EXECUTIVE SUMMARY

State aid analysis of the digital services tax proposals in EU countries

*Some EU Member States like France, Italy and Spain are currently considering adopting in the near future a digital services tax ("**DST**"). These are largely inspired by a Proposal for an EU Directive aimed at establishing a harmonized DST. However, the EU Council of Ministers has not reached an agreement on the said Proposal. As of today, therefore, there is no EU harmonized DST. In the current scenario the DSTs, as currently planned by some Member States, would therefore constitute unilateral measures subject to EU State aid law.*

*According to Article 107(1) of the Treaty on the Functioning of the European Union ("**TFEU**"), State aid is defined as a measure decided by a Member State and financed with public funds that confer a selective advantage upon certain undertakings, thereby creating distortions of competition within the Internal Market. The form of the measure is irrelevant and may include fiscal measures like those under examination. The EU Courts' case law makes clear that a specific tax addressed to certain undertakings may imply a selective advantage to other companies not subject to the tax.*

The following elements strongly indicate that the different DSTs, as currently designed, would involve the granting of State aid.

First, the key question is whether the Member State has set out the scope of the tax in such a way as to be coherent with its declared objectives or – on the contrary – whether it has exempted certain companies or sectors that should have normally been subject to the tax. It is clear that not all digital services nor all the services in which the participation of users create value – as per the DST's declared objective – are equally subject to the DSTs, therefore suggesting the presence of a selective advantage favouring certain undertakings or sectors that are exempted from the tax.

Second, the high revenue thresholds set to delineate the scope of the tax appear to have been set at an arbitrary level, thereby constituting a selective advantage to domestic *companies which do not exceed the worldwide thresholds, equally active in the same or similar sectors, but not subject to the tax.*

Third, the selective character of the tax is reinforced by the fact that a revenue-based tax, such as that at issue, has no apparent link with the declared objective of taxing the provision of digital services where users contribute significantly to the process of value creation, simply because significant value can be created by users regardless of the turnover of a company.

Fourth, these elements are indicative of de iure and de facto selectivity, since they would clearly produce a discriminatory effect against foreign companies. Statements made by different politicians at the national level suggest that the DSTs may have been designed so as to exclusively apply to very specific multinationals. Similarly, since the DST would be a revenue-based tax, it would produce a discriminatory effect on companies with a high turnover but a low profit margin and on loss-making companies.

It follows that unilateral DSTs, such as the Spanish, Italian or French DST, can be considered to be "selective" measures, as they clearly treat differently companies that are in comparable situations.

Finally, the DSTs would distort competition since they would be releasing non-taxed companies from the normal fiscal burden that they would have to bear under usual conditions, thereby distorting the level playing field.

*The above findings are not contradicted by a recent opinion issued by the French Conseil d'Etat. On the contrary, the said opinion implicitly recognizes the significant impact that State aid rules have in the analysis of the DST measures. Even though it succinctly expresses some unsubstantiated doubts as to the selective character of the DST, it also acknowledges that the European Commission ("**Commission**") itself has recently adopted Decisions declaring that taxes with striking similarities with the DSTs (advertising tax in Hungary and tax on the retail sector in Poland) constitute unlawful State aid. Although these Decisions are currently under appeal before the Court of Justice of the EU ("**CJEU**"), they clearly represent the point of view of the Commission* *on this kind of tax. The opinion therefore implicitly recognizes that there is a serious risk that the DST is considered by the Commission to be State aid.*

Pursuant to Article 108(3) TFEU, a Member State that is planning to grant State aid is obliged to notify it in advance to the Commission and to wait for its formal authorization before granting it. A notification under this provision is different from other communications made for other purposes (budgetary controls, technical norms, etc.). Thus, if a tax such as the DST constitutes State aid, it must be notified by the Member State before its adoption, and be subject to examination and, if compatible, subsequent approval by the Commission.

If a Member State does not fulfil this obligation and does not notify the Commission then any aid granted would automatically be considered as "unlawful aid" and the (DST) measure could be suspended and revoked. Indeed, any affected party would be able to allege the unlawful character of any aid before the national courts of the Member State which adopted the measure, and those courts would be obliged to take the necessary interim measures in order to preserve the effectiveness of Article 108 TFEU. This may include the suspension of the measure. So, if the Member State does not notify the draft DST to the Commission, the measure would be considered as unlawful aid, which means that national judges may suspend it and refer the matter to the CJEU. Alternatively, any affected party may directly address a complaint to the Commission and, in this case, this institution would be legally obliged to adopt a formal Decision on the State aid character of the measure and on its compatibility with the TFEU.

To sum up, a unilateral DST, such as the Spanish, Italian or French DST, can be considered State aid, since it clearly treats differently companies that are in comparable situations. Its implementation would therefore clearly be in breach of the EU State aid rules unless it is previously notified to and approved by the Commission.

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