aid law. The research is conducted by applying basic methods of legal science, especially the method of scientific analysis and case law analysis.

Key words: digital economy, digital services, tax, EU law, state aid.

JEL Classification: K34

1. Introduction

The popularisation of communication technologies and in particular the Internet have made an undeniable change in the ways of doing business. This set of transformations and opportunities called the "digital economy" while uneasy to define, caused an impact too significant to ignore and has since attracted the interest of economists and lawyers alike [Lipniewicz 2018: 266].

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While the size of the 'digital economy' is still relatively small - estimates revolve around 4-5% of value-added (with the biggest percentage of GDP in the USA – around 8-9%), [Impact assessment: 10; Anderton et al. 2020], it grows rapidly. For example, the size of e-commerce sales has doubled in only 5 years (from 1.548 billion US dollars in 2015 to 4.280 billion US dollars in 2020) [Retail e-commerce sales worldwide from 2014 to 2024]. The World Economic Forum predicts that a staggering 70% of new value created in the economy over the next decade will be based on digitally enabled platform business models" [Shaping the Future of Digital Economy and New Value Creation]. Many of the biggest global firms are digital companies (most notable Google/Alphabet, Apple, Facebook/Meta, and Amazon). Google alone has derived 75 billion dollars in revenue in 2015, 67 billions of which from advertising with the use of personal data [Thimmesch 2016: 151]. Even more astonishingly, Google almost tripled this outcome in 2020 with a revenue of over 181 billion dollars [Annual revenue of Google from 2002 to 2020].

In view of the above, there is an ongoing discussion at national, European, and international levels on the appropriate method of taxing the digital economy. Despite it being a relatively new issue, various general aspects related to the taxation of the digital economy have been discussed in the literature [e.g. Thimmesch 2016; Woźniak 2020; Lipniewicz 2018], as well as the impact of proposed solutions, the Digital Service Tax (hereinafter: DST) in particular, on various international legal acts [e.g. Hrabčák, Popovič 2020; Mason, Parada 2018; Sábo 2020].

This article will focus on the version of DST proposed by the European Commission. The following hypothesis will be verified: does the national DST constructed in line with the proposition of the European Commission interfere with EU state aid law? The article will be divided into four parts. The first part will provide an outline of the digital economy and its impact on tax law. The second part will focus on the proposal by the European Commission to address these issues. The third part will discuss EU state aid case law (in particular the case law on this subject) and the fourth part will include an assessment of the EU solution according to these principles.

2. Outline of the digital economy and its impact on current taxation rules

Some authors see the digital economy as a special category of "classical" economy – a traditional economic process made 'rapid-fast' due to high technological advancement and dematerialization of the traditional economic process [Hrabčák, Popovič 2020: 55; Lipniewicz 2018: 268]. Others see it as a different business model – with a set of very

different characteristics [Lipniewicz 2018: 268-269]. In general, two types of business models can be identified: partially digital (or hybrid) which consists of using the Internet only for selected activities and exclusively digital. While the former is relatively close to past economic models and therefore at least partially suited to old taxation rules, the latter's features make it inadequate to current taxation rules [Woźniak 2020: 523-524].

A rigid catalog of these characteristics has not yet been established, but the following can be presented. According to OECD, they include mobility, the reliance on data (so-called "big-data" in particular), taking advantage of network effects, using multi-sided business models, a tendency toward monopoly or oligopoly, and volatility [OECD 2015: 64-65]. Collin and Colin draw attention to the focus on very dynamic growth (or at least the attempts to achieve it), close ties to Venture Capital funding, functioning on multiple different markets and changing those markets with the use of new technologies and innovations, focusing on creating a special relationship with their customer and blurring the line between advertising and services, often providing free services in exchange for users' data [Task Force on Taxation of the Digital Economy: 7][1], naming the "traction" and constant change as defining criteria of the digital economy [Task Force on Taxation of the Digital Economy: 7-9]. Other authors assert that one of the most unique features is the object of this economy: data or information-driven goods or even data itself [Lipniewicz 2018: 270]. European Commission focuses on the flexibility and cross-border aspect of this economy and "scale without mass" business structure, which allows them to operate even without any physical appearance abroad [Impact assessment: 12].

The abovementioned features render current tax rules inadequate for several reasons. First, digital companies tend to be structured in a way that allows for easier tax avoidance with the use of popular tax optimization schemes. Second, they facilitate situations in which the income is generated in jurisdictions where they do not have any incorporated companies or permanent establishments. Additionally, a large amount of income is generated (either directly or indirectly) by use of users' data, which is obtained from users in exchange for the services and may be subject to additional processing.

This is most visible in digital services. There are two ways of interpreting digital service. In a narrow sense as "the concept of digital service and digital advertising is essentially identical" [Hrabčák, Popovič 2020: 54]. In a broad sense based on a proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence

[1] However, it is worth noting that consumers do not give that away for free. The economists have valued the consumer welfare gains from "free" online products at approximately $100 billion per year in the U.S. alone [Thimmesch 2016: 160].

{SWD(2018) 81 final} – {SWD(2018) 82 final} of 21 March 2018, as "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 (...)" [Hrabčák, Popovič 2020: 54].

OECD names among such services "e-commerce, app stores, online advertising, cloud computing, participative networked platforms, high-speed trading, and online payment services", [OECD 2015: 54]. European Commission focuses on "software publishing companies, computer service companies, Web agencies, and telecommunications operators. Other companies in sectors such as advertising, information, and entertainment have also become primarily digital" [Task Force on Taxation of the Digital Economy: 7]. There are therefore many aspects of the taxation of the digital economy, with different types of business models presenting different dilemmas.

The problem of taxing the activities that rely heavily on the internet and digital means is not a new one. The position of developed countries in the 1990s was to abandon a special regime of taxation of such companies. In October 1998 five principles were adopted, namely: neutrality (between the taxation of "classic" and digital activities), efficiency (minimizing the cost of tax claims), certainty and simplicity, effectiveness and fairness, and flexibility [Woźniak 2020: 533].

Instead of establishing special "Internet" taxes, OECD countries set on modernizing the existing rules of taxation so that they would be adequate for the new digital economy [Juchniewicz 2016: 212]. However, due to the abovementioned changes and massive growth of the digital economy, the application of the current tax rules to the digital economy leads to a misalignment between the place where the profits are taxed and the place where value is created [Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM(2018) 148 final of 21 March 2018): 2]. Thus, a new discussion about adequate tax action began.

3. EU proposal on taxing digital services

Currently, States are taking action to counter these problems, on international, European, and state levels. The goal of this article is not to provide an exhaustive list nor extensive description of the currently proposed solutions. Nonetheless, it is worth noting, that there is a vast diversity of propositions: from modifying VAT rules, integrating CIT rules among nations, taxing "digital presence", taxing data usage, or imposing special levies on certain industries.

Both at OECD and EU levels, there exists an agreement that imposing a "perfect", international solution will be a lengthy process, without guaranteed success. Therefore, interim measures are proposed. On 21.03.2018 European Commission has published a Proposal [Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM(2018) 148 final of 21 March 2018)] which is of great relevance for two reasons. First, European Union can create new legal solutions more decisively than OECD, and second, even if the EU's proposition will not be implemented on the European level, it will be an example for unilateral solutions (as best seen in the examples of digital services taxes currently implemented in Austria, France, Italy, Spain, and United Kingdom). Other states like the Czech Republic are currently in the legislative process [Czech Republic: Status of digital services tax legislation – KPMG United States] or declared the will to tax such activities (e.g. Poland).

A comprehensive long-term solution requires cooperation on a multinational level. Finding an understanding of this political issue is reasonably expected to take a long time. It is also expected that the longer lack of international regulation, the more countries will take unilateral actions, which could lead to additional fragmentation and distortions of competition [Impact assessment: 20; Hrabčák, Popovič 2020: 67].

What's more, lack of such regulation may lead to losing competitiveness and discourage new firms in the digital economy from incorporating a business in Europe [Impact assessment: 7]. Therefore European Commission asserts that more immediate, interim, and easy to implement measures will benefit the economy until the implementation of the comprehensive solution [Impact assessment: 7]. The Commission asserts that the preferred interim solution is "a tax on gross revenue levied on digital activities relying strongly on user contributions" in particular "for revenue from services related to online advertising and from multi-sided digital platforms, connecting different sides of the relevant market" [Impact assessment: 7].

Such interim solution is presented in the Proposal on the legal basis of art. 113 of the Treaty on the Functioning of the European Union (hereinafter: "TFEU") [Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1] [Impact assessment: 20]. Among general objectives of the Proposal are listed: protection of the integrity of the Single Market to ensure its proper functioning, making sure that the public finances within the Union are sustainable and that the national tax bases are not eroded, ensuring social fairness is preserved and that there is a level playing field for all businesses operating in the Union and fighting against aggressive

tax planning and to close the gaps that currently exist in the international rules which makes it possible for some digital companies to escape taxation in countries where they operate and create value [Impact assessment: 20].

These goals are to be achieved by imposing a 3% tax on revenues from certain digital services. Despite being called a “digital services tax”, this regulation covers only revenues from certain digital services. Namely, revenues resulting from (a) the placing on a digital interface 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, and (c) the transmission of data collected about users and generated from users' activities on digital interfaces [Proposal: Art. 3.1].

The Proposal further stipulates that point (a) 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 a point (a) [Proposal: Art. 3.3].

According to Art. 3.4 of the Proposal, several services are excluded from the scope of point (b):

a) making available 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) certain trading and crowdfunding services referred to in Section A of Annex I to Directive 2014/65/EU
c) service consisting in the facilitation of the granting of loans
d) transmission of data by a trading venue, systematic internalizer, or regulated crowdfunding service provider

What’s worth noting, point (c) covers only profit made by transmission of users’ data and not any profit made by using them without transferring to third persons.

The rationale behind the scope of taxable services was to capture only those which “would not be able to exist in their current form without user involvement” [Proposal: 7]. As stated in the Proposal, DST targets “the transmission for consideration of data obtained from a very specific activity (users' activities on digital interfaces)” [Proposal: 9] which is a clear reference to the concept of creation of business value by the user of a digital network [Woźniak 2020:

553-554]. This is in line with the opinion that currently, data "function as an asset, or even as a currency" [Thimmesch 2016: 147] and that personal data is even becoming "a primary currency of the digital economy" [Thimmesch 2016: 153].

Another important feature of the EU DST is the personal scope of the tax. As stipulated in art. 4 of the Proposal taxable persons will only be those meeting two thresholds:

a) EUR 750 000 000 for a total amount of worldwide revenues reported by the entity for the relevant financial year exceeds (to which I will later refer as "Global threshold"), and
b) EUR 50 000 000 for a total amount of taxable revenues obtained by the entity within the Union during the relevant financial year exceeds (to which I will later refer as "European threshold").

The rationale behind thresholds is as follows: global threshold limits the application of the tax only to those companies that have established strong market positions. European Commission assumes that this market position will allow them to "benefit relatively more from network effects and exploitation of big data and thus build their business models around user participation" [Proposal: 10]. While one can argue that it is, in fact, the other way around – focusing business model around user participation can lead to massive growth, such personal scope may be adequate for the second reason given by the European Commission. Namely: the fact that such business models in general lead to higher differences between the place of taxation and place of profit creating and are more prone to aggressive tax planning [Proposal: 10]. The final aim of the global threshold is to "exclude small enterprises and start-ups for which the compliance burdens of the new tax would be likely to have a disproportionate effect" [Proposal: 10].

European threshold aims to tax only those companies that have a "significant digital footprint at Union level" and is set at European level to "disregard differences in market sizes which may exist within the Union" [Proposal: 10]. In general, these rules should equalize from tax perspective situations where a person from a Member State contributes money to the revenue and participates in the generation of value in a non-monetary way, in particular by providing his personal data [Proposal: 11].

DST is not free from criticism. It was noted that "taxing selected segments of the digital economy (in this case online advertising) is contrary to the EU's efforts to remove barriers to the development of the digital economy" [Woźniak 2020: 552] and may lead to "unequal taxation and the >>bifurcation<< of the tax system into the sphere of the analog economy, which is subject to classic income taxation, and the sphere of the digital economy, in which

special income taxation is applied alongside classic solutions" [Woźniak 2020: 556-557]. It could also be discriminatory (in particular to foreign taxpayers) by the size of the company and revenue triggers [Mason, Parada 2018: 1194; Sábo 2020: 72]. It could also interfere with the General Agreement on Trade in Services [Sábo 2020: 73-74] and the rule of freedom to provide service [Sábo 2020: 75-76]. Finally, due to its material selectivity (narrow scope of services) and national selectivity (due to the thresholds), the DST of such structure may be incompatible with EU state aid rules [Mason, Parada 2018: 1190-1191; Sábo 2020: 76].

4. Overview of EU state aid law

State aid rules (in particular art. 107 of TFEU) shall protect the integral market and are addressed to the Member States, not the EU itself. Therefore, a tax adopted on the European level will not interfere with these rules. Nonetheless, analyzing the effects of EU version of DST against state aid rules has a practical and theoretical value. In the absence of European DST (at the moment of writing this article no such DST exists), member states stipulate national DSTs unilaterally and as mentioned above – those measures will be based on European Commission's Proposal. While these national DSTs may have some differences from the Proposal's version in general they feature narrow scopes (of services very similar as those in the Proposal) and high two-step thresholds (albeit with a "national" instead of "European" level). The temporary nature of the solution does not make it any less valuable to analyze its effects. Considering the political context, it can be expected that the interim solution may become permanent, especially because of agreements reached between the USA and countries that first implemented DSTs unilaterally [USTR Welcomes Agreement with Austria, France, Italy, Spain, and the United Kingdom on Digital Services Taxes | United States Trade Representative] (also similar to the case of the common system of value-added tax and the application of the principle of taxation in the state of destination) [Simić 2021: 210].

Under Article 107 TFEU, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Member States, be incompatible with the internal market[2]. The conditions for considering a measure to be prohibited aid

[2] The following paragraphs provide for exceptions to what is considered to be unlawful aid, but these are not relevant to this analysis.

derive from this provision. However, they have been repeatedly discussed in the case law of the Court of Justice of the European Union (hereinafter: "CJEU"). In general, a measure interferes with state aid rules when it can be attributed to the state, it is likely to affect trade between member states, it grants an advantage by favoring certain undertakings or the production of certain goods (selectivity) and it threats the competition [CJEU, Case C-280/00, Altmark].

When assessing tax measures from the perspective of the state aid law, one is dealing with an attempt to combine two contradictory tendencies: a broad autonomy of the state in shaping tax obligations and the European Commission's control over the impact of states on the common market - where the assessment of state measures is made objectively, because of the effects that the measure will have, rather than its form [Kociubiński 2018, 2019].

Taxes imposed by the national authority can be attributed to the State. However, more interestingly, a tax may result in state aid. According to the CJEU case law, the financing of a measure through state resources may consist not only in a "positive" transfer of resources by the State but also in withdrawal from taxing some resources from the taxpayer. Therefore, an exemption within a tax may be considered as a measure financed from state resources [CJEU, Case C-387/92, Banco Exterior de España: 14; CJEU, Joined Cases C-78/08 to C-80/08, Paint Graphos: 46; CJEU, Joined cases C-106/09 P and C-107/09 P, European Commission (C-106/09 P) and Kingdom of Spain (C-107/09 P) v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland: 72].

The advantage may also take the form of the reduction of costs normally borne by an undertaking's budget [CJEU, Case C-143/99, Adria-Wien Pipeline: 38] or similarly through various reductions in the undertaking's tax burden and, in particular, through a reduction in the applicable rate of tax, tax base, or amount of tax payable [CJEU, C-522/13, Ministerio de Defensa and Navantia: 21-31; CJEU, Case C-66/02, Italian Republic v Commission: 78; CJEU, Case C-222/04, Cassa di Risparmio di Firenze et. al: 132]. A measure leading to a reduction in a tax or duty gives rise to an advantage as it places the undertaking to which it applies in a more favorable financial position than other taxpayers and reduces the revenue of the State budget [CJEU, Case C-387/92, Banco Exterior de España: 14; CJEU, Joined cases C-393/04 and C-41/05, Air Liquide Industries Belgium: 30].

For a measure to be considered selective, it must favor certain undertakings or the production of certain goods compared with undertakings in a particular legal and factual situation that is comparable in the light of the objective pursued by the measure in question [CJEU, C-88/03, Portuguese Republic v Commission]. Of particular interest in the context

of taxation of digital services, a measure can be considered selective even if it concerns an entire economic sector [CJEU, C-75/97, Kingdom of Belgium v Commission: 33; CJEU, Case C-66/02, Italian Republic v Commission: 95; CJEU, Case C-248/84, Germany v Commission: 18]. There are multiple types of selectivity, such as material or regional selectivity [CJEU, Joined cases C-106/09 P and C-107/09 P, European Commission (C-106/09 P) and Kingdom of Spain (C-107/09 P) v Government of Gibraltar and the United Kingdom of Great Britain and Northern Ireland: 21; Stępkowski 2017: 101]. DST could be regarded as selective due to its thresholds causing so-called "reverse selectivity" - i.e. granting benefits to all entities except for a specific group.

Furthermore, it is not necessary to establish the actual effect of the aid on trade and the actual distortion of competition but rather that such an effect is likely to occur [CJEU, Case C-66/02, Italian Republic v Commission: 111; CJEU, Case C-148/04, Unicredito Italiano: 54; CJEU, Case C-372/97, Italian Republic v Commission: 44]. An aid affects trade when it strengthens the position of an undertaking compared with other competing undertakings [CJEU, C-522/13, Ministerio de Defensa and Navantia: 21-31; CJEU, Case C-197/11, Libert and Others: 77; CJEU, Case C-222/04, Cassa di Risparmio di Firenze et. al: 141].

Finally, to consider the selectivity of a tax measure, a three-step analysis should be applied. The first step is to determine the general or normal tax system applicable in a given member state (reference system, "normal taxation"). Second, to determine whether the measure under assessment derogates from the reference system to the extent that it differentiates between economic actors in a comparable factual and legal situation in light of the system's underlying objectives. If it does not constitute a derogation, it is not a selective measure. In other cases, it is necessary to assess whether the derogation is justified by the nature or general scheme of the system. If so, the measure will not be considered selective [CJEU, Case C-143/99, Adria-Wien Pipeline; CJEU, Case C-279/08, European Commission v Kingdom of the Netherlands; CJEU, Case C-308/01, GIL Insurance; CJEU, Joined Cases C-78/08 to C-80/08, Paint Graphos and Other].

Finding a reference system for imposing new taxes may prove problematic. In assessing this premise, the CJEU tries to find taxation principles that are common to all the entities that are assessed from the perspective of being affected by the aid measure. The question arises, whether the new tax can be a reference system to itself. The CJEU stated that "the constitutive features of a tax which includes progressive rates of taxation constitute, in principle, a system of reference or a 'normal' tax system to analyze the condition of selectivity [CJEU, Case C-562/19 P, European Commission v Republic of Poland: 42].

5. Assessment of DST proposed by the European Commission under the EU state aid rules.

As noted above, several national DSTs resemble EU Proposal, in particular with a system of thresholds and narrow scope of taxed services. It is thus valuable to assess these elements according to state-aid case law discussed above. DST imposed on a national level can be attributed to the state. The system of thresholds places a new burden only on some taxpayers, thus creating an advantage for others. It is likely to affect the trade by strengthening the position of the non-taxed companies (in fact, one of the political aims is to "improve the level-playing field). However, it is questionable whether it constitutes a selective measure. For the time being, no such tax was contested by the European Commission, thus no case law dealt directly with these taxes. However, interesting conclusions in this regard can be drawn from the case study of different taxes: Polish tax on the retail sector and Hungarian tax on advertisement.

In Polish tax exist two thresholds - the first at monthly revenue of PLN 17 million (approximately EUR 3,71 million – with tax rate of 0.8 percent of revenue above this amount) and the second threshold at monthly revenue of PLN 170 million (approximately EUR 37,1 million – with a tax rate of 1.4 percent above the amount). Hungarian tax contains one threshold – at HUF 100 million (approximately EUR 312.000) between 0 percent and 5.3 percent tax rate. Another similarity to the DST is that both these taxes also regulate a narrow scope of services (retail sale of a good to consumers or advertising).

Both these taxes have been called under scrutiny by the European Commission due to their progressive nature, respectively by the Decision 2018/160 on June 30, 2017 [European Commission, Decision 2018/160 on the State aid SA.44351 (2016/C) (ex 2016/NN) implemented by Poland for the tax on the retail sector] and the Decision 2017/329 on November 4, 2016 [European Commission, Decision 2017/329 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover]. European Commission asserted that these taxes constitute unlawful state aid within the meaning of Article 107 of TFEU, due to the progressive structure of the tax rates.

The case went before the CJEU, where the Court annulled the Decisions stating that the progressivity brought about by such a construction (introducing a "zero rate" for entities below the national or global threshold) does not yet make the measure selective within the meaning of Art. 107 TFEU. While it may seem that accordingly thresholds do not make DST selective, it is crucial to note that CJEU allowed that in certain cases this feature could be

discriminatory [CJEU, Joined Cases T-836/16 and T-624/17, Republic of Poland v European Commission: 42; Stępkowski 2019: 47-48].

Therefore, as noted by Sabo, this court ruling was “specific for the factual circumstances of this case” and does not grant EU member states a “carte blanche for the imposition of DSTs” [Sábo 2020: 76]. Although the European Commission did not prove that point of fact before the court, one of the assumptions of the DST so far has been to cover only the largest entities (which effect is caused primarily by the introduction of the global threshold and high amounts of both thresholds). The crucial feature of the tax is to place an additional burden on particular taxpayers.

The assessment of selectivity must be made by the three-step test mentioned earlier. As the thresholds, the narrow scope of services is constitutive features of the DST they will in principle, constitute a reference system. However, it does not rule out the assessment of this particular version of DST with thresholds as proposed by the European Commission to be selective. Demonstration by the European Commission that this feature is a “manifestly discriminatory element” [CJEU, Case C-562/19 P, European Commission v Republic of Poland: 42] would lead to excluding these thresholds from the reference system [CJEU, Case C-562/19 P, European Commission v Republic of Poland: 44]. This would lead to the conclusion that DST is a selective measure.

In my opinion proving this manifestly discriminatory character is possible. DST imposes a tax on a grossly small number of taxpayers. The conducted research indicates that this tax currently affects a very narrow group of entities. In fact, out of hundreds of thousands of potential taxpayers only twenty-seven companies would be covered under DST (with thresholds at 750 million euro globally and 25 million euro nationally) [Report on France’s Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974: 26-27], from which seventeen are US companies [Sábo 2020: 72].

Another interesting point is the possible material selectivity of the DST due to its narrow scope. In general, a narrow definition of the object of taxation (e.g. by listing specific types of taxable services) leads to the same result as defining the object broadly (e.g. all services) while introducing system exclusions (by listing services not covered by the tax). In both cases tax will be imposed only on several entities, giving an advantage to the remaining ones. The EU law and CJEU jurisprudence focus on the actual effect of the measure rather than the legislative technique or purpose. Thus, both scenarios could lead to the material selectivity of the measure.

As an example, let us consider two hypothetical platforms providing access to knowledge in the field of tax law, generating revenues of equal amount (sufficient for them to be subject to the DST). The goal of both platforms is to make materials about tax law available for users. While owners of both platforms provide the technical infrastructure, their business modes differ. The creators of Platform A hired experts who provided them with the content that is later available on the platform. The creators of platform A thus unilaterally sell access to knowledge. The creators of platform B wanted the users to share their knowledge. Users have their profiles where they can make content available to other users (with or without a fee) and post reviews. In addition, creators provide a certain base amount of available material (similarly to platform A).

Platform B will be subject to DST while platform A will not. The only difference is the possibility of interactions between users, which may not generate any profit at all. Furthermore, the exemption stipulated in art. 3.4.a of Proposal may cause disputes due to its unclear criteria. For example, what a purpose should be a “main purpose”. Should the creator’s intention prevail or the actual use? Such problems may cause an inadvertent effect of hindering the exchange of information. In a situation where the exchange of information between users does not translate into a clear profit for the entity providing the service, such an entity may structurally limit the possibilities of exchanging information between users.

In my opinion, such doubts arise because DST was created to tax specific entities. Contrary to the reasoning presented in the Proposal, it was constructed to catch particular firms rather than broader array of business models. Thus, copying the European Commission's version of DST on the national level may lead to the selectivity of the measure.

6. Conclusion

The hypothesis that national DST constructed in line with the proposition of the European Commission does interfere with EU state aid law was partially confirmed. Out of four prerequisites for unlawful state aid, three will be undoubtedly met. The national DST can be attributed to the state. By covering only some taxpayers it grants an advantage to the other and it is likely to affect the trade between member states.

The fourth premise (selectivity) is questionable. The main cause of potential selectivity is the threshold system which causes the tax to apply only to a few taxpayers. Neither the DST's narrow scope nor high threshold does cause the interference itself. However, if European Commission proves that threshold levels amount to a manifestly discriminatory element, DST will be considered selective. As the EU proposal covers only a minor percentage of

potential taxpayers, European Commission will likely be able to prove the discriminatory character. Another question is whether the committee will ignore such measures for political reasons.

Additionally, even if threshold levels would be changed, it cannot be ruled out that DST will be considered selective because of its other feature, namely the narrow scope of services covered by it. The idea to tax only those services that “would not be able to exist in their current form without user involvement” is sound. Nonetheless, it seems that DST was constructed to tax particular companies rather than a broader display of business models. The current wording of the Proposal leads to a situation when some of the similar services will be taxed by DST and others will not. It creates an arbitral, selective benefit for a part of the digital economy. Additionally, it is likely to cause a detrimental effect on the economy as a whole.

This leads to a conclusion that further discussion is necessary to achieving fair taxation of the digital economy and that simple transfer of the solution proposed by the European Commission on a national level is not admissible.

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