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NEW BELGIAN DIGITAL SERVICES TAX DISCUSSED IN COMMISSION

Following the failure to reach a consensus at the European level on a so-called "Digital Services Tax," and before the finalisation of the OECD proposal, Belgium has decided to move forward in relation to a taxation of digital US "giants" (the so-called Big Tech or *GAFAM/Internetgiganten*).

THE EU PROPOSAL

In 2018, a proposal for a Digital Service Tax Directive was published following discussions at the ECOFIN level as part of the "Fair Taxation of the Digital Economy" initiative. In a nutshell, the proposal would tax digital services revenue where the user value is created rather than where the tax residence or establishment of the service provider is.

In the absence of unanimity amongst EU Member States, the proposal has never been pushed forward. Various states have indeed proposed that such initiative will be best served by action at the OECD level.

At the same time, some other Member States (France, United Kingdom, Spain, Italy and now also Belgium, among others) have chosen to act separately with various domestic measures aimed at filling the gap before the entry into the force of measures taken at OECD or European level.

THE OECD APPROACH

On 31 January 2020, the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) published its Statement on a two-pillar approach to address the tax challenges arising from the digitalization of the economy.

Pillar One focuses on profit allocation rules and alternative nexus for companies acting in the digital area. The idea is to shift from the taxpayer residence nexus to the user residence nexus to tax digital activities.

Pillar Two aims at ensuring that the profits of internationally operating businesses are subject to a minimum rate of tax.

These principles would have a far-reaching impact on current international tax principles and would require public consultation and discussion amongst all 137 OECD members. This is the reason why the OECD will not have a final proposal before end of 2020 (if not further delayed by the Coronavirus crisis).

THE BELGIAN DST

The current proposal

In Belgium, a first initiative including (i) a draft Bill creating the Digital Services Tax ("**DST**") and (ii) a draft Bill introducing the notion of a digital services permanent establishment under Belgian domestic law was rejected in March 2019. However, both texts were reintroduced just after the 2019 elections.

This new initiative appears more successful this time given the fact that the DST proposal is now moving further in the Finance Commission. On the basis of the current text, the DST will apply to any company generating revenue arising 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; and

c) the transmission of data collected about users and generated from users' activities on digital interfaces.

The income (net of VAT and other taxes) generated by those activities will be subject to a 3% tax rate in Belgium to the extent the users of those services are located in Belgium (based on their IP address).

The total amount of DST will be considered as a non-deductible expense but will be creditable against any Belgian corporate income tax due. Any excess is non-refundable, but can be carried-forward up to four years.

The DST will be only be applicable to entities that exceed the following thresholds:

(a) the total amount of worldwide income reported by the entity for the relevant financial year exceeds €750m; and

(b) the total amount of taxable income obtained by the entity in Belgium from digital activities during the relevant financial year exceeds €25m.

The draft Bill also includes exemptions for certain digital financial services, digital crowd funding services and digital inter-company services. Income derived from those services will not be subject to the DST.

Finally, the draft law provides that the Belgian DST would be repealed as soon as an EU or OECD equivalent enters into effect.

Open questions

The draft Bill does currently not address the question of whether the DST will be in scope of relevant double tax treaties. In that regard, the parliamentary works mention that the DST is neither a corporate income tax nor a withholding tax but will nevertheless be creditable against any Belgian corporate income tax due to avoid double taxation. This position, if maintained, will certainly give an argument to Belgian courts to rule that the DST is indeed in the scope of the double tax treaties, which would jeopardise its effect.

Similarly, on the basis of remarks made by the Belgian Council of State, the selective nature of the DST may well be viewed by some as a breach of the Belgian constitutional (and EU) principles of non-discrimination. It will be difficult to justify, in light of the objective of the DST, that only specific services and highly profitable tech companies must be subject to the proposed DST.

Finally, the question whether the DST will not be deemed to be a state aid mechanism for entities not in scope of the DST will likely also be raised.

What's next?

The draft Bill creating the DST is now under review by the Finance commission before final vote by the Belgian parliament. It is currently unclear whether it will have sufficient support from the Belgian federal political parties. The fate of the draft Bill introducing the notion of a digital services permanent establishment is less clear, as this draft bill has not yet been examined in commission (contrary to the DST proposal).

At the very least, the question of the conformity of the DST with the double tax treaties should be clarified before the final vote.

The recent withdrawal of the US from the discussion at the European level of the taxation of Big Tech is bad news, as it may result in new unilateral US countermeasures, similar to those already announced against France.

Other states (even outside the EU) may now be tempted to follow suit and implement their own version of the DST, especially given the effect of the Coronavirus crisis on public finances, leading to non-coordinated opportunistic approaches.

CONTACTS

BRUSSELS TAX TEAM

Alexandre Ooms
Partner

T +32 (0)2 533 5073
E alexandre.ooms
@cliffordchance.com

Pierre-Olivier van Caubergh
Senior Associate

T +32 (0)2 533 5910
E pierre-olivier.vancaubergh
@cliffordchance.com

Thomas Linard de Guertechin
Associate

T +32 (0)2 533 5909
E thomas.linarddeguertechin
@cliffordchance.com