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Proposal for a

COUNCIL DIRECTIVE

on the taxation of digital activities

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The digital economy is transforming the way we interact, consume and do business. Digital companies are growing far faster than the economy at large, and this trend is set to continue. Digital technologies bring many benefits to society and, from a tax perspective, they create opportunities for tax administrations and offer solutions to reduce administrative burdens, facilitate collaboration between tax authorities, as well as addressing tax evasion.

However, digitalisation is also putting pressure on the international taxation system, as business models change. Policy makers are currently struggling to find solutions which can ensure a fair and effective taxation as the digital transformation of the economy accelerates, and the existing corporate taxation rules are outdated to catch such evolution. In particular, the current rules no longer fit the present context where online trading across borders with no physical presence has been facilitated, where businesses largely rely on hard-to-value intangible assets, and where user generated content and data collection have become core activities for the value creation of digital businesses. There is recognition at international level, by bodies such as the G20, that action is needed to adapt corporate tax rules to the digital economy. However, reaching an agreement at global level is likely to be challenging.

Such challenges were identified in the Communication of the Commission on '*A Fair and Efficient Tax System in the European Union for the Digital Single Market*' adopted on 21 September 2017. In this Communication the Commission set out its analysis of the tax challenges posed by the digitalisation of the global economy. This was followed by the conclusions adopted on 19 October 2017 by the European Council[1] which underlined the "*need for an effective and fair taxation system fit for the digital era*" and "*looked forward to appropriate Commission proposals*" by early 2018. The ECOFIN Council in its conclusions of 5 December 2017[2] also looked forward to appropriate Commission proposals by early 2018, "*taking into account relevant developments in ongoing OECD work and following an assessment of the legal and technical feasibility as well as economic impact of the possible responses to the challenges of taxation of profits of the digital economy.*"

The current corporate tax rules are built on the principle that profits should be taxed where the value is created. However, they were mainly conceived in the early 20th century for traditional 'brick and mortar' businesses and define what triggers a right to tax in a country ("where to tax") and how much of corporate income is allocated to a country ("how much to tax") largely based on having a physical presence in that country. That means that non-residents for taxation

[1] European Council meeting (19 October 2017) – Conclusions (doc. EUCO 14/17).

[2] Council conclusions (5 December 2017) – Responding to the challenges of taxation of profits of the digital economy (FISC 346 ECOFIN 1092).

purposes become liable to tax in a country only if they have a presence that amounts to a permanent establishment there. However, such rules fail to capture the global reach of digital activities where physical presence is not a requirement anymore in order to be able to supply digital services, and other characteristics of digital business models which have an impact on where the value is created and the profits are made.

Digital business models have different characteristics than traditional ones in terms of how value is created, due to their ability to conduct activities remotely, the contribution of end-users in their value creation, the importance of intangible assets, as well as a tendency towards winner-takes-most market structures rooted in the strong presence of network effects and the value of big data. The application of the current corporate tax rules to the digital economy has led to a misalignment between the place where the profits are taxed and the place where value is created, notably in the case of business models heavily reliant on user participation. This poses a double challenge from a tax perspective. Firstly, the input obtained by a business from users, which actually constitutes the creation of value for a company, could be located in a tax jurisdiction where the company carrying out a digital activity is not physically established (and thus not established for tax purposes according to the current rules). Therefore, the profits generated from such activities cannot be taxed there. Secondly, even where a digital business has a taxable presence in the jurisdiction where users are located, the value created by user participation may not be taken into account when determining how much tax should be paid in that jurisdiction. This creates a distortion of competition and has a negative impact on public revenues.

The first objective of this proposal is to lay down rules for establishing a taxable nexus in case of a non-physical commercial presence of a digital business, hereinafter: a "significant digital presence". New indicators for such a significant digital presence are required in order to establish and protect Member States' taxing rights in relation to the new digitalised business models.

The second objective of this proposal is to set out principles for attributing profits to a digital business. These principles should better capture the value creation of digital business models. In the current corporate tax framework transfer pricing rules are used to attribute the profit of multinational groups to the different countries. However, these rules have been developed for traditional business models and economic environments. The digital economy relies heavily on intangible assets such as user data and advances data analytics methods in order to extract value from user data. The challenge of identifying and valuing intangible assets as well as determining their contribution to value creation within a multinational enterprise requires complementary elements which this proposal seeks to provide.

- **Consistency with existing policy provisions in the policy area**

The ECOFIN Council conclusions of 5 December 2017[3] underlined "*that a globally accepted definition of permanent establishment and the related transfer pricing and profit attribution rules should also remain pivotal when addressing the challenges of taxation of profits of the digital economy*". The Commission acknowledges that the ideal approach would be to find multilateral, international solutions to taxing the digital economy given the global nature of this challenge. At international level, this issue was already identified under the BEPS project of the OECD (Action 1)[4], and the OECD is currently working on an interim report on the taxation of the digital economy to be presented to the G20 Finance Ministers in April 2018.

However, the growing challenge of ensuring that all actors in the digital economy are fairly taxed on their income has still not been adequately addressed globally, and to reach international consensus may take time. This is why the Commission has decided to take action. The Commission supports a comprehensive solution which includes both the underlying proposal for adapting the corporate tax rules at EU level so that they are fit for the specificities of digital businesses and a recommendation to Member States to extend this solution to their agreements with non-EU jurisdictions[5].

This proposal builds on the numerous initiatives taken by the Commission aimed at ensuring fair and efficient corporate taxation in the Union. In a broader context, it should be emphasised that the Common Consolidated Corporate Tax Base (CCCTB) would be the optimal solution to creating fairer and more efficient taxation the Commission. Obviously, in order to address the taxation of the digital economy, the rules on a taxable nexus for digital activities should be included in the CCCTB. Furthermore, with respect to allocating the profits of large multinational groups, the formula apportionment approach in the CCCTB should be adapted in order to effectively capturing digital activities. Therefore, the Commission welcomes the amendments in the reports of the European Parliament on the Common Base and the CCCTB as a good base for further work which ensure a fair taxation of digital activities. The Commission stands ready to work with Member States and the Parliament to examine how the provisions in this Directive can be incorporated into the CCCTB.

The present proposal aims to achieve the introduction of a taxable nexus for digital businesses operating cross-border in Member States' corporate income tax (CIT) systems. In addition, it includes rules on the attribution of profits based on the principle that taxation should take place where the value of a digital business is created. Given that the taxable nexus and the profit allocation rules will be based on a common understanding, an EU initiative adds value as compared to what a multitude of national rules aiming to capture cross-border activities of operating digital businesses, could attain. It creates a level-playing field for all Member States and provides taxpayers with legal certainty. Once the rules of this proposal have been implemented in Member States national legislation, the relevant provisions will be based on Union law. That implies that they will be directly effective in case of cross-border digital

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3 Above mentioned

4 OECD (2015), 'Addressing the Tax Challenges of the Digital Economy: Action 1 – 2015 Final Report', Organisation for Economic Co-Operation and Development (OECD), Paris.

5 Commission Recommendation on the taxation of digital activities.

activities within the Union, even if the applicable double tax treaties between Member States have not been modified accordingly.

Obviously, the provisions of this proposal will also apply if a business established in a non-EU jurisdiction operates through a significant digital presence in a Member State, where there is no tax treaty in place between the Member State concerned and that jurisdiction. However, in case there is a tax treaty between a Member State and a non-EU jurisdiction, the rules of the applicable tax treaty may override the proposed provisions on a significant digital presence. It is therefore proposed that the comprehensive solution also includes a recommendation addressed to Member States for including corresponding rules on a significant digital presence and profit allocation in their tax treaties with third countries.

In addition to the comprehensive solution, the Commission puts forward a proposal for a directive for a targeted solution, the Digital Services Tax, as a simple interim solution for the taxation of digital activities in the EU. The DST sets out a tax on the revenues derived from the supply of certain digital services.[6] The DST should only apply in the absence of a global solution. It should stop applying to EU companies once this Directive in place. For digital businesses established in a non-EU jurisdiction which businesses supply digital services to users in the Union, the targeted measure would continue to apply until changes are made to the relevant double taxation treaties in accordance with the provisions of the recommendation.

The present Commission proposals are also intended to contribute to the work at the OECD level, which remains essential in order to reach a global consensus on this topic. The EU should encourage and support a move by global partners in that direction. The comprehensive solution also sets out the EU's vision and serves as an example to influence the international discussions on a global solution for taxation in the digitalised economy.

- **Consistency with other Union policies**

This proposal is also consistent with the Digital single market strategy[7], where the Commission committed to ensure access to online activities for individuals and businesses under conditions of fair competition, as well as to open up digital opportunities for people and business and enhance Europe's position as a world leader in the digital economy.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

[6] Proposal for a Council Directive as regards a common system of a tax on the revenues resulting from the supply of certain digital services ('Digital Services Tax').

[7] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions 'A Digital Single Market Strategy for Europe' (COM(2015) 192 final of 6.5.2015).

Union's legislation concerning tax other than that on turnover falls within the ambit of Article 115 of the Treaty on the Functioning of the EU (TFEU). This provision stipulates that the measures of approximation under this article shall directly affect the establishment or functioning of the internal market.

- **Subsidiarity (for non-exclusive competence)**

This proposal complies with the principle of subsidiarity. As digital businesses are able to operate cross-border without having any physical presence, both inside the Union and from third countries, rules are needed to ensure that they pay taxes where they make profits. Given the cross-border dimension an EU initiative adds value as compared to what a multitude of national measures could attain. A common initiative across the internal market is required for a direct and harmonised application of the rules on a significant digital presence within the Union. Unilateral and divergent approaches by each Member State could be ineffective and fragment the single market by creating national policy clashes, distortions and tax obstacles for businesses in the EU. If the objective is to adopt solutions that function for the internal market as whole, the appropriate way forward is only through coordinated initiatives at EU level.

- **Proportionality**

The proposed Directive is necessary, suitable and appropriate for achieving the desired end. It does not imply a harmonisation of corporate tax rates in the EU and, therefore, it does not restrict Member States' capability to influence their desired amount of corporate tax revenues. It does not interfere with national policy choices in terms of the size of public sector's intervention and composition of tax revenues. It proposes a more efficient way to tax the digital activities of corporate taxpayers operating within the EU in view of a more efficient internal market.

- **Choice of the instrument**

Distortions in the internal market, as identified earlier, may only be tackled through binding legal rules and approximation of tax legislations through a common legislative framework. Soft law would be a suboptimal choice, as Member States would be free to not to implement it at all or it could lead to a piecemeal approach. Such an outcome would be highly undesirable. It would risk creating legal uncertainty for taxpayers as well as jeopardising the objectives for a coordinated and coherent corporate tax system in the internal market.

Based on Article 115 TFEU, *"the Council shall, acting unanimously ... issue directives for the approximation of laws, regulations and administrative provisions of the Member States as*

directly affect the establishment or functioning of the internal market." The Treaty is therefore prescriptive that in taxation other than that on turnover (covered by Article 113 TFEU), legislation shall exclusively be in the form of directives.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

• Stakeholder consultations

The consultation strategy has focused on three main groups of stakeholders: Member State's tax administrations, businesses, and citizens. The two main consultation activities consisted in the open public consultation, which received a total of 446 replies over 12 weeks from 26 October 2017 to 3 January 2018, and a targeted survey sent to all EU tax administrations. As regards a global solution a proposal for a digital presence in the EU is the preferred approach for more than half of the respondents to the stakeholder consultation.[8] The preferred option coincided for both groups of stakeholders: 14 out of 21 national tax authorities as well as 58% of the 446 respondents to the open public consultation believe that the 'digital presence in the EU' proposal can best address the current problems related to the international taxation rules for the digital economy. Stakeholders were not asked explicitly on their preferred approach vis-à-vis non-EU jurisdictions. The members of the Platform for Tax Good Governance (made up of all EU tax authorities and 15 organisations representing businesses, civil society, and tax practitioners) were also informed about this initiative and their opinions sought out. Spontaneous contributions have also been taken into account.

• Impact assessment

The impact assessment for the proposal was considered by the Commission's Regulatory Scrutiny Board on 7 February 2018. The Board issued a positive opinion on the proposal together with some recommendations, which have been taken into account. The opinion of the Board, the recommendations and an explanation of how they have been taken into account are included in Annex 1 of the Staff Working Document accompanying this proposal. See Annex 3 for an overview of who would be affected by this proposal and how.

The impact assessment of this proposal examined both fundamental reform options and other options for changes within the existing international tax system. Due to either legal and/or political feasibility constraints, more fundamental reforms have been discarded as realistic options at this stage. Instead the solution should focus on revision to the existing concept of a permanent establishment and profit allocation rules. At the same time, a solution only within the framework of the proposal for a CCCTB has been rejected on the grounds that it would be too narrow context for proposing a structural solution that would also have the chance to push

[8] See annex 2 of the Impact Assessment.

for a solution beyond the EU. The preferred option to address the issue within the EU was therefore a standalone Directive to modernise permanent establishment rules and profit allocation rules.

4. BUDGETARY IMPLICATIONS

This proposal for a Directive will have no implications for the EU budget.

5. OTHER ELEMENTS

• Implementation plans and monitoring, evaluation and reporting arrangements

The rules in this proposal should be integrated into Member States' CIT systems and the Commission's CCCTB proposal, and should ultimately be mirrored by corresponding changes in the OECD Model Tax Convention (OECD MTC) at international level. The Commission will monitor the implementation of the Directive once adopted and its application in close cooperation with Member States.

• Detailed explanation of the specific provisions of the proposal

Definitions (Article 2)

This Article provides definitions of various concepts necessary for applying the provisions in the Directive.

Scope (Article 3)

This proposal affects corporate taxpayers that are incorporated or established in the EU, as well as enterprises that are incorporated or established in a non-EU jurisdiction with which there is no double taxation treaty with the Member State where a significant digital presence of the taxpayer is identified. The proposal does not affect enterprises that are incorporated or established in a non-EU jurisdiction with which there is a double taxation treaty in force with the Member State of the significant digital presence, so as to avoid causing any breaches of those double taxation treaties. This may be different if the applicable tax treaty with a non-EU jurisdiction includes a similar provision on a significant digital presence which creates similar rights and obligations in relation to that non-EU jurisdiction.

Significant digital presence (Article 4)

As the concept of a significant digital presence is intended to establish a taxable nexus it should be regarded as an addition to the existing permanent establishment concept. The proposed rules for establishing a taxable nexus of a digital business in a Member State are based on digital

revenues and the number of users. These rules are not intended to establish a significant digital presence based on the mere consumption of a good or service. They should reflect the reliance of digital businesses on a large user base, user engagement and user's contributions. The criteria should cater for different types of business models. Digital business models are very heterogeneous. Some might have a very large user base while others may have a smaller user base, but may still have significant user contributions if each individual user contributes a large value. Furthermore, they should ensure a compatible treatment in different Member States, irrespective of their size, and leave out trivial cases.

There is a significant digital presence in a Member State if one or more of the following criteria are met: if the revenues from providing digital services to users in a jurisdiction exceed EUR 10 000 000 in a tax year or if the number of users of a digital service in a Member State exceeds 100 000 in a tax year.

A digital service is a service that is delivered over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention. In order to exclude a taxable nexus based on the place of consumption only, the mere sale of goods or services facilitated by using the internet or an electronic network is not regarded as a digital service. For example, giving access (for remuneration) to a digital marketplace for buying and selling cars is a digital service, but the sale of a car itself via such a website is not.

Involving minimal human intervention means that the service involves minimal human intervention on the side of the *supplier* without any regard to the level of human intervention on the side of the user. A service shall also be regarded as requiring only a minimal human intervention in situations where the supplier initially sets up a system, regularly maintains the system or repairs it in cases of problems linked with its functioning.

Profits attributable to the significant digital presence (Article 5)

The proposed rules for allocating profits to a significant digital presence are built on the current framework applicable to permanent establishments. They confirm the principle whereby a significant digital presence should be attributed the profits that it would have earned through certain significant economic activities performed via a digital platform, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the assets used, functions performed, and risks assumed. Therefore, the authorised OECD approach (AOA) remains the underlying principle for attributing profits to a significant digital presence. This said, the framework needs to be adapted in a consistent manner, to reflect the way value is created in digital activities. Indeed, in the functional analysis of the permanent establishment, the criterion of significant people functions relevant to the assumption of risk and to the economic ownership of assets in the context of digital activities is not sufficient to ensure a profit attribution to the significant digital presence that reflects the creation of value. This situation occurs where a significant digital presence operates through a digital platform without any physical presence in a certain jurisdiction or where no significant people functions are performed in the jurisdiction of the significant digital presence.

In the functional analysis of the significant digital presence, activities undertaken by the enterprise through a digital platform related to data and users should be considered economically significant functions relevant to the attribution of economic ownership of assets and risks to the significant digital presence. 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 even if these are not linked to people functions in the same Member State.

For example, in attracting new users to a social network, the set of intangible assets that would be attributable to the business of the social network plays a key part in guaranteeing the positive network externalities, i.e. that the users are able to connect to a large number of other users. The enlargement of the network which is achieved through the significant digital presence enhances that same set of intangible assets. This set of intangibles would be further enhanced by the processing of user-level data to enable the social network to sell advertising space at a premium since the advertising space is customised to the interests of the users.

It follows that the functions related to the development, enhancement, maintenance, protection and exploitation of unique intangibles would be typical to a significant digital presence. Each of the economically significant activities contributes to the value creation in the digital business models in a unique manner and is an integral part of these models. The profit split method would therefore often be considered as the most appropriate method to attribute profits to the significant digital presence. In this context, possible splitting factors could include expenses incurred for research, development and marketing (attributable to the significant digital presence *vis-à-vis* the expenses attributable to the head office and/or any other significant digital presences in other Member States) as well as the number of users in a Member State and data collected per Member State.

The proposed rules only lay down the general principles for allocating profits to a significant digital presence as more specific guidelines on the allocation of profits could be developed at the appropriate international fora or at EU level.

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament[9],

Having regard to the opinion of the European Economic and Social Committee[10],

Acting in accordance with a special legislative procedure,

Whereas:

(1) The rapid transformation of the global economy through digitalisation is putting new pressures on corporate tax systems at EU level and internationally, calling into question the ability to effectively establish where digital companies should pay their taxes, and how much they should pay. Although it is recognised at international level, by bodies such as the G20, that action is needed to adapt corporate tax rules to the digital economy, reaching an agreement at global level is likely to be challenging.

(2) The BEPS Action 1 report on "Addressing the Tax Challenges of the Digital Economy" released by the OECD in October 2015 set out some different approaches as to the taxation of the digital economy but did not reach any firm recommendations. Meanwhile, there is a growing need to find solutions which can ensure a fair and effective taxation as the digital transformation of the economy accelerates.

(3) The Commission Communication on "A Fair and Efficient Tax System in the European Union for the Digital Single Market" adopted on 21 September 2017 stated that new international rules specific to the challenges raised by digital economy are needed to determine where the value of businesses is created and how it should be attributed for tax purposes. This would entail a reform of international tax rules on the definition of a permanent establishment and profit attribution applicable to digital activities.

(4) The European Council Conclusions of 19 October 2017 *"underlined the need for an effective and fair taxation system fit for the digital era*" and "*looked forward to appropriate Commission proposals by early 2018*". The ECOFIN Council Conclusions of 5 December 2017 underlined "*that a globally accepted definition of permanent establishment and the related transfer pricing and profit attribution rules should also remain pivotal when addressing the challenges of taxation of profits of the digital economy*" and encourages "*close cooperation between the EU, the OECD and other international partners in responding to the challenges of taxation of profits of the digital economy*".

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9 OJ C […], […], p. […].

10 OJ C […], […], p. […].

(5) In this regard it is imperative that Member States include rules in their national corporate income tax systems in order to exercise their taxing rights. These rules should extend the definition of a permanent establishment and establish a taxable nexus for a significant digital presence in their respective jurisdictions. In addition, it is necessary to lay down the general principles for allocating taxable profits to such a digital presence.

(6) To this end the provisions of this directive should apply to all taxpayers that are subject to corporate tax in one or more Member States and to entities resident for tax purposes in a non-EU jurisdiction, in respect of their significant digital presence in a Member State.

(7) Considering that non-EU jurisdictions are generally not bound by Union law, the provisions of this Directive should not apply if an entity is resident for tax purposes in a non-EU jurisdiction that has Double Tax Convention in force with the Member State in which there is a significant digital presence, unless that Convention includes a similar provision on a significant digital presence which creates similar rights and obligations in relation to that non-EU jurisdiction.

(8) In order to provide for a robust definition of a taxable nexus of a digital business in a Member State it is necessary that such a definition is based on the revenues from providing digital services or the number of users. The mere consumption of a good or service should not establish a taxable nexus. Therefore, the sale of goods or services which is facilitated by using the Internet or an electronic network should not be regarded as a digital service within the meaning of this Directive.

(9) In order to enable the taxation of an enterprise's significant digital presence in another jurisdiction in accordance with the domestic law of that jurisdiction, it is necessary to establish the principles of attributing profits to that significant digital presence. The rules should be built on the current principles for profit attribution and be based on a functional analysis of the functions performed, assets used and risks assumed by a significant digital presence in performing its economically significant activities through a digital platform. Particular attention should be paid to the fact that a significant part of the value of a digital business is created where the users are based and data related to the users is collected and processed as well as where digital services are provided. Considering that the economically significant activities performed by a significant digital presence contribute in a unique manner to value creation in the digital business models, profit split should be the most appropriate method for arriving at a fair allocation of profits to the significant digital presence. This should not however exclude the possibility whereby a taxpayer proves that, based on the outcome of the functional analysis, an alternative method in line with internationally accepted principles is more appropriate. It is also essential that the profit splitting factors bear a strong correlation with the creation of value.

(10) Considering that a key objective of this Directive is to improve the resilience of the internal market as a whole in order to address the challenges of taxation of the digitalised economy, this cannot be sufficiently achieved by the Member States acting individually.

As digital businesses are able to operate cross-border without having any physical presence, both inside the Union and from third countries, rules are needed to ensure that they pay taxes where they make profits. Given the cross-border dimension an EU initiative adds value as compared to what a multitude of national measures could attain. A common initiative across the internal market is required for a direct and harmonised application of the rules on a significant digital presence within the Union. Unilateral and divergent approaches by each Member State could be ineffective and fragment the single market by creating national policy clashes, distortions and tax obstacles for businesses in the EU. If the objective is to adopt solutions that function for the internal market as whole, the appropriate way forward is only through coordinated initiatives at EU level. Thus, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective. This Directive only aims to achieve the essential minimum degree of coordination within the Union for the purpose of attaining its objectives.

(11) It is necessary that any processing of personal data carried out in the context of this Directive, should be conducted in accordance with Regulation (EU) No 2016/679 of the European Parliament and of the Council, including obligations to provide appropriate technical and organisational measures to comply with the obligations imposed by Regulation (EU) No 2016/679**,** in particular those relating to the lawfulness of the processing, the security of the processing activities, the provision of information and the rights of data subjects, data protection by design and by default. Whenever possible, personal data should be rendered anonymous.

(12) It is imperative that the Digital Services Tax should cease to apply to corporate taxpayers in the Union once this Directive is in place. However, the Digital Services Tax should continue to apply for digital businesses resident for tax purposes in a non-EU jurisdiction that has a convention for the avoidance of double taxation in force with the Member State of the significant digital presence, where that convention does not include similar provisions on a significant digital presence.

(13) The Commission should evaluate the implementation of this Directive three years after its entry into force and report to the Council thereon. Member States should communicate to the Commission all information necessary for this evaluation. An advisory DigiTax Committee should be established to examine questions on the application of the Directive.

CHAPTER I

SUBJECT MATTER, DEFINITIONS AND SCOPE

Article 1

Subject matter

1. This Directive lays down rules for a significant digital presence through which the business of an enterprise is wholly or partly carried on in the Union.

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

(1) 'digital services' means services which are delivered over the Internet or an electronic network to a user in a Member State and the nature of which renders their supply essentially automated and involving minimal human intervention. Digital services shall not include the sale of goods or services which is facilitated by using the Internet or an electronic network;

(2) 'digital platform' means a digital interface accessible for users, such as a website or mobile application;

(3) 'revenues' means proceeds of sales and of any other transactions including value added tax and other taxes and duties collected on behalf of government agencies;

(4) 'entity' means any legal person or legal arrangement that carries on business through either a company or a structure that is transparent for tax purposes;

(5) 'user' means any individual or business that uses an Internet Protocol (IP) address in a Member State and that registers with, logs on or visits an entity's digital platform;

(6) 'tax year' means the applicable tax year in a Member State;

Article 3

Scope

1. The rules of this Directive shall apply to all taxpayers that are subject to corporate tax in one or more Member State and to entities resident for tax purposes in a non-EU jurisdiction, in respect of their significant digital presence in a Member State.
2. The profits that are attributable to a significant digital presence in a Member State shall be taxable within the corporate income tax framework of that Member State.

3. The rules of the Directive shall not apply if the entity is resident for tax purposes in a non-EU jurisdiction that has a convention for the avoidance of double taxation in force with the Member State in which there is a significant digital presence, unless that convention includes similar provision on a significant digital presence which create similar rights and obligations in relation to that non-EU jurisdiction.

CHAPTER II

SIGNIFICANT DIGITAL PRESENCE

Article 4

Significant digital presence

1. A permanent establishment shall include a significant digital presence through which the business of an enterprise is wholly or partly carried on.
2. A digital platform shall constitute a significant digital presence if:
(i) the revenues from supplying digital services to users in that Member State exceed EUR [7 000 000] in a tax year; or
(ii) the number of users of a digital service in a Member State exceeds [100 000] in a tax year; or
(iii) the number of online contracts for supplying a digital service that are concluded in that tax year by the business with individuals or businesses who are resident in that Member State exceeds [1000].

Article 5

Profits attributable to the significant digital presence

1. The profits attributable to the significant digital presence shall be those that such digital presence would have earned if it were a separate and independent enterprise performing the same or similar activities under the same or similar conditions, in particular in its dealings with other parts of the enterprise, taking into account the functions performed, assets used and risks assumed, through a digital platform.

2. The determination of profits attributable to the significant digital presence shall be based on a functional analysis. In order to determine the functions of, and attribute the economic ownership of assets and risks to, the significant digital presence, the economically significant activities performed by such presence through a digital platform shall be taken into account. For this purpose, activities undertaken by the enterprise through a digital platform related to data or users shall be considered economically significant functions of the significant digital presence which attribute risks and the economic ownership of assets to such presence.

3. In determining the attributable profits under paragraph 2, due account shall be taken of the economically significant activities performed by the significant digital presence which are relevant to the development, enhancement, maintenance, protection and exploitation of the enterprise's intangible assets.

4. The economically significant activities performed by the significant digital presence through a digital platform include, inter alia, the following:

(a) collection, storage, processing, analysis, deployment and sale of user-level data;

(b) collection, storage, processing and display of user-generated content;

(c) sale of online advertising space;

(d) making third-party created content available in a digital marketplace;

(e) any other digital service.

5. In determining the attributable profits under paragraphs 1 to 4, taxpayers shall use the profit split method unless a taxpayer proves that an alternative method based on internationally accepted principles is more appropriate having regard to the results of the functional analysis. The splitting factors may include expenses incurred for research, development and marketing as well as the number of users and data collected per Member State.

CHAPTER III

FINAL PROVISIONS

Article 6

Review

1. The Commission shall evaluate the implementation of this Directive three years after its entry into force and report to the Council thereon.

2. Member States shall communicate to the Commission all information necessary for evaluating the implementation of this Directive.

Article 7

Committee on the taxation of the digital economy

1. An advisory committee on the taxation of the digital economy, called the 'DigiTax Committee', shall be set up.

2. The DigiTax Committee shall consist of representatives of the Member States and of the Commission. The chairman of the Committee shall be a representative of the Commission. Secretarial services for the Committee shall be provided by the Commission.

3. The DigiTax Committee shall adopt its own rules of procedure.

4. The DigiTax Committee shall examine questions on the application of this Directive, as raised by its chairman, on his own initiative or at the request of the representative of a Member State and shall inform the Commission of its conclusions.

Article 8

Data protection

The data collected from the user in application of this Directive shall be limited to data indicating the Member State in which they are located, without allowing for identification of the user.

Article 9

Transposition

1. Member States shall adopt and publish, by 31 December 2019, the laws, regulations and administrative provisions necessary to comply with this Directive.

They shall communicate to the Commission the text of those provisions without delay.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication.

2. Member States shall apply those provisions from 1 January 2020. Once a Member State applies the provisions to comply with this Directive, that Member State shall cease to apply the provisions to comply with Council Directive (2018/…) as regards a common system of a tax on the revenues resulting from the supply of certain digital services ('Digital Services Tax') unless the taxable person within the meaning of that Directive is resident for tax purposes in a non-EU jurisdictions that has a convention for the avoidance of double taxation in force with that Member State and that convention does not include similar provisions on a significant digital presence.

Article 10

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 11

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President