EU and WTO concerns

Panel 5: Target, temporary solutions

ACTL/IBFD conference: “Taxing the Digital Economy”

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Dr. João Félix Pinto Nogueira

(j.nogueira@ibfd.org)



The retained approach does not breach any double tax treaties with third countries or **WTO rules**. It remains fully grounded on the most basic principle of **corporate taxation** – namely, that profits should be taxed where value is created.

Source: 2018.03.21 Q&A on a fair and efficient system in the EU for the Digital Single Market

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Outline

1. **Introduction**
2. **WTO Law concerns**
3. **EU Concerns**
    1. Primary Law: State Aid
    2. Primary Law: Fundamental Freedoms
    3. Other concerns
    4. Legal basis
4. **Concluding remarks**

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1. Introduction

"There are situations that people in Europe cannot accept. ***American*** internet giants should pay their fair share of tax, and likely will, under a new EU system
Our tax system was conceived (…) for the beginning of the 20th century".
"*We cannot wait for global agreement on such an urgent topic." (26.03.2018)*
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Pierre Moscovici,
Commissioner for Economic and Financial Affairs

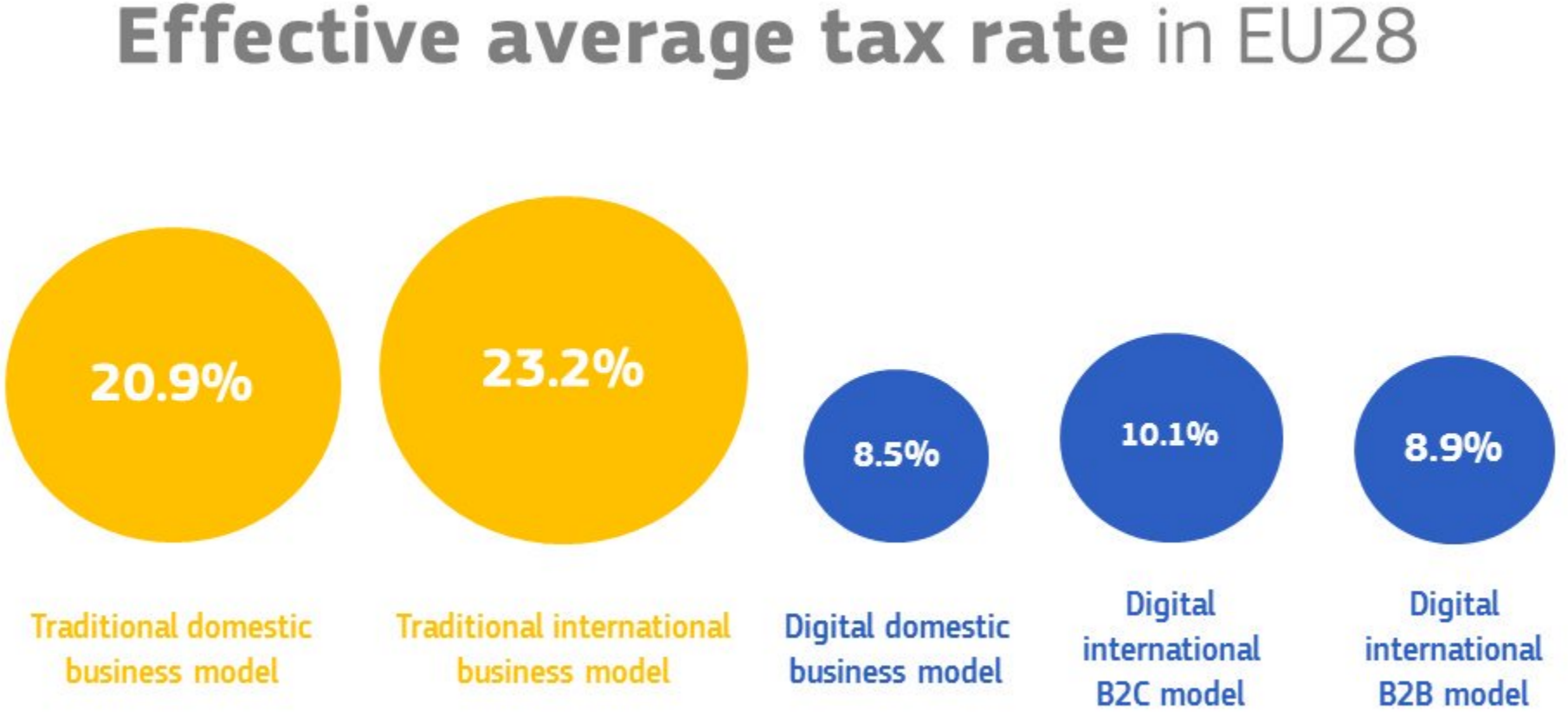


Margrethe Vestager,
Commissioner for Competition

"The enforcement of **EU State aid rules alone is not sufficient** to tackle tax avoidance. We need to use this momentum to reform our corporation taxation framework to make it both fairer and more efficient both at the international level and in Europe. (…) Our ultimate goal is that **all companies, big or small, pay their fair share of tax where their profits are earned**. Because only then, companies can compete on **equal terms** – and not at the expense of European citizens and companies that do pay their fair share of tax" (20.06.2018)

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1. Introduction



[5] Source: Tweet @EU_Commission, 2018.03.07

2. WTO Concerns



Does the DST obstacle trade in goods or services?

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2. WTO Concerns

- **GATS (General Agreement on Trade in Services)**
  - Most favoured nation
  - National treatment
    - **EU Schedule of commitments. Does it cover DST services?**

      CPC 878 advertising services

      CPC 834 data processing services (includes P2P)

    - **Exceptions (discriminatory treatment allowed):**

      Measures within the scope of a tax treaty

      Measures “aimed at ensuring the equitable or effective imposition or collection of direct taxes”

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2. WTO Concerns

- **Exception based on equitable or effective imposition or collection of direct taxes**
  - Is the DST a direct tax?
  - The desgin definition of taxpayers
  - The deduction:

    Recital 27 of the proposal "*In order to alleviate possible cases of double taxation where the same revenues are subject to the corporate income tax and DST, **it is expected** that MS will allow businesses to deduct the DST as a cost from the CIT base in their territory, irrespective of whether both taxes are paid in the same MS*"

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3. EU Law Concerns

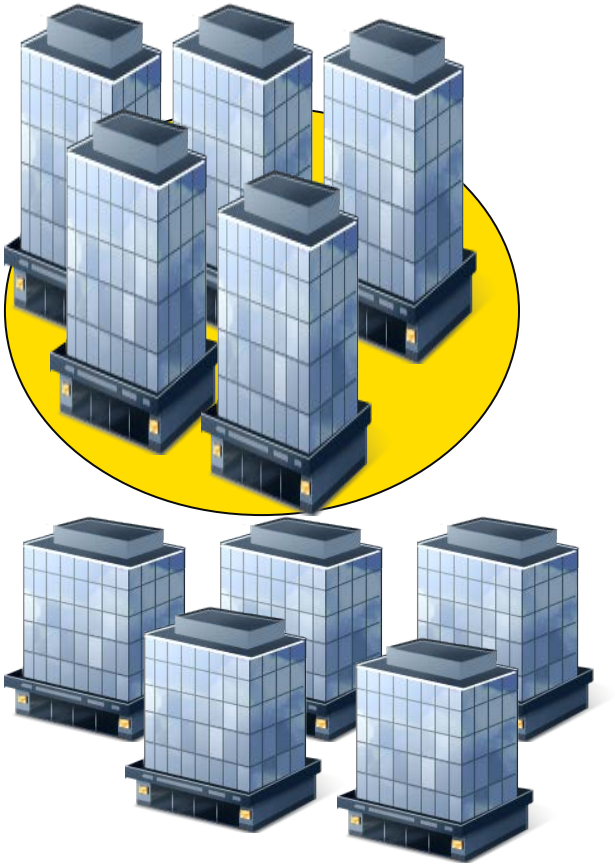


Does DST it infringe primary law?
Does DST it infringe any other EU Law requirement?

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3. EU Law Concerns

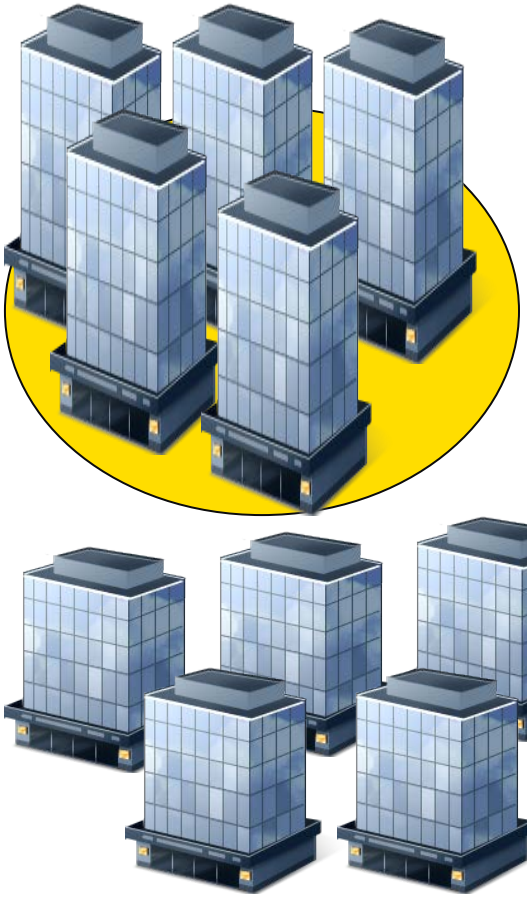
- **DST constitutes State Aid?**

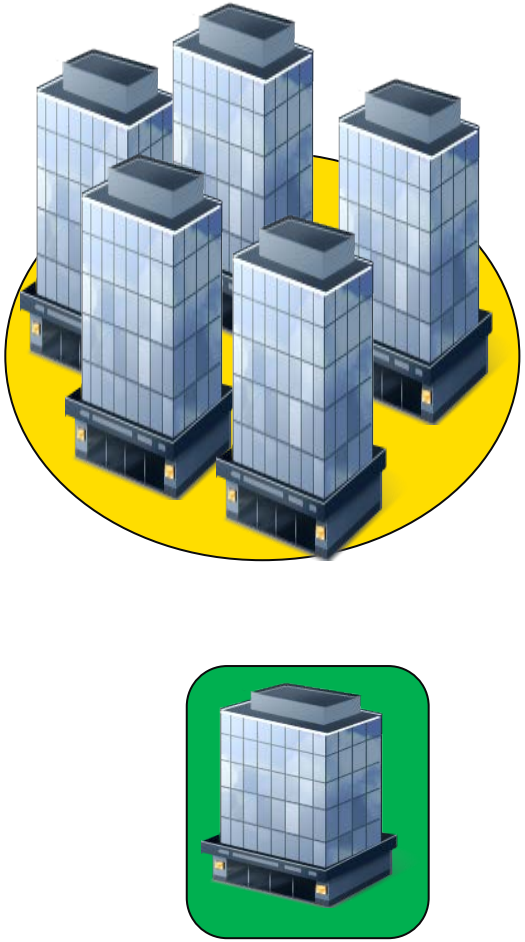


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3. EU Law Concerns

- **DST constitutes State Aid?**





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3. EU Concerns

- **DST infringes fundamental freedoms?**
  - Applicable freedom (external dimension of the fundamental freedoms)
    - Free movement of goods
    - Freedom to provide services
      - Issues on transportation services
  - Discrimination between resident and non-resident taxpayers?

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3. EU Concerns

- **Legal basis**
  - Art. 113 TFEU

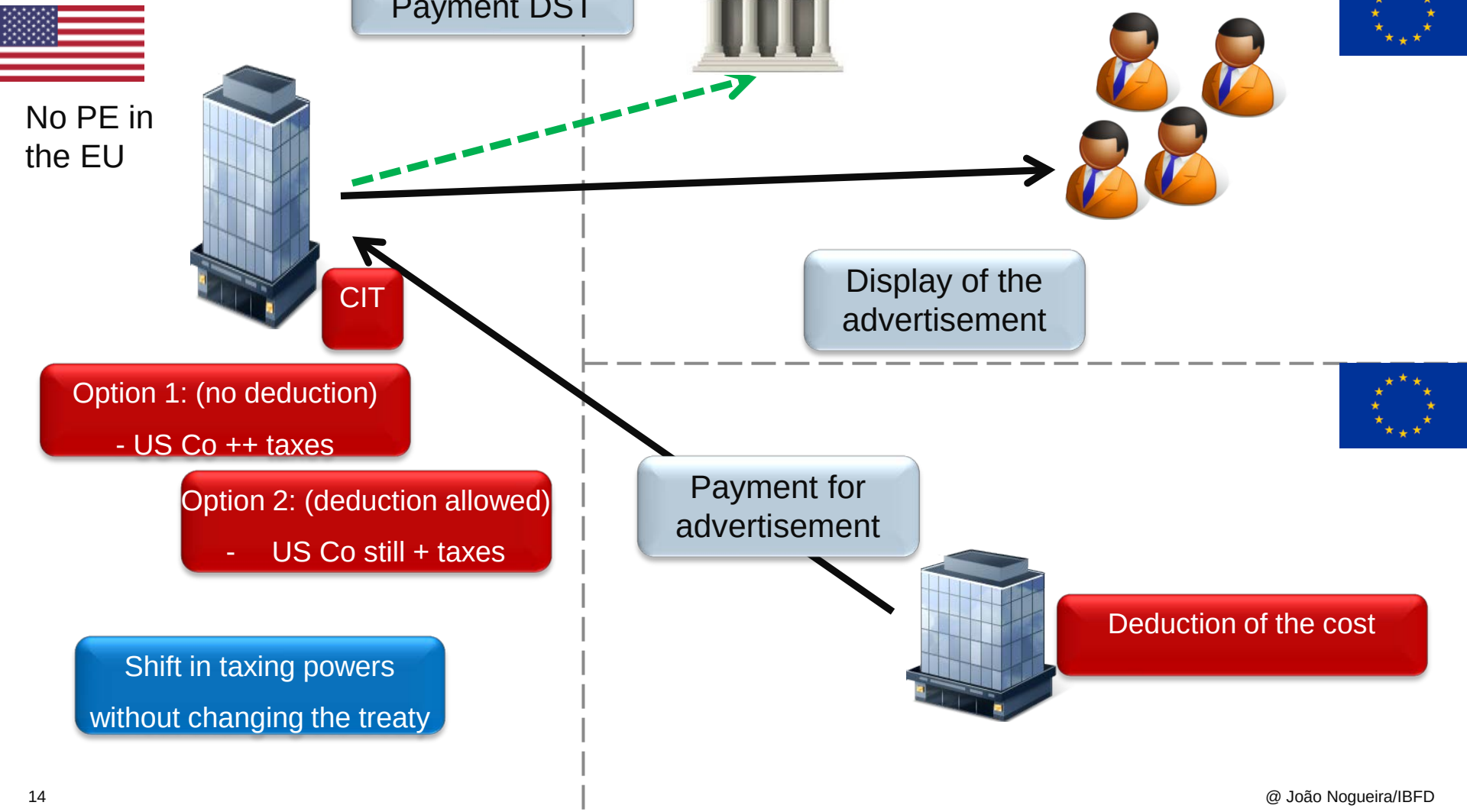
    "The Council shall (…) adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the **establishment and the functioning of the internal market** and **to avoid distortion of competition**"

  - Needed for the functioning of the internal market?
  - Needed to avoid distortion of competition?

  - DST as an hindrance to those two goals?

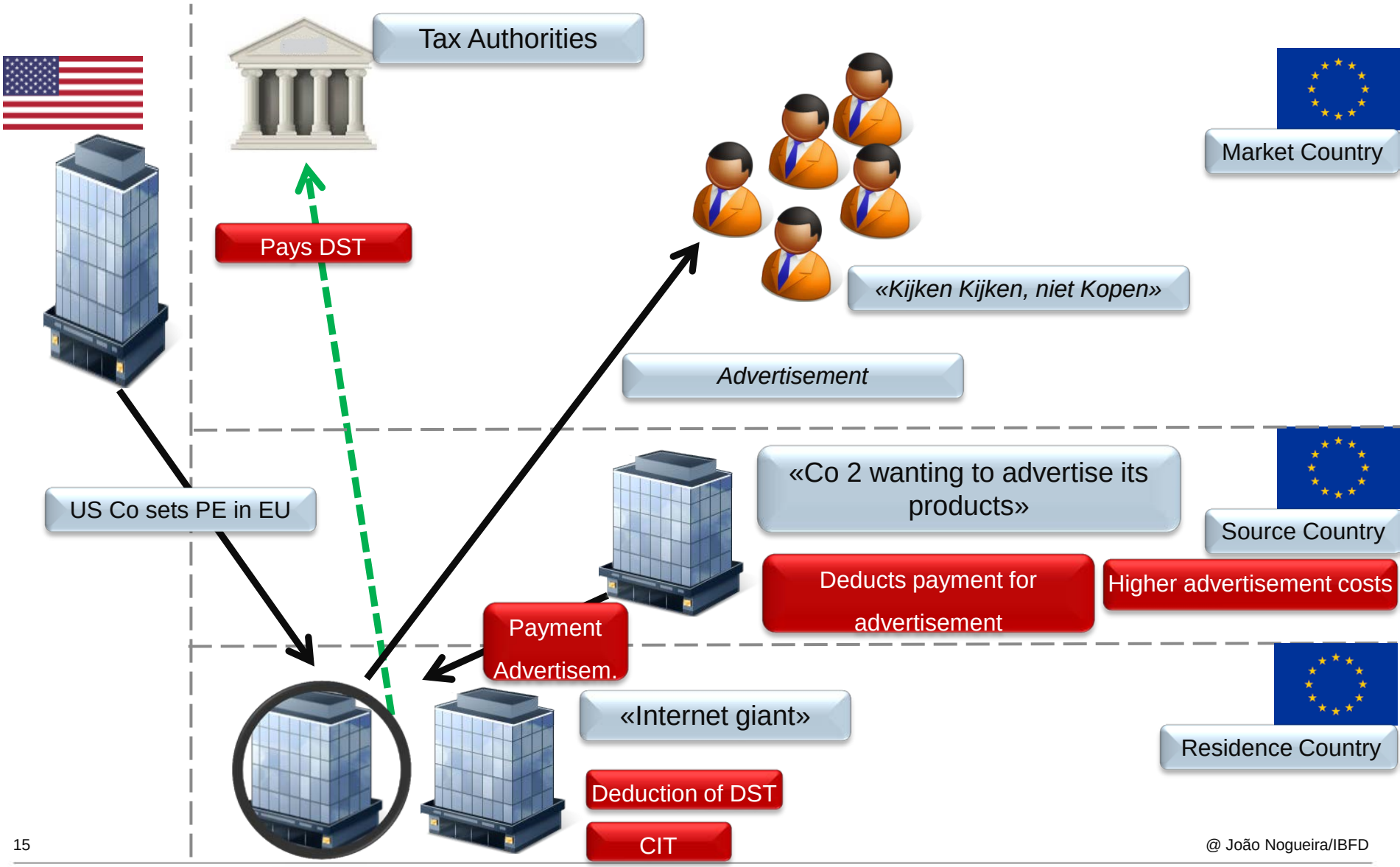
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3. EU concerns



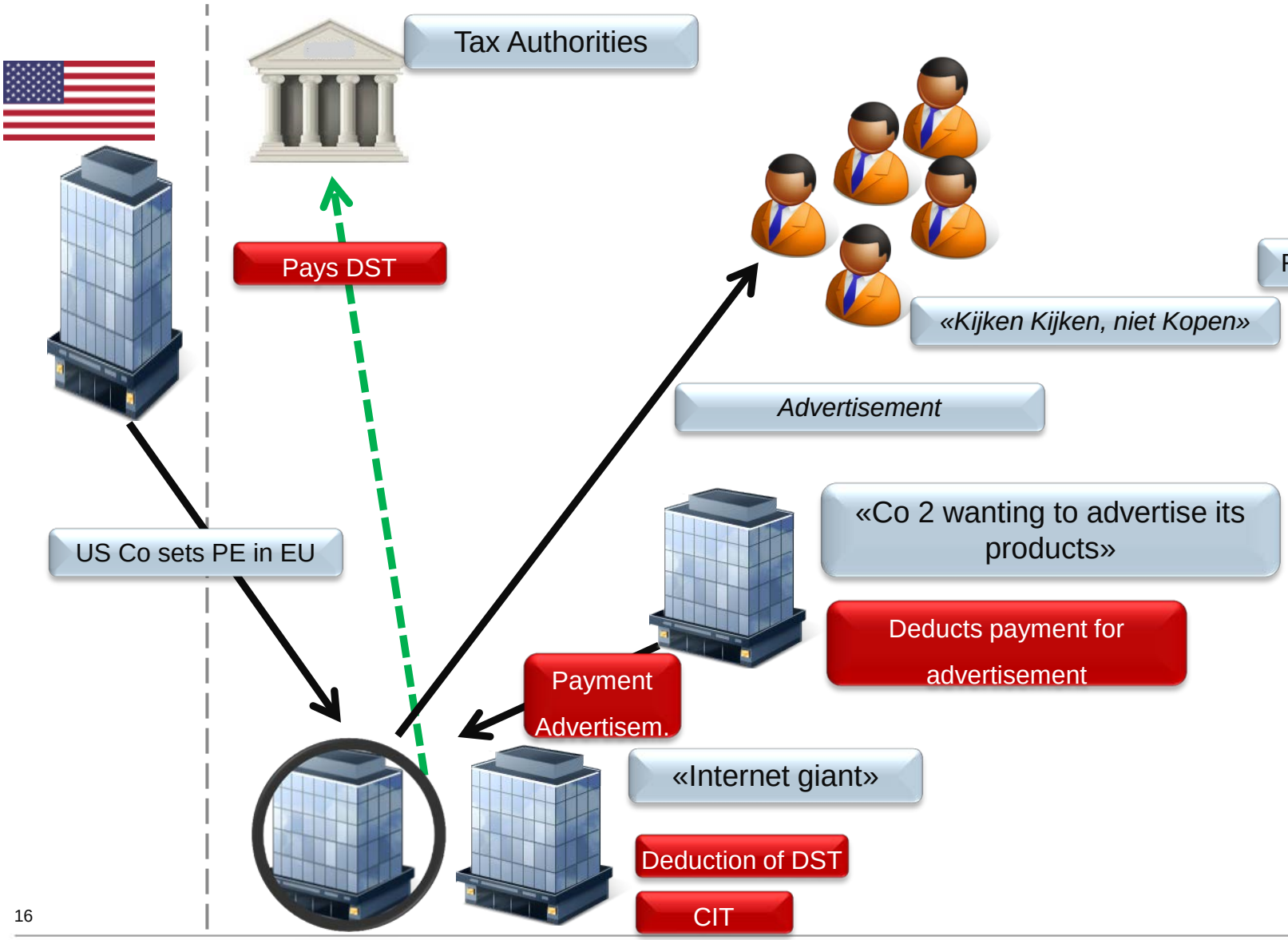
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3. EU concerns



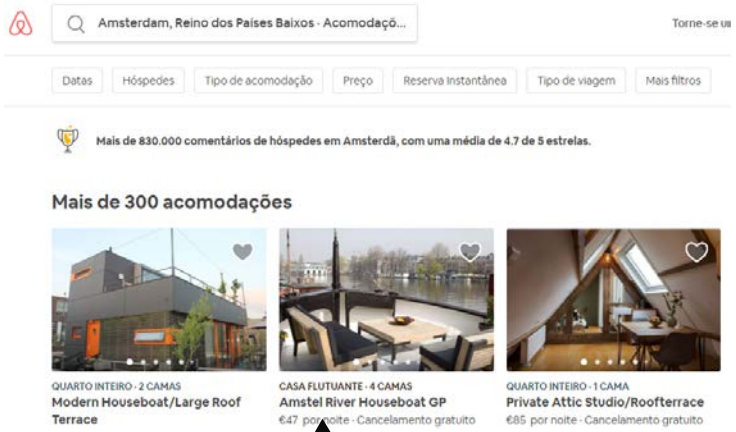
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3. EU concerns



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X. EU Concerns





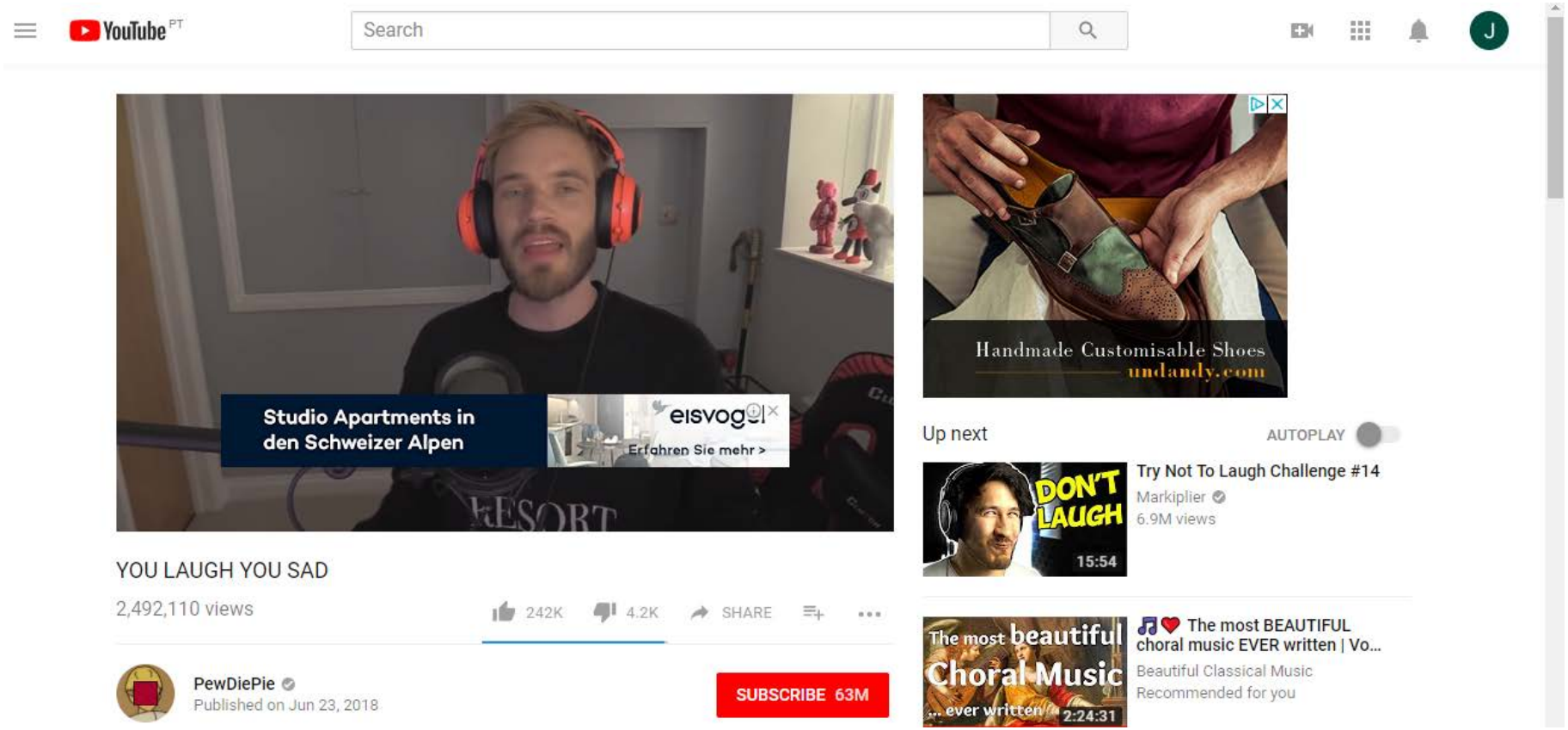






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3. EU concerns



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3. EU concerns

Subsidiarity and Proportionality: Article 5 TFEU

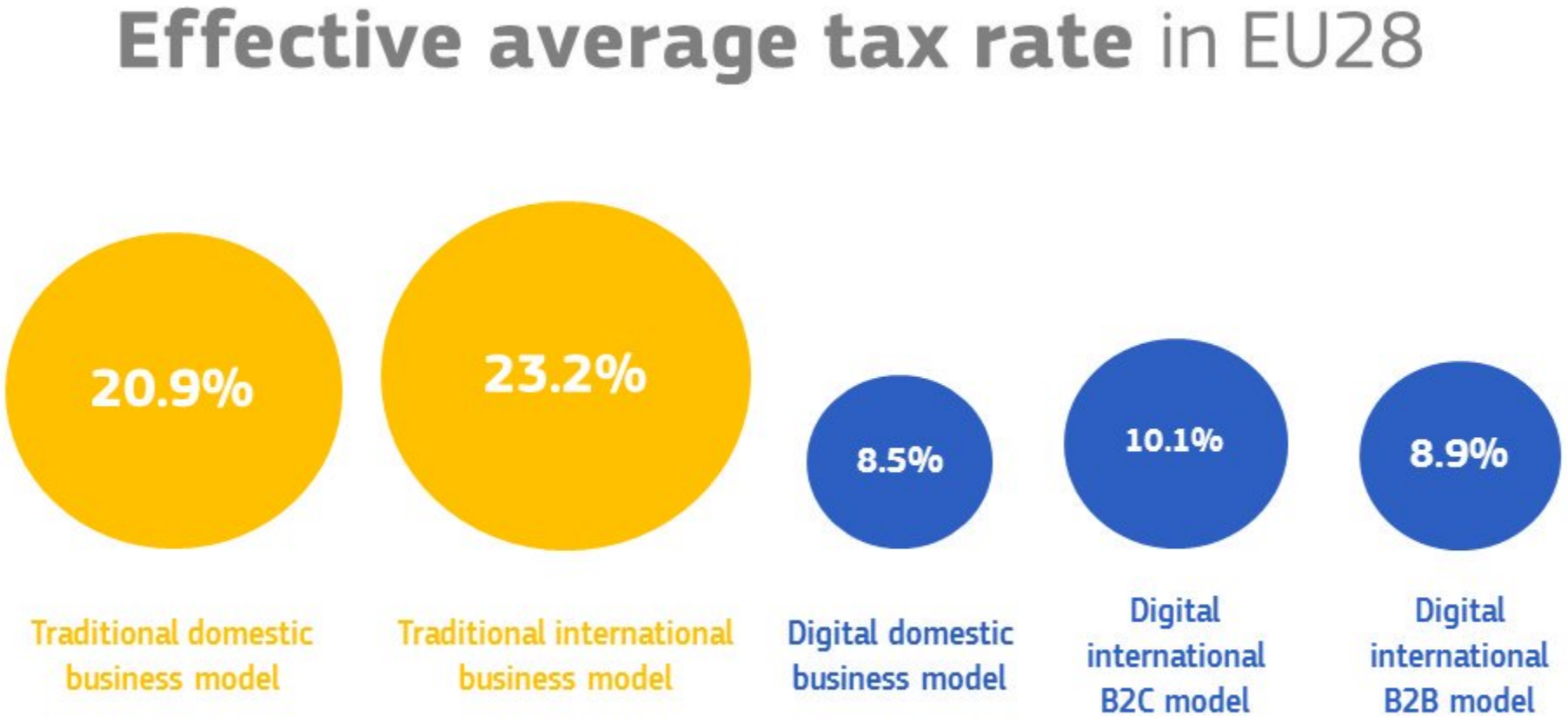
3. Under the **principle of subsidiarity**, in areas which do not fall within its exclusive competence, the Union shall act **only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States**, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. (…)

4. Under the **principle of proportionality**, the content and form of Union action shall **not exceed what is necessary to achieve the objectives of the Treaties**. Economic distortion (breach of neutrality and equality): why should (competing) physical supplies be favoured? Enhanced cooperation?

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3. EU concerns

- **What if the initial premise is wrong?**

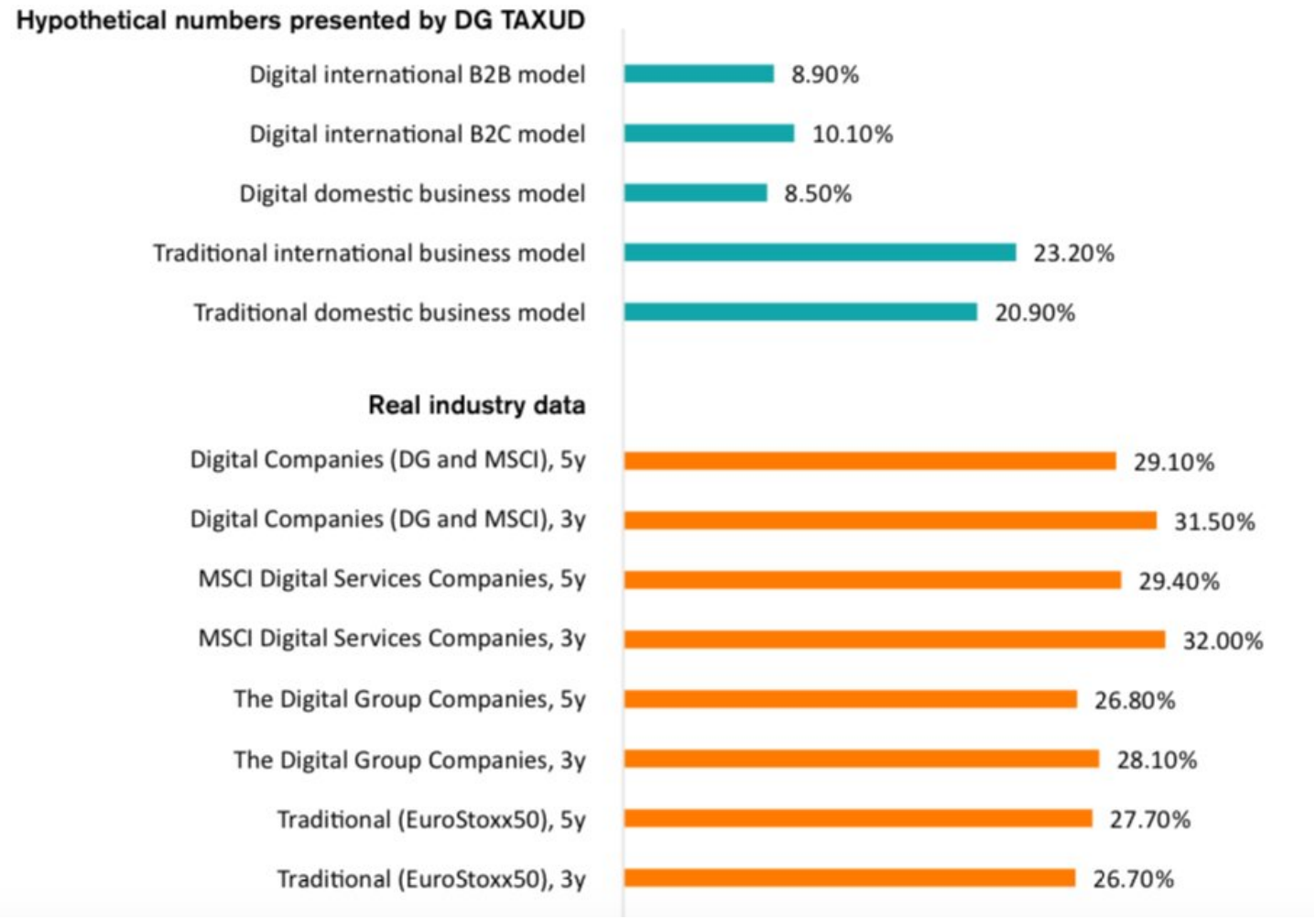


Fonte: Tweet @EU_Commission, 2018.03.07

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3. EU concerns

Figure 2: Effective average tax rates: EU estimates versus real effective corporate tax rates



Fonte: Tweet, @MatBauerEco, 2018.03.12

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4. Concluding remarks

- **We do need digital economy!**
- **Digital giants are taxpayers too!**
- **Digitalisation of the economy raises new concerns**
  - BEPS tackled some of them
  - Other reforms are needed (BEPS II? ATAD III?)
- **Is this a EU issue? Is the EU the right forum?**
  - “Why to invest our political capital on this?”
- **Are there EU concerns besides compatibility?**

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http://www.ibfd.org/IBFD-Profiles/Jo-o-F-lix-Pinto-Nogueira


https://www.linkedin.com/in/joaofelixpintonogueira


https://twitter.com/jfnogueira


https://www.facebook.com/joaofelixpintonogueira


joaofelixpintonogueira@gmail.com


j.nogueira@ibfd.org

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Many thanks!

j.nogueira@ibfd.org

X. Extra

- **Digital Service Tax**
  - Tax, at a rate of 3%, of ALL revenues (net of VAT) deriving from the following services:
    - (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;
    - (c) the transmission of data collected about users and generated from users' activities on digital interfaces. Exclusion: provision of these services to related companies (TP)
  - Entities not be covered if not meeting two thresholds
    - EUR 750M worldwide revenue (company or consolidated group)
    - EUR 50M of taxable revenues within the EU (c/cgroup)

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X. Extra

- **Digital Services Tax:**
  - Territorial scope:
    - Place where the users are located (user IP)
    - If users are located in several countries – Art. 5(3)
      - Online advertisement: % of times it “appeared” on the device
      - Provision of goods and services on a multi-sided electronic interface: % of concluded contracts; in its absence, number of users with an account
      - Sale of user data: % of the users whose data was sold
    - Not to be considered:
      - place of consumption;
      - place where the payment took place.

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