



Newsletter

EU TAX INSIDER

Web tax: State of Play after the EU Commission Proposals for a Fair and Growth-Friendly Taxation of Digital Business Activities

The new rules on digital taxation proposed by the European Commission on 21 March 2018 represent an opportunity to summarize the position of the G20, the OECD, the EU and Italy on how to address the tax challenges of the digital economy.

To date, the measures proposed which seem to better address the problem are: (I) a long-term solution consisting in a new nexus in the form of a significant digital presence and (II) an interim solution consisting in an excise tax applicable to revenues derived from certain digital activities (the so called “web tax”).

(a) G20 position

On 1 March 2018, in a letter addressed to the G20 Chair, the EU Commission and the finance ministers of France, Germany, Italy, Spain and the UK have set out their high-level views on the tax challenges of the digital economy. In particular, they stated that new global long-term solutions on territorial nexus and the allocation of profits should be pursued, although this should not prevent countries being allowed to adopt interim solutions, preferably on a coordinated basis.

On 20 March 2018, the official communiqué of the G20 Meeting held in Buenos Aires highlighted that the impacts of the digitalisation of the economy on the international tax system remain key outstanding issues of the OECD BEPS Project. In addition, the G20 leaders confirm their commitment to work together to seek a consensus-based solution by 2020.

(b) OECD position

Action 1 of the OECD BEPS Project specifically deals with the tax challenges of the digital economy. The 2015 Final Report on Action 1 concluded that none of the following options analysed by the Task Force on the Digital Economy were recommended: (I) a new nexus in the form of a significant economic presence; (II) a withholding tax on certain types of digital transactions, and (III) an equalisation levy. Indeed, in the OECD opinion, it is expected that the measures developed in the BEPS Project will have a substantial impact on the tax issues related to the digital economy. In addition, it was pointed out the importance to continue working on such issues.

On 16 March 2018, the OECD published an Interim report on the Tax Challenges Arising from Digitalisation agreed by the more than 110 members of the Inclusive Framework. Members agreed to work towards a consensus-based long-term solution reviewing the “nexus” and “profit allocation” rules - key concepts to allocate taxing rights between countries and to determine the fair share of the multinational enterprise’s profits that will be subject to taxation in a given jurisdiction. It was announced that a final report will be published in 2020. In addition, the Interim Report discusses an interim measure in the form of an excise tax on the supply of certain digital services that would apply to the gross consideration paid for such services. According to the Interim Report, whether such excise tax falls within the scope of a particular tax treaty is a determination that must be made by each country based on the precise features of the excise tax and wording in the relevant tax treaty.

(c) EU position

On 21 September 2017, the European Commission published a communication on A Fair and Efficient Tax System in the European Union for the Digital Single Market describing the main issues and objectives in relation to the tax challenges of the digital economy. On 21 March 2018, the European Commission published: **(I)** a communication entitled “Time to establish a modern, fair and efficient taxation standard for the digital economy”; **(II)** a first Directive Proposal introducing rules relating to the corporate taxation of a significant digital presence; **(III)** a second Directive Proposal on a digital services tax on revenues resulting from the provision of certain digital services and **(IV)** a recommendation for the Member States to negotiate the necessary adaptations to their double tax conventions with non-EU jurisdictions in relation to the corporate taxation of a significant digital presence.

The first Directive Proposal provides for the Commission’s preferred long-term solution to the taxation of the digital economy. It sets rules for establishing a taxable nexus for digital businesses operating across border in case of a non-physical presence but significant digital presence. Under article 4 of the Proposal, there is a significant digital presence in a Member State if one or more of the following criteria are met: **(I)** if the revenues from providing digital services to users in a jurisdiction exceed EUR 7 million in a tax period; **(II)** if the number of users of a digital service in a Member State exceeds 100.000 in a tax period or **(III)** if the number of business contracts for digital services exceeds 3.000. In addition, the Proposal sets out rules for attributing profits to a digital business. The authorised OECD approach remains the underlying principle for attributing profits to a significant digital presence. However, the attribution of profits should take into account the development, enhancement, maintenance, protection and exploitation of intangible assets in the performance of the economically significant activities by the digital presence. In determining the attributable profits to the digital presence, taxpayers shall use the profit split method unless they prove that an alternative method is more appropriate having regard to the results of the functional analysis.

The second proposal provides for an interim solution that will tackle the digital taxation issue until a comprehensive solution is in place. The 3% tax will apply to revenues created from the following activities: **(a)** selling of online advertising space; **(b)** making available to users of a multi-sided digital interface; **(c)** selling of data collected about users and generated from users’ activities on digital interfaces. Such tax would be collected by the Member States where the users are located and will only apply to companies with total annual worldwide revenues exceeding EUR 750 million and EU revenues exceeding EUR 50 million.

Lastly, the Commission Recommendation puts forward a proposal for adaptations to the double tax conventions of Member States with non-EU jurisdictions in order: **(I)** to extend the concept of a permanent establishment to include a significant digital presence through which the business of an enterprise is wholly or partly carried on in another jurisdiction, and **(II)** to include rules for attributing profits to a significant digital presence.

(d) Italian position

The 2018 Italian Budget introduced starting from 2019 a new tax on digital services provided to Italian enterprises and Italian permanent establishments of foreign entities. The definition of digital services will be specified by an implementing Decree. Such tax will be levied at 3% rate on the value of each transaction. It will apply to resident and non-resident digital service providers which in a calendar year carry on more than 3.000 transactions.

If further information is required, please refer to your **LED Taxand** contact or to eiascone@led-taxand.it or fcardone@led-taxand.it

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