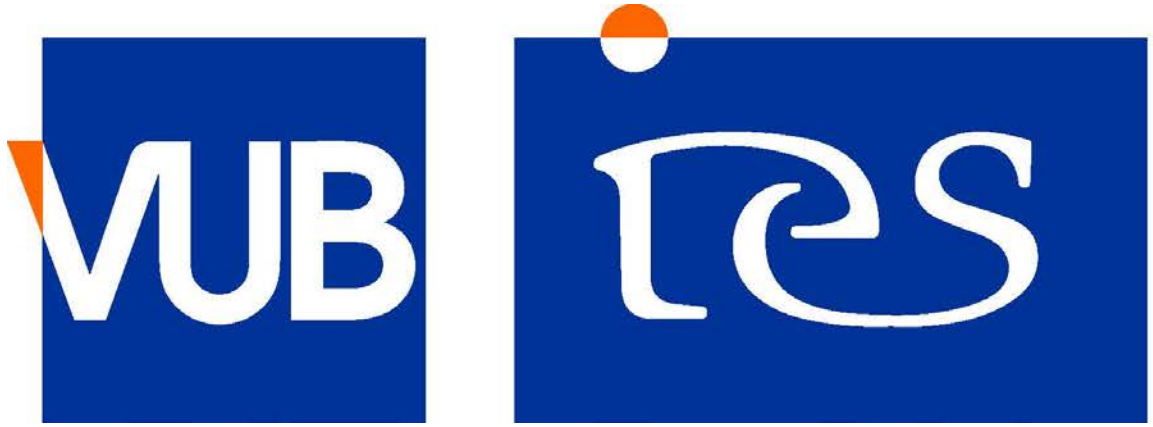


INSTITUTE FOR EUROPEAN STUDIES

Prof. Dr Marie Lamensch

Digital Services Tax and Other Indirect Taxes

Taxing the digital economy: the EU proposals and other insights
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Outline:

1. DST and VAT compared

2. Is the DST an *indirect tax*?

1. DST and VAT compared

❖ DST - Taxable revenue (Article 3)

Revenue (total gross, net of VAT and other taxes) arising from:

1. The placing on a digital interface of advertising targeted at users of that interface

Example: Facebooks sells advertising space to Nike on its digital interface for 2 million EUR and the advertisement is visible by EU users.

❖ DST - Taxable revenue (Article 3)

2. The transmission of data collected about users which has been generated from such user's activities on digital interfaces

Example: Amazon collects data about EU users (generated by their activity on the website) and sells them for 50 million EUR to a third party.

❖ DST - Taxable revenue (Article 3)

3. The making available of multi-sided digital interfaces to users which allows users to find other users and facilitates the provision of underlying supplies of goods or services directly between users.

Target = sharing economy benefiting from “network effect”.

Example: AirB&B charges 1 million EUR to users offering their place for short stays in the EU via the platform (even if the users who are looking for places to rent do not pay a fee for using the platform).

Taxable revenue: DST and VAT compared

VAT

- Seeks to tax: consumption (expenditure).
- Tax base: all supplies of goods and services (in principle).
  - ✓ Broad scope to maximise revenue and preserve neutrality between sectors.

DST

- Seeks to tax: the value created by user participation.
- Tax base: only certain digital services characterized by user value creation
  - ✓ Narrow scope to target one specific sector considered as not paying its fair share under traditional corporate taxation rules – "Equalisation" - *Revenue a side issue?*

Taxable revenue: DST and excise tax compared

Excise tax

- Specific alcohol tobacco and energy products
  - ✓ Narrow scope to target specific sectors considered as "harmful for customers and society" / Pigovian theories (compensating externalities)

DST

- Only certain digital services characterized by user value creation are subject to the DST
  - ✓ Narrow scope to target one specific sector considered as not paying its fair share under traditional corporate taxation rules – "Equalisation" - *Revenue a side issue?*

Taxable revenue: DST and VAT compared

VAT

- Taxable amount: everything which constitutes consideration obtained or to be obtained by the supplier, including taxes (excluding the VAT itself) - Would not include the DST because not paid to the supplier.
- Both B2B and B2C supplies are taxed (multi-stage tax). Input VAT can be deducted or refunded for businesses purchases (non-cumulative tax).

DST

- Taxable amount: total gross revenue of the supplier, net of VAT and other taxes
- Single stage tax. Revenue taxed mostly arise from B2B supplies, but could be from B2C (eg. if a sharing economy platform asks for remuneration from both parties). In any case, the "users" that create the value include businesses and consumers.

Taxable revenue: DST and VAT compared

VAT

- Head-office/branch supplies (same legal entity): out of scope.
- Intra-group supplies (including different legal entities): in scope, except when within a VAT group (no cross-border VAT groups).

DST

- Intra-group supplies (entities that are fully included in consolidated financial statements, including different legal entities): out of scope.

❖ DST - Tax rate (Article 8)

VAT	DST
• Standard rate: min 15% (20% in average in the EU). • Reduced rates (“positive list”, 2018 proposal for reform: more freedom via “negative list”).	• 3%

❖ DST - Taxable person (article 4)

Entity above **both** of the following thresholds:

- The total amount of worldwide revenues reported by the entity for the latest complete financial year for which a financial statement is available exceeds EUR 750 000 000 (same as for CCCTB)

  Expl. memorandum on this 1st condition: *"the economic capacity of the businesses qualifying as taxable persons should be seen as indicating their capacity to attract a high volume of users*".

- The total amount of taxable revenues obtained by the entity within the Union during that financial year exceeds EUR 50 000 000

  Expl. memorandum on this 2nd condition: *"limits the application of the tax to cases where there is a significant digital footprint at the Union level in relation to the revenues covered by the DST*".

Taxable persons : DST and VAT compared

VAT

- Applies without distinction to EU and non EU taxable persons.
- Turnover threshold varies among the MS but higher threshold is around EUR 100.000 in UK

DST

- Applies without distinction to EU and non EU taxable persons.
- Very high turnover threshold. *De facto* discrimination (most taxable persons will be non-EU)?

  ! EU taxable persons might be allowed to deduct DST from CIT (Preamble, Recital 27)

  ✓ If cannot, playing field is not levelled?

  ✓ If can: discrimination?

❖ DST - Place of taxation (Article 5)

- The tax is due in the Member State where the users are located.

A user will be *deemed to be located in a Member State* in a given tax period if:

- **Revenue from placing of advertisement:** The advertisement appears on the user device at a time when the device is being used in that Member State in that tax period to access a digital interface.
- **Revenue from transmitting user data:** data generated from the user having used a device in that Member State to access a digital interface, whether during that tax period or any previous one, is transmitted in that tax period.

❖ DST - Place of taxation (Article 5)

- **Revenue from the making available of multi-sided digital interfaces to users:**
  - If the interface facilitates the provision of underlying supplies of goods or services between the users: The user uses a device in that Member State in that tax period to access the digital interface and concludes an underlying transaction on that interface in that tax period.
  - If the interface is not used for that purpose, the user has an account for all or part of that tax period allowing the user to access the digital interface and that account was opened using a device in that Member State.

❖ DST - Place of taxation (Article 5)

Revenue for one supply can be linked to many users… Allocation of taxing rights?

Example: Facebooks sells advertising space to Nike on its digital interface for 2 million EUR and the advertisement is visible by EU(different MS) and non-EU users.

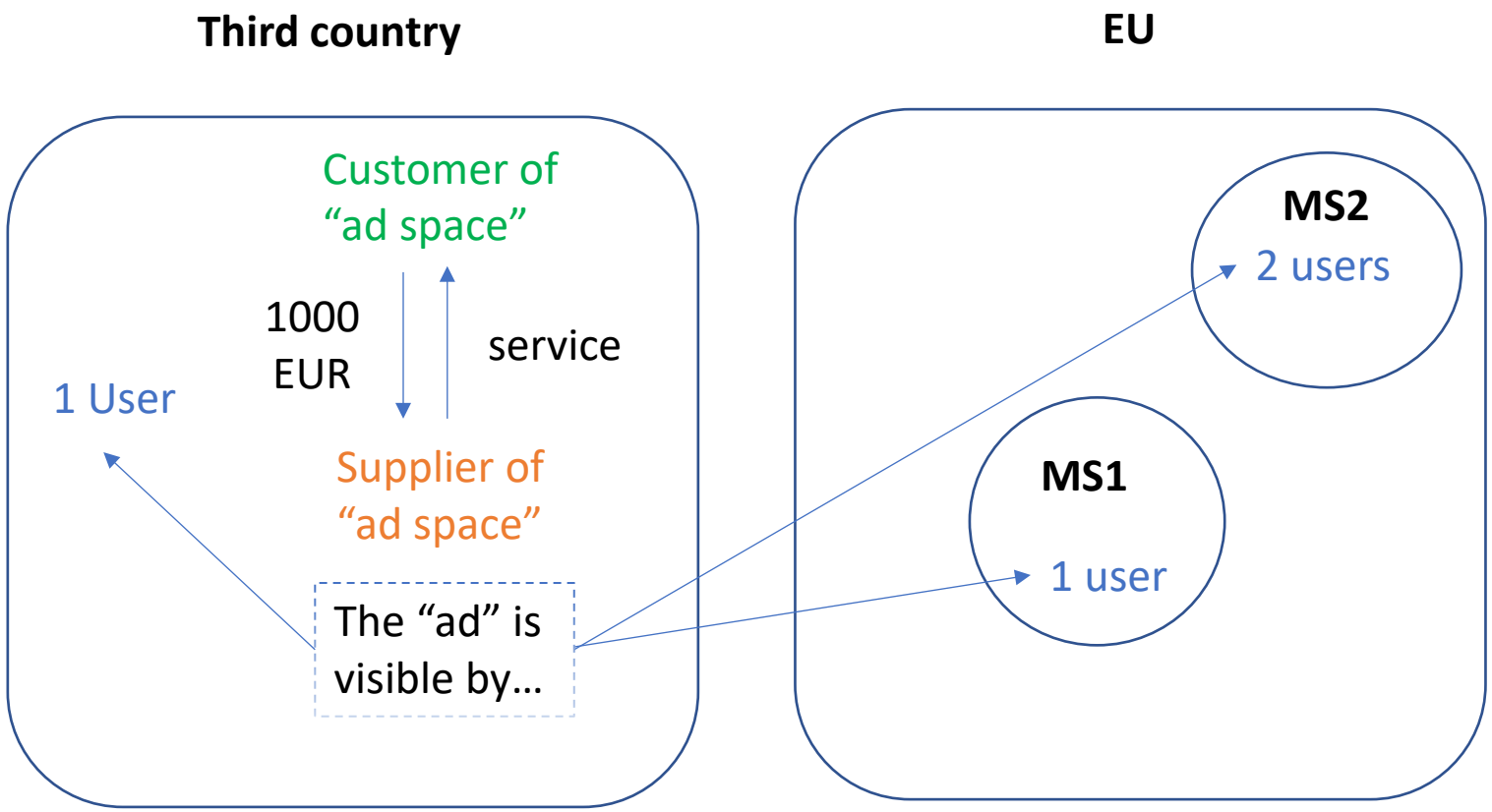
❖ DST - Place of taxation (Article 5)

For each tax period, **the proportion** of an entity's total taxable revenues that is **treated as obtained in a Member State** shall be determined as follows:

- **Revenue from transmitting data:** in proportion to the number of users from whom data transmitted in that tax period has been generated as a result of users having used a device to access a digital interface, whether in that tax period or a previous one.

- **Revenue from advertisement:** in proportion to the number of times an advertisement has appeared on user's device in that tax period.

❖ DST - Place of taxation (Article 5)



How much DST?

Taxable revenue = 1000 EUR

Apportionment in each State where users: 500 in MS2, 250 in MS1 and 250 in third state.

DST due: 3% of 500 in MS2 and 3% of 250 in MS1
(DST not due in third country).

❖ DST - Place of taxation (Article 5)

- **For the making available of multi-sided digital interfaces to users:**
  - If the interface facilitates the provision of underlying supplies of goods or services between the users: in proportion to the number of users having concluded underlying transactions on the digital interface in that tax period.
  - If the interface is not used for that purpose: in proportion to the number of users holding an account for all or part of that tax period allowing them to access the digital interface.

❖ DST - Place of taxation (Article 5)

Where is the user's device being used? Reference to IP address or any other method of geolocation that would be more accurate.

Data collected limited to data indicating the Member State where the users are located, without allowing for identification of those users.

Place of taxation: DST and VAT compared

VAT

- Depends whether supply of goods or services.
- Taxation of services:
  - B2B: “user location” (main establishment v. fixed establishment)
  - Remote B2C: MS of residence of the customer (IP = a possible evidence of customer residence)

DST

- Taxation at destination (User location).
- Allocation of taxing rights depending on proportion of use as compared to use in other MS and third countries.

❖ DST - Remitting of the tax (article 10 ff.)

- Taxable period: calendar year.
- OSS system: The taxable person will have to chose a Member State of identification and to submit a DST return for each taxable period, within 30 days of the end of the taxable period. It will receive a DST return number.
- The DST return will indicate:
  - the total amount of DST due and a breakdown per MS.
  - The total amount of WW revenue and total amount of revenue in the EU
- Payment of the DST: within 30 days of the end of the taxable period.
- Changes are only possible by means of amendments of the return (and not by adjustments to subsequent returns).

Remitting of the tax: VAT and DST compared

VAT

- MOSS available (optional) for certain supplies (currently: electronic services – as of 2021: distance sales and imports; as of 2022: for intra-EU B2B supplies of goods?).
- EU taxable persons have to elect their MS of establishment as MSI – non-EU taxable persons can chose.
- No threshold (10.000 EUR as of 2019 for e-services and EU distance sales).
- MOSS returns: amount of VAT due + breakdown per country.
- Quarterly returns (monthly for imports as of 2021)
- Corrections in subsequent returns.

DST

- Same OSS than for VAT? Taxable persons may chose MSI (not obliged to register where are resident for CIT purposes)
- Threshold conditions.
- OSS returns: total amount due + breakdown per countries + turnover data
- Annual returns.
- Correction by amending returns.

❖ Revenue allocation?

DST	VAT
• 100% to Member State where the DST is due	• 0,3% goes to EU budget (own resource)

❖ Time limit?

- "Temporary VAT system" has been in place since 1993. "Definitive VAT system" should replace it by 2022.

- No sunset clause in the DST proposal.

  Intention: interim measure, but until when?

  - ➢ Until EU significant digital presence directive is adopted? (Enhanced cooperation within the EU an option?) And then? DST not applicable for EU companies but only for third countries?

  - ➢ Until DTCs are amended? And then? DST rescinded for businesses in relevant third State? What about domestic businesses?

2. Is the DST an “indirect tax”?

DST presented as an **indirect tax:** "*Given its (preferred) features, this tax would have more elements of an indirect tax, so it would need to be treated as an indirect tax other than turnover taxes and excise duties*" (Impact Assessment p. 20).

Legal basis: Article 113 TFEU requiring the Council, acting unanimously and after consulting the EP and the EESC to "*adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition*.".

Is this a correct legal basis?

Objective of the EC?

However:

- **Objective with the DST**: Taxing gross revenue as a proxy for tax on profit
  - Expl. memorandum: the purpose is to fight against tax planning and to fill the gap between where profit are taxed and where value is created" - Same rationale as for DP proposal (p. 4).
  - Impact Assessment: "*the outcome of the DST would approximate the outcome of the Significant Digital Presence PE*" (p.78).

- **Direct tax**: the person who actually pays the tax to the authorities suffers a corresponding reduction of his income (v. indirect taxes whose burden is to be passed to someone else).

- **Chargeable** on an annual basis (and not on a transactional basis) with apportionment of taxing rights.

- **Recital 27 of Preamble**: MS may allow businesses to deduct DST from CIT base to avoid double taxation – not a credit or exemption but *deduction* as a cost

DST Covered by DTC?

- Article 2(2) OECD Model: *"There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital (…)".*

- Article 2(4) OECD Model: "The Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes (…)".

- Commentary: *"scope of application of the Convention: taxes on income and on capital; the term "direct taxes" which is far too imprecise has therefore been avoided"* **– Does in fact not matter whether direct or indirect tax.**

- Either the DST is not covered and there should be no credit/exemption or the DST is covered and it is infringing the terms of DTCs.

Thank you for your attention