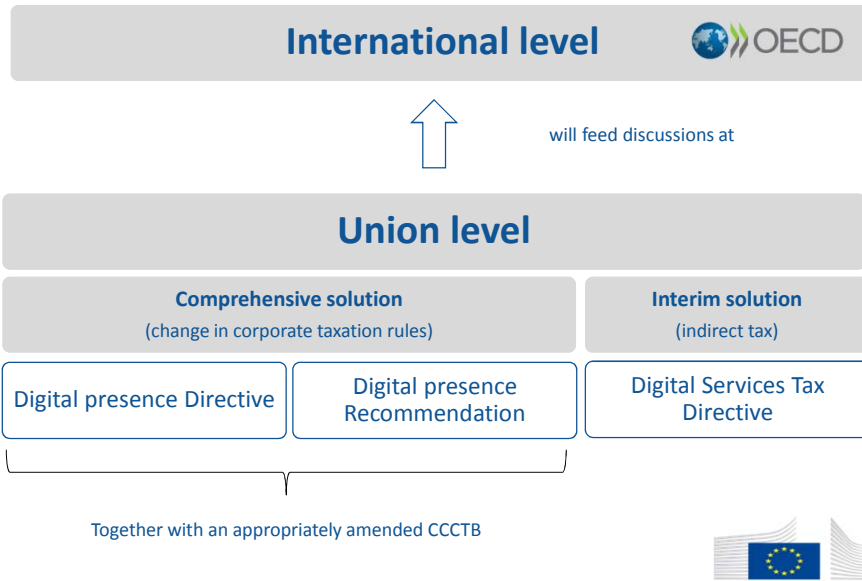


EU-Digital tax package

1. Proposal for a COUNCIL DIRECTIVE on the common system of a digital services tax on revenues resulting from the provision of certain digital services
2. Proposal for a COUNCIL DIRECTIVE laying down rules relating to the corporate taxation of a significant digital presence
3. COMMISSION RECOMMENDATION relating to the corporate taxation of a significant digital presence

Architecture of the package



FR – DE Proposal on Ecofin 4/12/2018
(joint declaration on the taxation of digital companies
and minimum taxation)

Fiscal attaché meeting 11/12/2018
DST (digital services tax) => DAT (digital advertising tax)

Nature of the problem / Why
does EU needs to (re)act?

WHY?

Main principle:
Profits should be taxed where the value is created

WHY?

Characteristics of digital business models:

- Limited physical presence
- Disruption in value creation & indirect revenue generation
- Importance of intangible assets
- Winner takes most dynamics

WHY?

Type of MNE	Total revenue	Annual revenue growth	International footprint	Relevance of intangible assets
Digital	872	14.2%	2.1	3.1
IT&Telecoms	2825	3.1%	2.2	1.2
Other	5682	0.2%	1.1	1.4

WHY? Consequences in relation to taxation

Comparison of the geographical allocation of web visits (left) and profits (right) for five large web companies



Source: European Commission Joint Research Centre, based on Bureau van Dijk Orbis database (2016) and SimilarWeb (2016, www.similarweb.com). Legend: geographical allocation of web visits (left-hand side); profits (measured as EBITDA = Earnings before interest, taxes, depreciation and amortisation, right-hand side).



WHY? Consequences in relation to taxation

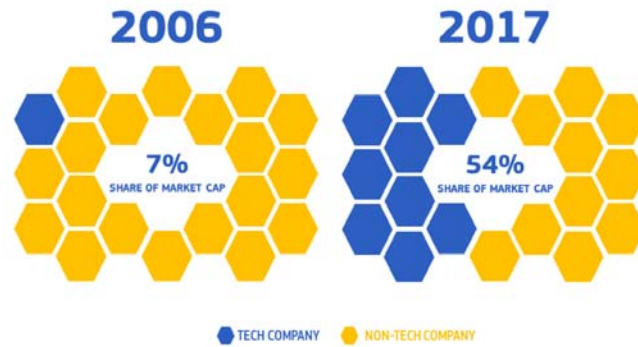
Effective average tax rates of different model companies

	Domestic company	Multinational group	Multinational group engaged in aggressive tax planning using most beneficial IP box regime
Traditional business model	20.9	23.2	16.2
Digital business model	8.5	9.5	-2.3

Source: Own computations based on ZEW (2016, 2017) and ZEW et al. (2017).



WHY? All these issues are only set to grow



Source: Global Top 100 Companies by market capitalisation' PWC, 2017; Financial Times Global 500 database, 2006.



Policy response / How can the EU
(re)act ?

Legal basis

Article 115 of the TFEU

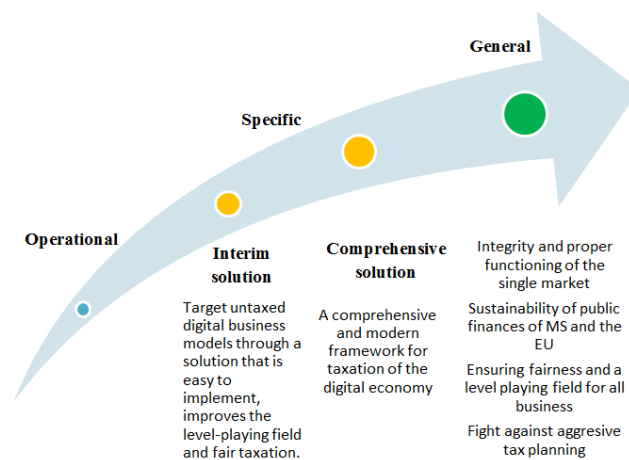
Article 113 of the TFEU

Subsidiarity

Necessity of EU action

Added value of EU action

Objectives: what is to be achieved?



Interim measure

Digital Services Tax (DST)

Tax on companies / Tax on services?

BACKGROUND OF DST-THE PROPOSAL ?

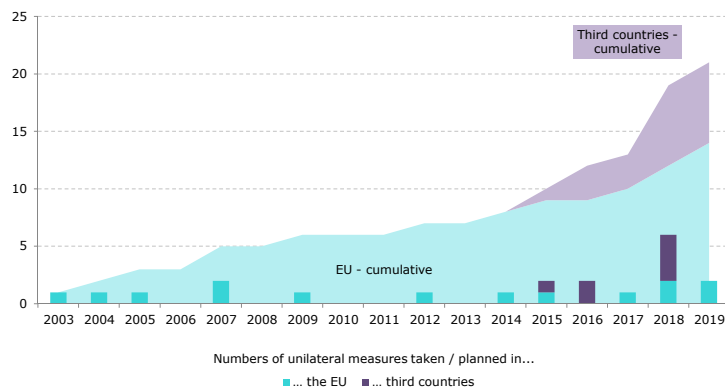
- Taxation needs to take place where value is created
- Digital Economy: value creation through user participation

BACKGROUND OF THE DST-PROPOSAL ?

- Long-term measure (SDP) will take time

=> DST as an interim solution
- Objective: “to target revenue stemming from the supply of certain digital services by taxable persons”

Positive trend towards unilateral interim solutions



Source: European Commission (see Impact Assessment, section 9.3.1).

DST: main elements of the tax

Article 3	• Taxable revenues
Article 4	• Taxable person
Article 5	• Place of taxation
Article 6-7	• Chargeability – Calculation of the tax
Article 8	• Rate
Article 9-18	• Administrative obligations
Articles 19-21	• Administrative cooperation between Member States
Articles 25-26	• Transposition – Entry into force

DST: taxable revenues – Article 3

How has the scope of DST been determined?

- DST is a tax on certain digital activities, not a tax on "businesses" or specific sectors.
- DST with a targeted scope, applied to activities where the "user value creation" is the highest.

DST: taxable revenues – Article 3

Why a tax on gross revenues and not on profits as an interim measure?

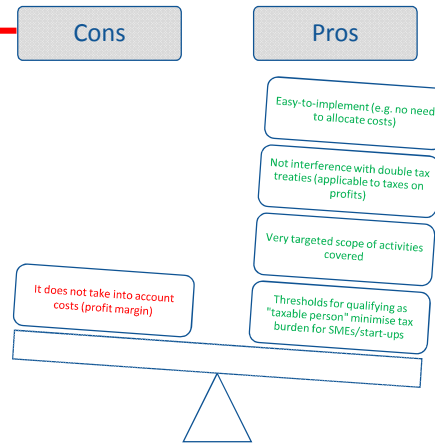
Other potential negative impacts (which are **not** specific to taxes on revenues, but also taxes on profits):

- “Cost may be passed on to users”

No uniform answer for the variety of services concerned, as it depends on competition and elasticity of demand (see section 9.3.9 of the impact assessment).

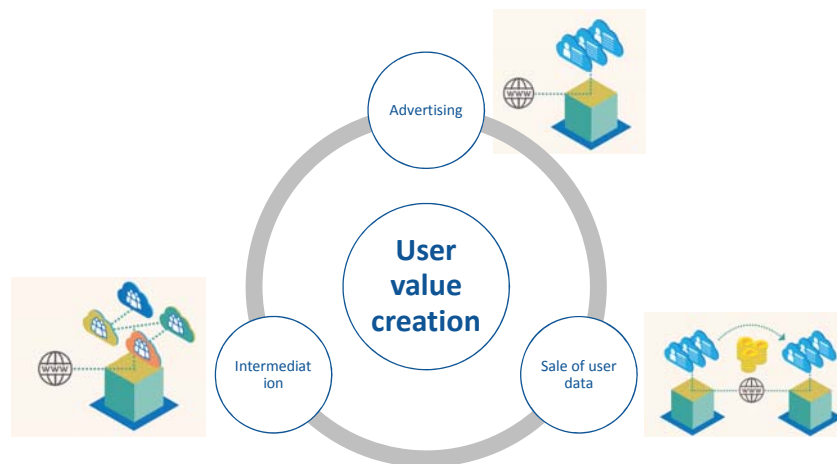
- “Potential double taxation”

In cases where a company pays DST and CIT, possible double taxation alleviated through **deductibility of DST paid as a cost** from corporate tax base (see section 9.3.7 of the impact assessment).



DST: taxable revenues – Article 3

Activities with the highest user participation



DST: taxable revenues – Article 3

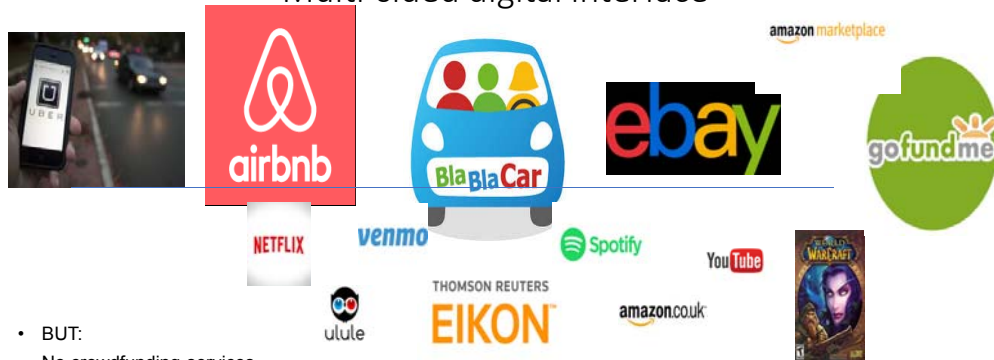
Article 3(1)(a) – placing of advertising

DST: taxable revenues – Article 3

Article 3(1)(b) – intermediation

DST: taxable revenues – Article 3

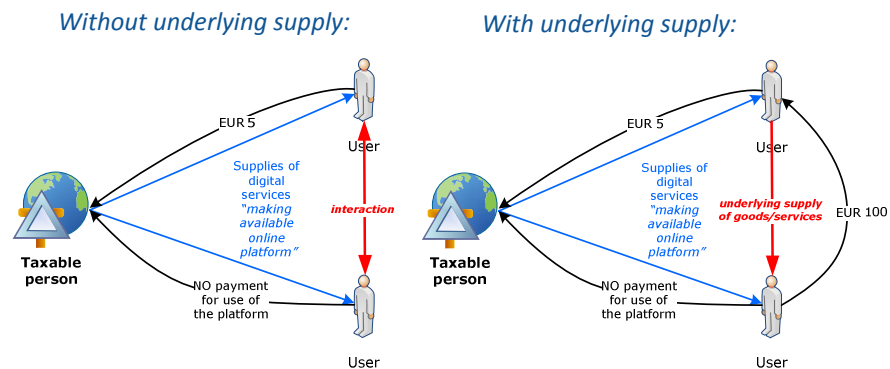
Multi-sided digital interface



- BUT:
- No crowdfunding services
- No financial services
- No payment services
- No provision of digital content

DST: taxable revenues – Article 3

Article 3(1)(b) – intermediation



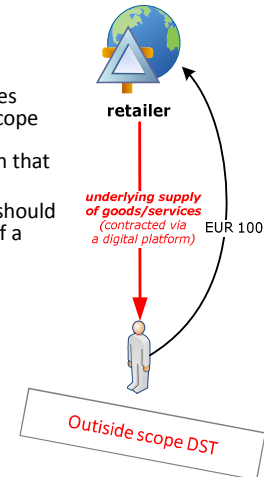
In both cases, revenues obtained by intermediation platform (EUR 5) subject to DST.



DST: taxable revenues – Article 3

Article 3(1)(b) – intermediation

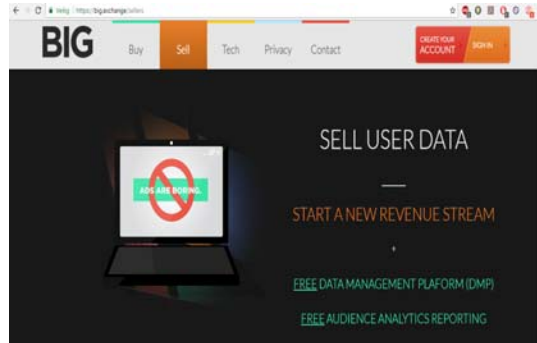
- Revenues resulting from retail activities (sale of goods or services contracted online via the web of the supplier) fall outside the scope of DST, because there is no user value creation (no "triangular" scenario). Digital platform used as a means of communication in that context (recital 13).
- Whether a supplier is acting as a retailer or as an intermediary should be assessed on the basis of the legal and economic substance of a transaction. For instance:
 - With whom is the user entering a legal contract?
 - Who is assuming inventory risks?
 - Who determines the price?



DST: taxable revenues – Article 3

Article 3(1)(c) – sale of data

Sale of user data



Data from only one Web user has been estimated at \$800 by the Boston Consulting Group™, and will 3X until 2020. Facebook™ made an average \$6.4 revenue per user in 2013. Those companies like Facebook™, Google™ and Amazon™ built their model on data. What are YOU waiting for?

DST: taxable revenues – Article 3

Outside scope DST

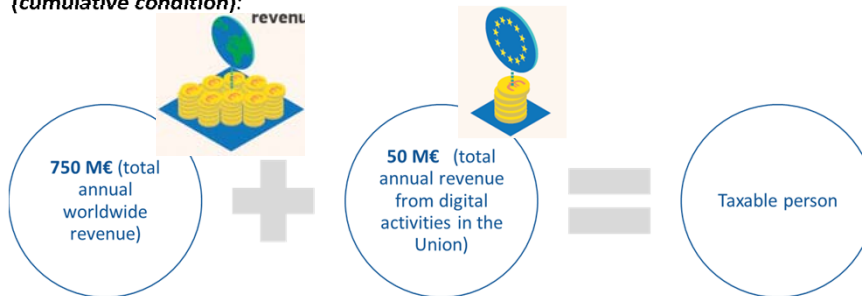
Article 3(4)(a) – Payment and communication services

Article 3(4)(a) – Supply of digital content

Article 3(4)(b) and (c) and Article 3(5)
Certain financial services

DST: taxable persons – Article 4

To qualify as a taxable person, an entity must be **above both** of the following **thresholds** (*cumulative condition*):



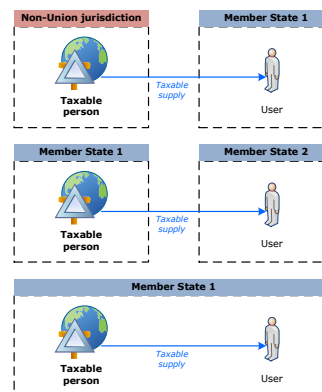
In **consolidated groups**, thresholds applied to the amounts reported/obtained by the consolidated group as a whole.

DST: taxable persons – Article 4

Due to the need to respect **TFEU fundamental freedoms and international obligations**, DST must not be discriminatory (towards non-established suppliers). Hence, DST applies to following scenarios:

- 1) non-Union to Member State
- 2) Cross-border within Union
- 3) Domestic

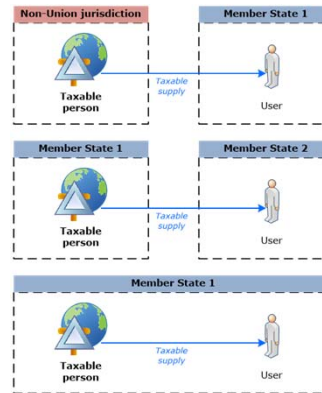
In cases where a company pays DST and CIT, possible double taxation alleviated through deductibility of DST paid as a cost from corporate tax base.



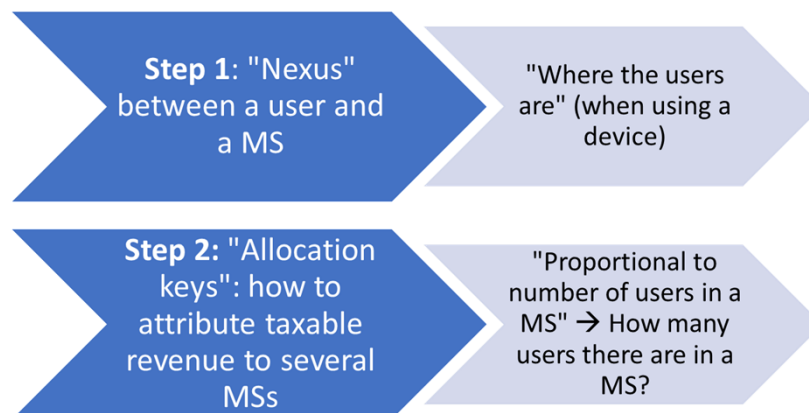
DST: taxable persons – Article 4

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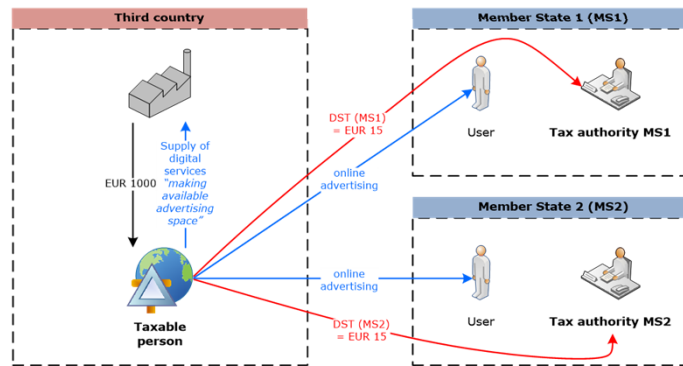
DST: place of supply rules – Article 5



DST: place of supply rules – Article 5

Placing of advertising

- DST rate = 3%
- It is assumed that all payments are in EUR

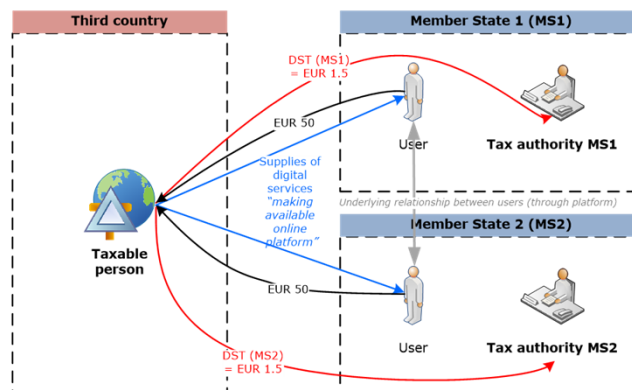


- DST taxable revenues = EUR 1000
- Place of taxation? Member States where users are located (MS1 and MS2).
- Apportionment in each MS proportional to the number of users in those MS (EUR 500 in each MS)
- DST due in MS1 (3% x 500) = EUR 15
- DST due in MS2 (3% x 500) = EUR 15

DST: place of supply rules – Article 5

Intermediation

- DST rate = 3%
- It is assumed that all payments are in EUR



- DST taxable revenues = EUR 100
- Place of taxation? Member States where users are located (MS1 and MS2)
- Apportionment in each MS proportional to the number of users in those MS (EUR 50 in MS1 and EUR 50 in MS2)
- DST due in MS1 (3% x 50) = EUR 1.5
- DST due in MS2 (3% x 50) = EUR 1.5

DST: place of supply rules – Article 5

Location of the service

- Taxable revenue obtained by an entity in a tax period is attributed to a MS if “users with respect to the taxable service are located in that MS” (nexus)
- Irrespective if user has contributed in money

Advertising	Multi-sided interface	Sale of data
Where ad appears on user's device when accessing a digital interface	Where user uses a device to access a digital interface and conclude a transaction, if there is an underlying supply	Where transmitted data has been generated by the user's device having accessed the digital interface
	Where user access interface and account is opened if there is no underlying supply	

DST: place of supply rules – Article 5

Allocation of the service

- After identifying the service and the location of the service, the taxable revenue needs to be allocated
- Use of device based on IP address

Advertising	Multi-sided interface	Sale of data
# times advertisement has appeared on a user's device	# users having concluded the underlying transaction	# users from whom transmitted data has been generated by accessing a digital interface
	# users holding an account for all or part of that tax period	Access in that tax period or a previous one

DST: place of supply rules – Article 5

Step 1: "Nexus" – Article 5(2)

- Advertising: advertising displayed in a MS.
- Intermediation
 - with underlying supply: underlying transaction concluded from a MS.
 - without underlying supply: account opened using a device in a MS.
- Sale of data: data generated by a user in a MS.

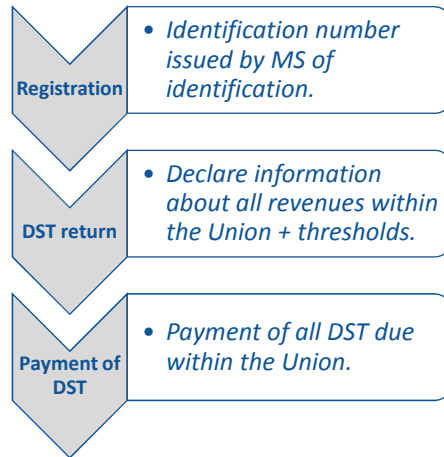
Step 2: "Allocation keys" for proportional allocation in cases where users are not only in 1MS – Article 5(3)

- **Advertising:** number of times advertisement displayed in a MS.
- **Intermediation**
 - with underlying supply: number of users having concluded transactions in a MS.
 - without underlying supply: number of users holding an account opened in a MS.
- **Sale of data:** number of users whose data generated in that MS has been sold.

Article 8 – Rate (revenue potential)

			in EUR billion	% of CIT revenue
Tax rate	1%	Advertising	0.3	0.1%
		Marketplace/intermediaries	1.3	0.3%
			1.6	
	3%	Advertising	0.8	0.2%
		Marketplace/intermediaries	3.9	0.9%
			4.7	
	5%	Advertising	1.3	0.3%
		Marketplace/intermediaries	6.5	1.6%
			7.8	

DST: Obligations – Articles 9-18



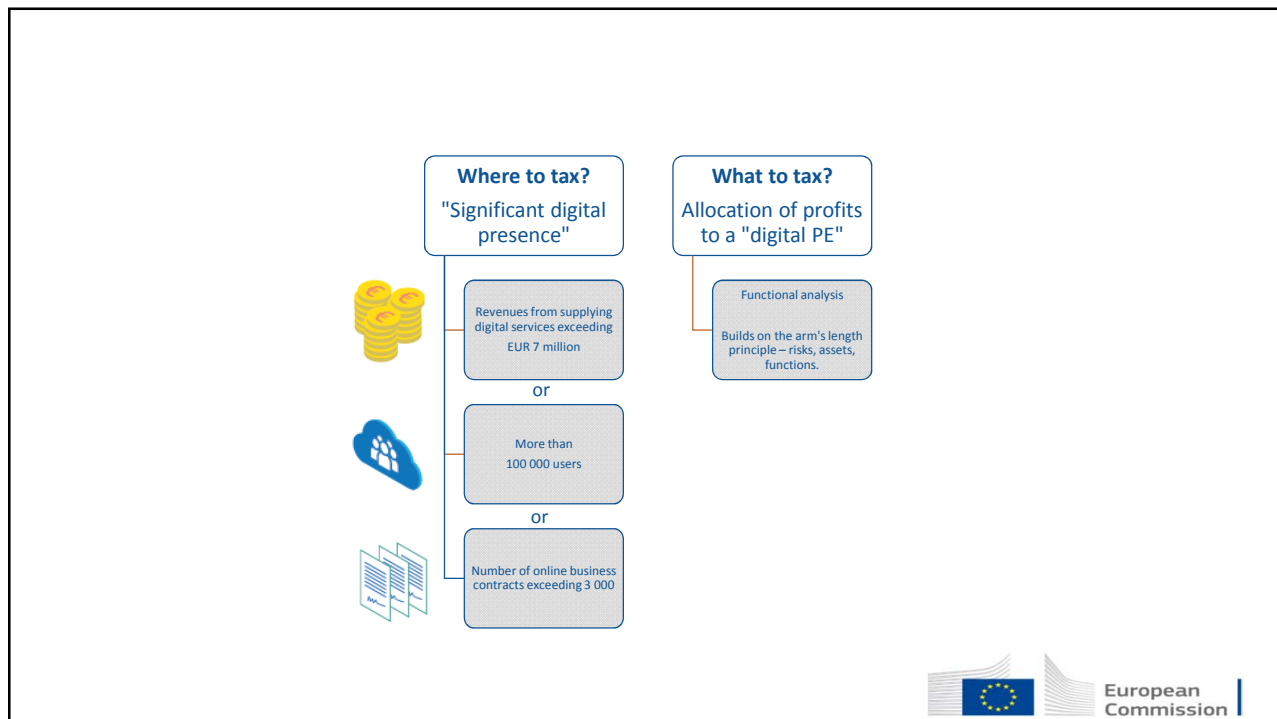
Comprehensive solution

Policy objectives

- **Misalignment** between place where value is created and place where profits are taxed.
- Need to update the **taxable nexus** – absence of physical presence - focus on revenues/number of users/business contracts.
- Need to adapt the criteria for profit allocation: **data** and **users** contribute central input to the digital business models

Changes to the Corporate Tax rules

- 2 key questions:
 1. *Where to tax? Taxable nexus.*
 2. *What to tax? Profit allocation.*
- EU level - Directive
- Extend to global level - Recommendation
- CCCTB



Articles of the Directive

- Art. 1 Subject matter
- Art. 2 Scope: corporate taxpayers
- Art. 3 Definitions
- Art. 4 Significant digital presence: the digital PE
- Art. 5 Profit allocation

Significant Digital Presence - PE

- Current PE definition: physical presence required.
- Extending the PE concept in order to capture digital presence => 'Digital PE'

Significant digital presence - scope

- No new tax.
- Within existing corporate tax systems of MSs.
- Applies to entities in a MS or in a 3rd country (where no DTC).
- Entity resident in a 3rd country may become taxable in a MS in respect of its significant digital presence.

Significant digital presence - Users

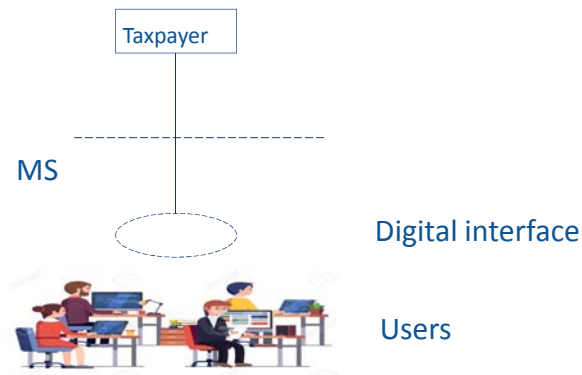
- Where to tax?
- OECD BEPS Action 1 Report outlined some ideas:
 - *revenue-based factors;*
 - *digital factors (e.g. local website / domain);*
 - *user-based factors;*
 - *contract conclusion.*
- *Taxable nexus where users are.*

Significant digital presence - Users

- What to tax?
- Some hints relating to users in OECD TFDE interim report:
 - *large user base;*
 - *user-generated content;*
 - *active user participation.*
- *All generating value for the business.*

Significant digital presence

Digital interface required



User involvement – 3 thresholds

- How to capture user involvement?
- 3 proxies to determine user involvement.
- Digital presence in a MS should be significant, not just any website.
- 3 alternative thresholds: there is a significant digital presence if one (or more) of these thresholds is met.
- Revenues from digital services exceed EUR 7 000 000; or
- Number of users of a digital services exceeds 100 000; or
- Number of business contracts for supplying digital services to users exceeds 3 000.

Profit attribution rules (i)

- **Data and users**
 - provide **central input** into the digital business models;
 - enhance the **value of** a digital enterprise's **intangibles** through **processing and analysis**;
- Digital enterprises **invest heavily** in having a digital presence where users are located;
- Investment is linked to the collection, processing, analysis and deployment of data and user input;
- Expected **arm's length return** on the activities linked to the digital presence

Profit attribution rules (ii)

- Taxing rights are attributed to the MS of the significant digital presence (Art. 5(1))
- Arm's Length Principle remains unaffected (Art. 5(2))
 - *Significant digital presence - separate and independent enterprise*
 - *Analysis of functions, assets and risks*
- *The attribution of profits to the significant digital presence is based on a functional analysis*
- *Account is taken of the economically significant activities performed by the enterprise through a digital interface. These include:*
 - *Activities related to data and users which attribute risks and assets to the significant digital presence*
 - *Activities relevant to the DEMPE functions which result in enhancing the value of intangible assets held by the enterprise*

Profit attribution rules (iii)

- Use of Profit Split Method for profit attribution (Art. 5(6))
 - *Structured as a rebuttable presumption*
 - *Possible alternative methods (internationally accepted principles)*
 - *Splitting factors may include:*
 - *Traditional factors – R&D, marketing costs, etc.*
 - *Users and data*

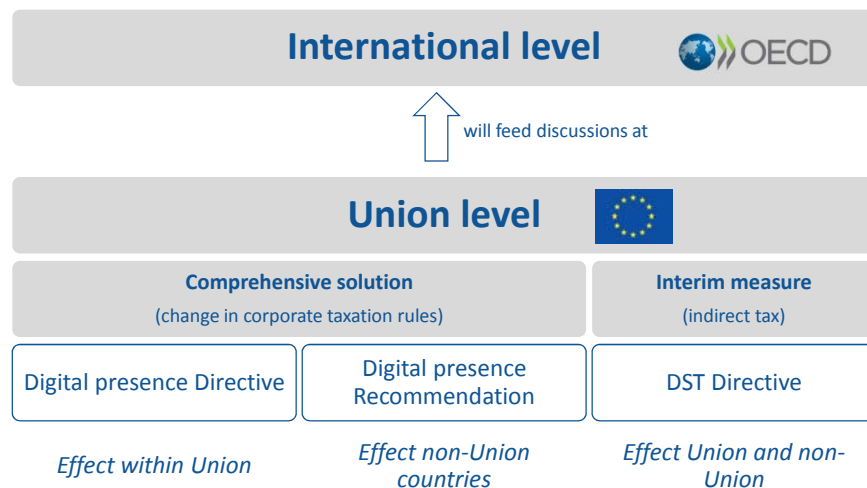
Significant digital presence - scope

- Corporate taxpayer in a 3rd Country I with a SDP in MS B
- No tax treaty between 3rd Country and B
 - => MS B should tax profits of SDP
- Corporate taxpayer in a 3rd Country II with a SDP in MS B
- Tax treaty between 3rd Country II and MS B without SDP
 - => MS B does not have right to tax profits of SDP
- Corporate taxpayer in MS A with a SDP in MS B
- No SDP in PE Article in Tax treaty between A and B.
 - => EU law prevails: MS B should tax profits of SDP.

Recommendation

- Directive does not interfere with MSs' DTCs with 3rd countries.
- Solution must ultimately be global.
- EU input into the international discussions.

In summary: The EU approach



Nog vragen?