Initiation of a Section 301 Investigations of Digital Services Taxes in Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom.

Written Submission

[Docket No. USTR–2020–0022]

To the Honorable Members of the Section 301 Committee,

Brussels, June 30th 2020,

Madam, Sir,

Following the request for public input by the Office of the US Trade Representative on the Digital Service Tax in Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom, please receive this submission.

1. The motivation to provide input as a Belgian citizen to the Section 301 Committee with regard to DST remains the same since my August 18th 2019 input[1] on the French DST. But what were then concerns for a potential trade dispute, has now become fear for a probable all-out trade war between economies representing a combined 2,5 billion population and involving 6 out of the top-10 leading countries in worldwide trade (see WTO report of 2018[2] : USA, Germany, France, United Kingdom, Italy and the Netherlands).

The input provided relates to **European Union Member states that have adopted or are considering adopting a type of DST as suggested by the European Commission in March 2018 (hereinafter referred to as European DST's)**. To some extent based on the December 2nd 2019 report of your Committee to the USTR on the French DST, the participant suggests two policies for recommendation to the USTR that can in turn be applied on most – if not all - types of DST.

2. On the USA Senate's Committee on Finance hearing of Wednesday June 17th 2020, the USTR commented on questions relating to European DST's that :

- This type of taxes is fundamentally unfair because it is designed to tax only USA companies.
- Given the fact that EU countries are completely 'dug-in' over the issue, the USA decided to leave the OECD negotiations.
- This does not take away the need of finding a solution that leads to a tax scheme for fair international taxation in the area of digital activities.

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[1] Docket No. USTR-2019-009, submission Verhaeghe

[2] https://www.wto.org/english/res_e/statis_e/wts2019_e/wts2019_e.pdf

Both Mr. Wyden, the Democratic Senator for the State of Oregon, and Mr. Grassley, Chair of the Senate's Committee on Finance and the Republican Senator for the State of Iowa, expressed their full support during this hearing for a strong policy in reaction to all sorts of discriminatory taxation. Therefore, independently of who will win the next USA Presidential elections, this issue will still stand, and with it an escalating trade war if sides are still 'dug-in' by then.

3. Senator Wyden referred during that same hearing to his fear that discriminatory taxation on digital activities of USA based companies in Europe may in particular lead to the loss of good paying jobs in the USA. With regard to such an effect, I must respectfully question if there is such a link.

Taxation on the base of corporate revenue is first of all an issue for the shareholders of these companies. Both European and American shareholders of taxed USA companies or groups are on an equal footing there. Next, taxes raised on digital business conducted in the European Union may possibly result to increased prices there and not in the USA. So, I see no impact of European DST's on employment in the US and the terms of contract for USA employees.

When concerned about preserving good or better paying jobs in the USA, the ruling of the Supreme Court of the State of California on independent contractors[3] in the digital economy and their impact on overall conditions for America's workers and the budgets of local, state and federal authorities, seems a more relevant approach to consider on the Federal level.

4. The DST's of Spain, Austria and the Czech Republic that are under investigation and the French DST the Committee already reported on to the USTR, can all be related to criteria for a DST as set out in a proposal for a directive of March 2018 by the European Commission. That type of DST singles out certain types of digital business models and only taxes companies when high thresholds on both the group level and the national level are reached. These main characteristics are considered by US policymakers as intended protective measures that single out successful USA companies for discriminatory taxation.

The thing is that in the European Union the absence of fair corporate income taxation, or corporate income taxation at all, on various digital activities occurring on the territory of European Member states is in turn considered as highly unfair. For example: it is reported[4] that in 2018 Amazon EU SARL, a company based in Luxembourg, registered 27,9 billion EUR of revenue from its European activities, with an operative loss of 493 million EUR, before taxes, leaving no corporate income to tax. In perspective, this accounted revenue obtained from about 500 million Europeans and companies in the EU so only made up in 2018 for 3 % of the reported worldwide revenue of Amazon group for that year. This is not credible.

[3] SCOCAL, 30 April 2018, *Dynamex operations West Inc. V. Superior Court, S222732* leading to the Assembly Bill No. 5 on Worker status: employees and independent contractors adopted on 19 September 2019 by the US State of California.

[4] Fair Tax Mark, report on the 'Silicon Six and their $100 billion global tax gap.' (see https://fairtaxmark.net/wp-content/uploads/2019/12/Silicon-Six-Report-5-12-19.pdf)

It is common sense to see such levels of accounting wizarding have been but waiting to trigger reactions from both the EU tax and competition law policy makers, such as taxing on the base of revenue through European DST or by looking closely into price-setting and unlawful commercial practices.

Such abusive practices of accounting and tax rules are especially sensible in the light of the increased budgetary needs to face the costs of the Covid 19 pandemic in the EU. In order to help finance those budgetary needs, the European Commission announced a second attempt to introduce a DST on the level of the European Union. On the basis of public statements, it seems that that DST will be similar to the French DST. By lack of an alternative that provides fair taxation under corporate taxation, it can be reasonably suspected that the EU policy will remain 'dug-in' over what is considered as highly unfair practices through digital activities.

5. As pointed out in my submission on the French DST, I see truth and reason in the positions of the USA, that considers this type of DST discriminatory and yearns for a fairer form of taxation, and of the EU, that adopted such DST's in order to address a highly unfair situation.

Your Committee considered my submission received on the French DST[5] as a mixed opinion. That 'mixed opinion' still stands today for all DST's based on the European's Commission proposal of March 2018. This submission suggests two policy options to deal with excessive practices through digital activities. When considering these policies, European DST's could be abandoned or adjusted by the EU policy makers as to avoid the singling out of USA businesses for taxation purposes and with it a glooming trade war.

A. Request on input on the determinations required under section 304 of the Trade Act, including what action, if any, should be taken.

6. In response to the publicly announced intention of the European Commission to make a second attempt for an EU-wide DST, the USA Administration responded by opening this investigation and by leaving -two weeks later- the OECD talks on digital taxation with regard to Tax Treaty-*change* that sought to achieve fairer taxation on digital activities.

European DST is basically the product of the European Commission assessment of March 2018 that in the field of corporate income taxes Tax Treaty-*change* is required for effective corporate income taxation of digital business models occurring in Europe. As long as no solution is found through Tax Treaty-*change* on how to include digital business under corporate income tax rules, there will be a 'dug-in' position on the side of the EU and an increasing number of its Member states on the use of DST's. And most likely also other jurisdictions around the world will be inclined to hold on to their DST for similar reasons.

The USTR's call on June 17th 2020 before the US Senate's Committee of Finance for finding a solution that leads to a tax scheme for fair international taxation is but common sense and in its objectives in full alignment with the EU's and other countries' objectives in that field. The

[5] Report of December 2nd 2019 of the Section 301 Committee on France's Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974, p. 12, footnote # 38.

issue is if there is still time and how to get there from now before a trade war is triggered by the end of this year?

In order to have countries to abandon or adjust their DST's, a fast approach that can provide a middle ground is needed. Such an approach exists through evolutive Tax Treaty-*interpretation* that can be applied immediately. As pointed out in my submission of last year to your Committee on the French DST[6], there is both a rationale and a hard law base provided to that end by customary international law (CIL) on the rules of interpretation of treaties. CIL interpretation rules place a taxation on corporate revenue from digital activities within the existing double tax treaties network and provide in return a lawful base for enforcing equal treatment requirements against discriminatory taxation criterions that DST's lack.

7. The European Commission is to give 27 European leaders of government a policy recommendation on the further taxation of digital activities on the European Union level by July 15th 2020.

The following question was addressed to the European Commission on June 16th 2020 by a Belgian Member of the European Parliament in response to the public announcement of the opening of this investigation (the participant underlined and bolded):

> ***Priority question for written answer P-003594/2020***
> ***to the Commission***
> *Rule 138*
> ***Cindy Franssen*** *(PPE)*
>
> *Subject: Digital taxes – trade war*
>
> *The Office of the United States Trade Representative (USTR) recently opened Investigation 2020-0022 against the EU in connection with digital services taxes on the basis of the Commission's March 2018 draft directive. A trade war by the end of 2020 is thus becoming a reality.*
>
> *On 20 December 2018, the United Nations adopted a resolution on rules for the evolutionary interpretation of treaties, which apply as customary international law. Rules for interpretation in customary international law are Union law [7] and can be universally invoked [8]. Evolutionary interpretation rules make it possible, without treaty override, to set up a digital physical presence and tax its turnover from digital activities instead of taxing accounting profit, which is sometimes determined under other foreign rules. A progressive corporate tax on turnover was recently found to be in accordance with Union law [9].* ***<u>This is an alternative to digital services taxes in order to avert a trade war.</u>***
>
> *Is the Commission prepared to investigate in the near future whether these new factors provide a basis for an updated recommendation to Member States on the interpretation of their double taxation treaties, with the US call for* ***<u>de facto equal treatment of national firms and multinationals</u>****, when taxing digital activities, being extensively complied with* ***<u>by taxing firms on the basis of comparable criteria for activities on their territories</u>****?*

6 Docket No. USTR-2019-009, submission Verhaeghe, p. 2 – 3, § 3.
7 CJEU, Case C-386/08, 25 February 2010.
8 Article 38 of the Statute of the International Court of Justice.
9 CJEU, Case C-75/18 and Case C-323/18, 3 March 2020.

The usual time available for the European Commission to give in writing a position on an urgent question is 3 to 4 weeks.

Such a type of taxation based on CIL rules of interpretation of treaties[10] would first be looking[11] at the level of activity reached by a digital business model that occurs in a national territory in order to grant the right to that jurisdiction to tax the revenue retrieved from it. Revenue itself does not trigger the right to tax, activity does when reaching a minimum level that is considered proportionate to the size of the population in that jurisdiction.

The taxation rules on revenues from only qualifying digital business models then apply regardless if it was made by resident companies, physical permanent establishment or digital permanent establishments without any physical presence in that national territory. Equal taxes levied on revenue from comparably sized digital activities are the result. Taxation is triggered when a safe harbor threshold is passed. That threshold is also set in function of the size of the population.

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[10] UN General Assembly Resolutions of 20 December 2018, # 73/203 on *Identification of customary international law* and # 73/202 on *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*, to be read for full understanding of its meaning with the Report of the INTERNATIONAL LAW COMMISSION, Chapter IV Yearbook 2018,

- commentary on conclusion 2, §§ 2 and 3, p. 17 - 18: *Paragraph 1 of draft conclusion 2 emphasizes the interrelationship between articles 31 and 32, as well as the fact that these provisions, together, reflect customary international law*. (..) *Recourse may be had to the supplementary means of interpretation, either in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning of the treaty or its terms ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable."* and § 13, p. 22 : "*Paragraph 5 uses the term "means of interpretation". This term captures not only the "supplementary means of interpretation", which are referred to in article 32, but also the elements mentioned in article 31 (..) The term "means" does not set apart from each other the different elements, which are mentioned in articles 31 and 32. It rather indicates that these elements each have a function in the process of interpretation, which is a "single", and at the same time a "combined", operation*."

- commentary on conclusion 2, § 1, p. 17 en § 14, p. 20: "*..First, article 31, as a whole, is the "general rule" of treaty interpretation. Second, articles 31 and 32 together list a number of "means of interpretation", which shall (article 31) or may (article 32) be taken into account in the interpretation of treaties. (..) The interpreter needs to identify the relevance of different means of interpretation in a specific case and determine their interaction with the other means of interpretation by placing a proper emphasis on the in good faith, as required by the treaty rule to be applied.(..)*"

- commentary on conclusion 8, § 2, p. 64 ; § 5, p. 65 ; § 9, p. 67 : "*In the case of treaties, the question of the so-called intertemporal law has traditionally been put in terms of whether a treaty should be interpreted in the light of the circumstances and the law at the time of its conclusion ("contemporaneous" or "static" interpretation), or in the light of the circumstances and the law at the time of its application ("evolutive", "evolutionary", or "dynamic" interpretation).(..) This approach confirmed by the jurisprudence of international courts and tribunals. The various international courts and tribunals that have engaged in evolutive interpretation — albeit in varying degrees — appear to have followed a case-by-case approach in determining, through recourse to the various means of treaty interpretation that are referred to in articles 31 and 32, whether or not a treaty term should be given a meaning capable of evolving over time. (..) The interpreter thus has to answer the question of whether parties can be presumed to have intended, upon the conclusion of the treaty, to give a term used a meaning that is capable of evolving over time."*

- see on the origin and meaning of CIL – interpretation rules after these resolutions ; Prof. Merkouris, Panos 'The rules of interpretation of Customary International Law – Paper No. 003/2019 on Treaty interpretation and its Rules : Of Motion through Time, 'Time-Will' and 'Time-Bubbles'.', TRICI-Law Research Paper Series, University of Groningen, Faculty of law, Paper No. 8/2020 – last revisited in March 2020.

[11] for an application of these CIL-interpretation rules on Tax Treaties that relate to the digital economy : see the cañada approach suggested in the submission by Verhaeghe on November 12th 2019 to the OECD request for public input on Pillar I, and Docket No. USTR-2019-009, submission by Verhaeghe to the request for input on the French DST and further texts on the portfolio of the www.jus-tax.be website.

This approach answers the call of the USTR for a solution that leads to a fair and equal treatment in digital taxation. If the EU is to receive a signal of willingness from the USA-side to consider an approach of criterions of corporate taxation through Tax Treaty-*interpretation* while still looking for a global agreement and waiting for the global implementation of that agreement through Tax Treaty-*change*, this policy option makes a reasonable chance to persuade EU policy makers to adapt in turn their tax policy with regard to DST.

8. There is to some extent a precedent for such an approach that would result in corporate revenue taxation with varying effective corporate tax rates according to different types of digital business models.

Hungary has levied a progressive corporate income tax on corporate revenue obtained from advertising in Hungary or publicity viewed on websites in Hungary. It has also levied a tax on retail sales in Hungary and yet another progressive corporate tax on revenue retrieved from telecommunication activities. Some of these taxes were implemented since 2013 to 2017 and did not gave cause for an investigation by the USTR since.

Hungary is still not included in the list of countries under the current investigation. The reason for this may be found in the criterions of taxation that are different than the proposal of March 2018 made by the European Commission. These tree Hungarian taxes do not refer to thresholds on the group level and all three taxes apply equally on all companies involved in a similar type of activity on the Hungarian territory.

The European Commission saw progressive corporate tax rates as a form of state aid because only the most important companies that were settled in other EU member states would meet these criterions. After having rebuked on June 27th 2019[12] the European Commission on issues of an alleged state-aid through progressive rates of corporate income tax on arguments based on considerations that related to both benefit & ability-to-pay theories in international taxation, the Court of Justice of the European Union (hereinafter referred to as CJEU) found in three other rulings of March 3rd 2020[13] all these Hungarian taxes to be compliant with EU law[14] on the ground of similar considerations. Only in the case of Google Ireland Ltd. the CJEU withheld a flaw because penalties for not timely reporting activities after a prior warning were found to be claimed in violation with the right of defense of Google Ireland Ltd.[15].

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[12] The participant has referred to the importance of this ruling for further developments in this field in his submission on the French DST. - CJEU, 27 June 2019, case T-20/2019, *European Commission v. Hungary*.

[13] See for a summary of these 3 rulings on the Euro Tax Flash homepage of KPMG : [CJEU decisions on progressive tax on turnover and fines related to advertising tax, published in March 2020]

[14] CJEU, 3 March 2020, case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ; CJEU, 3 March 2020, case C-323/18, *Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, C-323/18 and CJEU, 3 March 2020, case C-482/18, *Google Ireland Limited v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága*.

[15] CJEU, 3 March 2020, case C-482/18, *Google Ireland Limited v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága*.

9. Another policy option to avert a trade war consists of a set of adjustments to DST's that deal with the issue of singling out USA businesses for taxation. USA trade partners willing to adjust their DST to these standards should in return be allowed to apply their adjusted DST.

The findings of the report of December 2nd 2019 of the Committee on the French DST are in the participant's view likely to apply on all DST's that use the European Commission's draft of a directive of March 2018 as a model. The Committee recommended the following policies in response to that French DST :

> *"The evidence collected in this investigation indicates that:*
>
> *(1) The French DST is intended to, and by its structure and operation does, discriminate against U.S. digital companies;*
>
> *(2) The French DST's retroactive application is unusual and inconsistent with prevailing tax principles and renders the tax particularly burdensome for covered U.S. companies;*
>
> *(3) The French DST's application to revenue rather than income contravenes prevailing tax principles and imposes significant burdens on covered U.S. companies;*
>
> *(4) The French DST's application to revenues unconnected to a physical presence in France contravenes prevailing international tax principles and is particularly burdensome for covered U.S. companies; and*
>
> *(5) The French DST's application to a small group of digital companies contravenes international tax principles counseling against targeting the digital economy for special, unfavorable tax treatment.*
>
> *Additionally, concerning the two rationales for the DST that French officials have publicly put forward: both of these explanations rely on incorrect or unproven assertions.*
>
> *A range of tools may be appropriate to address these serious matters, including intensive bilateral engagement, WTO dispute settlement, or "imposing duties, fees, or other import restrictions on the goods or services of France".*

10. Should the same three policy options (intensive bilateral engagement, WTO dispute settlement, or "imposing duties, fees, or other import restrictions on the goods or services of France") be recommended to the USTR as an outcome for the current investigation?

- *Imposing duties, fees, or other import restrictions on the goods or services?*

11. The USTR announced trade sanctions on 2,4 billion worth of French products. France is however still committed to collect that tax by the end of 2020 and various countries have since adopted their DST's. The EU Commission has committed its support to the French republic in this trade dispute by retaliation on US products.

Announcing sanctions by the USTR was not an approach that incited France so far to abandon or even to adjust its DST in order to address the discriminatory effects found by the Committee. Further sanction announcement may not yield another result.

- *WTO dispute settlement.*

12. If found in breach with GATS requirements on equal treatment, France would then have to adjust or abandon its DST. But one can question if that policy option on DST's can be effective as long as the blockade on the functioning of the WTO appellate body is in force.

The US may have legitimate reasons in willing China into playing along 'the WTO-book' by abandoning the status of a developing country for WTO-purposes, so full WTO-rules can apply on the trade relations with this country. But as long as this is not settled, triggering WTO dispute settlements does no longer seem an effective policy to force countries into reviewing their DST.

- *Intensive bilateral engagement.*

13. There was an extensive amount of bilateral discussions with France after the December 2nd 2019 report that resulted in postponing the collection of the DST by France but could not convince France to adjust or abandon its DST.

Given the high number of jurisdictions involved in the current investigation, intensive bilateral engagement seems at the very least unpractical and not effective to avert in time a trade war.

14. If the Committee is to give these three similar policy options to the USTR as the outcome of the current investigation, the participant fears an all open trade war unavoidable since no incentive or motivation is given to the EU countries to come back on their 'dug-in' positions.

One can only reasonably hope that no country is wanting to go there, even when it feels left without further options. History shows that such a setting can spin out of control fast. **But foremost, a trade war will not bring a solution to the problem and do nothing but harm all involved in it.** In the end, after all economies involved have greatly suffered additional damage on top of the pandemic, only negotiations can provide a solution.

The DST's that are implemented or are being considered by Austria, the Czech Republic, Spain and the European Union basically use the criterions of the proposal for a directive of March 2018 of the European Commission. As did the French DST.

Policy options for not being dragged into that trade war are scarce. A list of adjustments based on the findings on the French DST could ease the tensions and provide a common ground. This can in turn allow to restart the OECD negotiations for finding a solution on the long term.

15. Considering this, the participant sees two new policies that have a sufficient potential for a common ground and that therefor can be considered by the Committee for recommendation to the USTR :

a) Determine a list of adjustments to be made on DST's in order to avoid or stop USA trade sanctions, and restart OECD negotiations on Tax Treaty-*change*. The next section of this submission suggests several adjustments and provides rationale.

b) Consider evolutionary Tax Treaty-*interpretation* to tackle some of the hottest issues on the short term. DST's that give cause to discriminatory taxation issues may in response be put on hold or be redrawn. Restart OECD negotiations on Tax Treaty-*change* on the long term.

Neither of the three policies (intensive bilateral engagement, WTO dispute settlement, or "imposing duties, fees, or other import restrictions on the goods or services of France") commended in the report of December 2nd 2019 will in the view of the participant suffice to provoke a shift in positions that may avert a trade war. Restarting talks on Tax Treaty-*changes* alone is not considered by the participant as a potentially effective policy to avoid a trade war by the end of 2020 when not combined with at least one of these two policy options (adjustments and Tax Treaty-*interpretation*).

The Section 301 Committee is invited by the participant to suggest to the USTR the option of adopting a policy on a list of *adjustments* on DST's and/or evolutionary Tax Treaty-*interpretation* to tackle to hottest issues of discrimination by DST's and retake OECD negotiations up on Tax Treaty-*change* after assessing the response to these policies for adjusting or abandoning DST's.

Question for input on discriminatory taxation by DST's against U.S. companies - Summary of the findings on discriminatory taxation by the French DST & suggested adjustments.

p.	Findings in the report on the French DST	Adjustment
19	.. some of the services not covered by the DST are indistinguishable, from the perspective of a consumer, from those covered by the DST.	(type A) All similar activities are to be equally taxed or exonerated.
23	.. for the sale of Internet advertising data, the service is deemed to be provided "in France" if the data sold concern a user located in France. It could be that none of the companies involved – neither the seller nor the purchaser of the data – is French..	None - see rationale provided See further on wealth creation & extraterritoriality of DST.
24	.. companies are not required (or allowed) to determine the actual value of the services deemed to have been provided "in France"..	(type B) Allow companies to prove their actual revenue from their digital activities in that country to rebuke the tax base calculated on a base of a formulary apportionment of worldwide income.

25	.. digital intermediaries tend to charge sellers a commission base on a percentage of the transaction price, not a flat fee for each transaction... the formula would overestimate the amount of revenue actually generated from sales to French users..	(type B) Allow companies to prove their actual revenue from their digital activities in that country to rebuke the tax base calculated on a base of a formulary apportionment of worldwide income.
26	.. the revenues to which the tax applies may or may not be equal to revenues actually earned by covered companies from providing covered services "in France".	(type B) Allow companies to prove their actual revenue from their digital activities in that country to rebuke the tax base calculated on a base of a formulary apportionment of worldwide income.
28 & 31	.. the revenue thresholds seem the most likely reason Havas is not expected to be covered by the DST.. .. about two thirds – seventeen of twenty-seven – of the company groups expected to be covered by the DST will be U.S. – based..	(type C) No revenue thresholds on a group level, safe harbor criterion proportionate to the size of the population.
32	.. in contrast to the French DST, the EU global revenue threshold referred to total revenues, not revenues from the covered services... large companies that provided the covered services as a small part of their business (..) would meet the EU revenue thresholds far sooner than they would meet the French thresholds.	(type C) No revenue thresholds on a group level, reasonable safe harbor in comparison to the size of the population.
35 & 39 & 43	.. the selection of the services covered by the tax, including carve-outs in the definition of such services, targets U.S. companies and not French companies.. ..It does not cover other sectors where French companies are more successful, including sectors similar to the covered services. .. by excluding online retail and direct sale of services online, the French DST focuses on U.S. based-companies and excludes French ones engaged in essentially the same business.	(type A) All similar activities are to be equally taxed or exonerated
35 & 46 & 51	The DST's revenue thresholds likewise target U.S. companies as opposed to French ones. .. although Orange Group is a huge and successful company that provides targeted advertising services in France, the DST's revenue thresholds likely mean it will face zero DST liability... .. no rationale for the 750 million EUR group requirement for revenue from covered services only..	(type C) No revenue thresholds on a group level, reasonable safe harbor in comparison to the size of the population.
35 & 52 & 53	.. the DST's relationship to other taxes discriminates against US companies... .. DST payments will be <u>deductible expenses</u> against French corporate income tax...	Why are foreign paid DST's that are paid by a US based company not also costs that can be <u>deductible expenses</u> from US CIT tax base ? The

	.. foreign companies do not become subject to a country's corporate income tax (CIT) until after they have created a permanent establishment (PE) there...	participant cannot see the point of this line of reasoning.
59 & 63 & 65 & 75 & 76	.. the French DST applies to gross revenues generated from providing the covered services "in France".. it differs from a tax on income (also called net profit), which taxes a company's income or profit.. the architecture of the international tax system reflects that corporate income (as defined by domestic law), and not corporate gross revenue.. .. because the DST does not allow for the deduction of costs from gross revenues, the DST is equivalent to an income tax with a far higher rate than its nominal 3 percent level.. .. international tax system reflects the principle that companies should not become subject to a country's corporate tax regime except based on a territorial connection to the country.. ..the evidence does not support either of the French government's assertion, i.e., that the digital services companies targeted by the DST have lower overall rates of taxation than the average rate of taxation of large "traditional" companies or that digital services companies uniquely benefit from the value they obtain from data provided by or concerning their users. .. more relevant studies show that digital companies pay an average effective tax rate that is comparable or even higher than the average tax rate for traditional companies..	This is the purpose of the DST by lack of a physical permanent establishment – hence the interest of reverting to a digital permanent establishment in order to be taxed on income rather than revenue. Proposed adjustments (type D): 1) Determine ranges of DST tax rates for digital business models with low profit margins. 2) Determine shares in the gross revenue allocated to a jurisdiction that relate to the use of production factors by the digital business model in that jurisdiction (user input, electricity use paid for by the user, use of local telecommunication)
69	.. for a company that operates mostly in North America, the average value of an ad placed to a person in France is likely below the average value of an ad the company places..	(type E) Include GDP per capita in the formula for allocating taxable revenue & allow to prove the real revenue obtained from these activities.
72	..by excluding the sale of goods and services owned by the company itself, the narrow definition of the covered services focuses the tax on digital companies and not traditional companies engaged in e-commerce..	Traditional companies that produce themselves goods and services and that are engaged in e-commerce have in most cases physical presence to provide services to customers (be it through an agent). (type F) Only 'purely' digital sellers that did not produce the goods in their group should be covered.
74	.. the DST's application to a small group of digital companies is unusual and inconsistent with tax policy principles cautioning against trying to 'ring-fence' the digital economy..	(type D.2) Determine shares in the gross revenue allocated to a jurisdiction that relate to the use of production factors by the digital business model in that jurisdiction (user input,

		electricity use paid for by the user, use of local telecommunication)
78	..users do not create value for the covered companies in a unique significant way..	?.. their preferences and choices have an obvious marketing & data mining value, ?? .. and mail-addresses can be used / sold for advertising purposes... ??? whose is that mail-address & data? the user or the company - see data protection & right to be forgotten issues etc.

This summarizes the adjustments to address some of the major points of critic on the French DST :

A : All similar activities are to be equally taxed or exonerated.
B : Allow companies to prove the actual revenue from their digital activities in a country to rebuke the tax base calculated on a base of a formulary apportionment of worldwide income.
C : No revenue thresholds on a group level, reasonable safe harbor in comparison to the size of the population.
D : 1) Determine ranges of DST tax rates for digital business models with low profit margins.
2) Determine shares in the gross revenue allocated to a jurisdiction that relate to the use of production factors by the digital business model in that jurisdiction (user input, electricity use paid for by the user, use of local telecommunication).
E : Include GDP per capita in the formula for allocating taxable revenue & allow to prove the real revenue obtained from these activities.
F : Only 'purely' digital sellers that did not produce the goods in their group should be covered.

16. Adjustments A and F relate to the **scope** of the DST. Adjustments B, C, D and E relate to the **taxation** of the digital business model that falls within that scope.

The participant resumes some of the recent findings of Madam S. Buriak[16], a researcher at the law faculty of the Vienna University, on rationale that can provide a scope for digital business models:

[16] Svitlana Buriak, 'A New Taxing Right for the Market Jurisdiction: Where Are the Limits?', *INTERTAX*, Volume 48, Issue 3, p. 301 – 316.

17. In 1923, the Report of Economists identified the concept of economic allegiance as the most appropriate for resolving the problem of double taxation[17]. The underlying rationale is the economic allegiance of business profits in line with the stages of production or delivery of goods and services and income generated therefrom. In this regard, it is important to note that the PE concept is only a rule, which was built upon the deeper principles of profit allocation developed by the League of Nations and international tax practice in the early twentieth century.

A nexus for DST should consider specific business activities with customers that directly lead to income generation and not the hypothetical intrinsic value of customers. Value creation can be relied upon when allocating profits between different units of the group to examine on a case-by-case basis what are a company's most valuable activities in terms of generating revenues. While profit allocation rules can still consider the concept of value creation in order to determine the most valuable activities in the group that should be remunerated with higher profits, wealth production should be the core concept to identify which jurisdictions should have taxing rights over business profits. Hence, there is no common value creation recipe for every business – and not even for every business model – to decide how much value is created by customers or any other value drivers and even more to apply a fixed ratio of income attributable to customers as a factor of income generation as proposed by the Unified Approach (Amount A).

Furthermore, there is no precise science on the hierarchy of the values of functions and resources and therefore, the analysis is often a matter of subjective discretion. Consequently, value creation cannot be used as the principal justification for the allocation of taxing rights to market jurisdictions[18].

18. On the base of that criterion of wealth creation, the scholar S. Buriak suggest the following digital business-models that can provide a rationale to place wealth creation in market jurisdictions :

a) Business to Business to Consumer (B2B-2C) Model: a company operating the platform and business users that are retailers or service providers.

Such platform can collect end-consumer data to provide additional services like targeted advertisements of business users' products leading to an additional stream of revenue for the platform operating company and to added value for the services of the business users. In that regard, the data collected is an input into the wealth production process of delivery of targeted advertisement services.

Therefore, it is considered that the market jurisdiction where the end-consumers – being a source of income-generating data – are located should also be regarded as the place of origin of income since the main input in the wealth production process is extracted there.

[17] Svitlana Buriak, *l.c.*, p. 306, footnote 39 : League of Nations and Financial Commission, Report on Double Taxation: Document E.F.S.73. F.19 (5 Apr. 1923) (League of Nations 1923 Report on Double Taxation). See also OECD, Action 1 Report, supra n. 34, s. 2.3.2.1; Jean Schaffner, The Territorial Link as a Condition to Create a Permanent Establishment, 41(12) Intertax 638, 645 (2013).

[18] Svitlana Buriak, *l.c.*, p. 305.

b) Business to Consumer to Business (B2C-2B) Model : a company providing free services to build a base of potential consumers for business users, being the ultimate targeted customers of the platform.

The role of the end-users of the platform is to give consent to the collection of their personal data to be used in the marketing activities or sales in exchange for services received by the platform. Therefore, data collection (extraction) should be considered as a business function of the platform rather than a user contribution. Nevertheless, end-user data is a meaningful input into the wealth production process of social media networking and search engine businesses. Data is a product in itself.

The data collection activity from the market jurisdiction being one of the main activities of the company in the wealth production process should lead to the taxing rights being allocated to the market state since in that case, customer data is one of the primary sources of wealth for such companies. Therefore, for social-media platforms, a nexus should be established to the jurisdiction where the end-users are located and from where data is extracted.

c) Digital Media Platforms: a company uses personal preferences of the customers to offer personalized choices to the customers.

The targeted advertisements are primarily based only on limited[19] personal information like gender, age, and location of the end-users. Therefore, the role of end-users in the wealth creation process of digital media platforms is present.

d) Business to Customers (B2C) E-Commerce Model : the question in Madam Buriak's view is whether companies merely selling their products in other jurisdictions through websites and applications should be within the scope of a new taxing right of the market states if the new right is based on the principle of origin of income and not on the destination-based approach.

The participant has another view on the E-Commerce Model then Madam Buriak with regard to the criterion of wealth creation. Web shops can also use information of users to incite them to buy the goods bought by the company running it, rather than those of the goods of other competing companies that are also put up for sale in that web shop. Web shops of companies that produce their own goods or services will typically mainly or only present that group's products on their websites. Customers have a role of wealth creation in web shops that mainly offer goods produced by other groups.

Madam Buriak considered that the destination-based cash flow tax is grounded on merely practical aspects of the prevention of tax avoidance and the race to the bottom imposed by tax competition in the long run. Other considerations justifying destination-based taxation are that the customer-based intangibles are located in the jurisdiction of the final purchaser and

[19] The participant finds that all personal information is considered relevant for marketing purposes. Even the location.

that the benefit principle may at least to some extent justify the allocation of taxing rights on a destination basis[20].

For that E-commerce model it is in the participant's view critical to keep the main reason in mind for DST coming into life : the assessment of absence of physical presence in the market jurisdiction that doesn't allow direct taxation on the revenue derived from these activities. The participant considers that this assessment is outdated when considering CIL interpretation rules of treaties. However, there is no need for DST or CIL interpretations rules of treaties since the vast majority of groups that produce services and groups have, if not resident subsidiaries, at least an PE through an agent that is to follow up on customers' requests in territories with enough customers.

Companies that just sell goods or services over the internet they did not produce are eligible to qualify for this model in the participant's view since they present a risk for tax avoidance by not having a physical presence in that jurisdiction. This rejoins the first motivation for destination-based taxation: addressing and preventing tax avoidance.

Also, what is the rationale to consider that goods and services from various companies sold on platforms qualify and goods and services from various companies sold on websites do not? The type of digital medium seems irrelevant.

Finally, the participant considers that destination-based taxation as a tool to address tax avoidance is justified in the presence of groups that produce 'tools of connectivity' such as laptops, smartphones, tablets, etc. These products typically have a large portion of their price to cover Intellectual Property Rights that can be shifted at leisure over the globe by that group. So, groups that sell tools of connectivity they produce should also be included in this business model.

19. On the basis of that wealth creation approach and in part based on destination-based theory objectives (tax avoidance, presence of customer-based intangibles, benefit theory) that relate to the E-commerce business model only, the participant suggests that all business-models that qualify under these four digital business models (B2B-2C, B2C-2B, Digital Media Platforms, B2C) can be considered for the adjustments A & F on the DST scope :

A : All similar activities are to be equally taxed or exonerated.

F : Only 'purely' digital sellers that did not produce the goods in their group should be covered.

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[20] Svitlana Buriak, *l.c.*, p. 302, § 6 with reference to B. Moreno, A Note on Some Radical Alternatives to the Existing International Corporate Tax and Their Implications for the Digital(ized) Economy, 46(6/7), *Intertax* 560, 561 (2018); M. Devereux, Pillar One: First Step Towards a Destination-Based Tax?, 1461 *Tax J.* (16 Oct. 2019), https://www.taxjournal.com/articles/pillar-one-first-step-towards-a-destination-based-tax (accessed 28 Jan. 2020). See also B. Rajathurai & M. Clayson, Unify and Conquer: The OECD's 'Unified Approach' to Pillar One, 1461 *Tax J*. (16 Oct. 2019), https://www.taxjournal.com/articles/unify-and-conquer-the-oecd-s-unified-approach-topillar-one (accessed 28 Jan. 2020); J. Li, Global Profit Split: An Evolutionary Approach to International Income Allocation, 50(3) *Can. Tax J.* 823, 866 (2002); M. F. de Wilde, Comparing Tax Policy Responses for the Digitalizing Economy: Fold or All-in, 46(6/7) *Intertax* 466, 473 (2018).

All companies involved in the same type of activities in the territory of that market jurisdiction must therefore qualify for the DST. Included resident companies. When not reaching a certain level of activity, companies should be equally exonerated for safe harbor purposes.

Equal type and size of the digital activities place both resident and non-resident companies on an equal footing for taxation purposes and so addresses the critics on criterions of the French DST that singled out USA companies on the basis of scope, without rationale provided to that end.

20. As to the singling out of USA companies on the base of other criterions of the French DST such as revenue criterions on the group level or on the company level, limited or extended to revenue from that type of activities or overall income, the high levels of safe harbors, etc. the suggested adjustments B, C, D and E are :

B : Allow companies to prove their actual revenue from their digital activities in that country to rebuke the tax base calculated on a base of a formulary apportionment of worldwide income.

C : No revenue thresholds on a group level, reasonable safe harbor in comparison to the size of the population.

D : 1) Determine ranges of DST tax rates for digital business models with low profit margins.
2) Determine shares in the gross revenue allocated to a jurisdiction that relate to the use production factors by the digital business model in that jurisdiction (user input, electricity use paid for by the user, use of local telecommunication).

E : Include GDP per capita in the formula for allocating taxable revenue & allow to prove the real revenue obtained from these activities.

These adjustments basically relate to three questions:

- What revenue to allocate to the business models in scope of the DST and how to do that? (adjustments B and E).
- What part of that revenue expresses the rationale of wealth creation and not value creation? (adjustment D.2)
- How to tax that part? (adjustments C and D.1)

21. Adjustments B and C are plain simple and do not need further comments on their purpose or logic. Best would be to set a minimum level of digital activities on the scale of one million people.

Adjustment E relates to a formula were worldwide reported revenue of the group is redistributed according to the number of worldwide users or connections and the number of the national users or connections. By adding GDP per capita to the formula, you allocate better the share of wealth creation by a customer with a higher spending budget. This formula could be : (GDP per capita of the market jurisdiction / (all GDP per capita of all market jurisdictions that have at least equal minimum level of digital activities compared to the size of the population / the number of that market jurisdictions).

22. Adjustment D2 does not consider net income, it determines what part of the revenue allocated to the market jurisdiction can be related to wealth creation for taxation purposes.

In international taxation it is considered fair that companies that benefit from services provided in the territory where their activities take place, can be asked to contribute (the benefit theory). On grounds of fairness, the Supreme Court of the United States (hereinafter SCOTUS) found in the ruling of 21 June 2018 in the case *State of South Dakota v. Wayfair*[21] that companies having a purely digital turnover of more than 100.000 USD have a digital nexus that qualifies for a sales tax. One could consider sales taxes triggered on the base of a digital nexus as American DST's. In a record time of 18 months after that ruling, almost 40 other USA States had adopted American DST's. There seems to be a wide cross-country opinion in the USA that finds it highly unfair that digital business escape equal contribution. Sales taxes pay up in some States for most of the public services all companies use when delivering goods or providing services to their customers. European DST's seek that same fairness.

The main difference with European DST's is however the Commercial clause that is guarded closely by the Supreme Court of the United States and compels these US States of adopting their American DST with equal treatment for all companies.

Use of public infrastructure provides a rationale for granting taxing rights in order to have all who benefit from it to contribute on a minimal base. It is then logic to consider revenue and not profit/net income. Revenue expresses better the quantity of public infrastructure that may have been used in that territory to gain it/make profit. In the ruling of 18 May 2015 in the case *Comptroller of the Treasury of Maryland v. Wynne* [22], the SCOTUS found that there is no USA rule that forbids to tax corporations on the base of revenue (gross receipts). The CJEU has since rendered similar rulings as SCOTUS in the field of corporate taxation[23] and found there is no EU rule that forbids to tax corporations on the base of revenue (turnover).

23. Considering this, some digital business models use more public infrastructure than others: those models that end up selling goods use roads, police protection, etc. Those business models showing mainly images or movies use up a lot of electricity and require investments in cable and telecommunication networks and regulations.

These criterions provide a rationale for considering a smaller or a larger size of the revenue (gross receipts) to qualify for contribution to public services that were indispensable for the digital activity to take place in that territory.

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[21] https://www.supremecourt.gov/opinions/17pdf/17-494_j4el.pdf

[22] http://www.supremecourt.gov/opinions/14pdf/13-485_o7jp.pdf

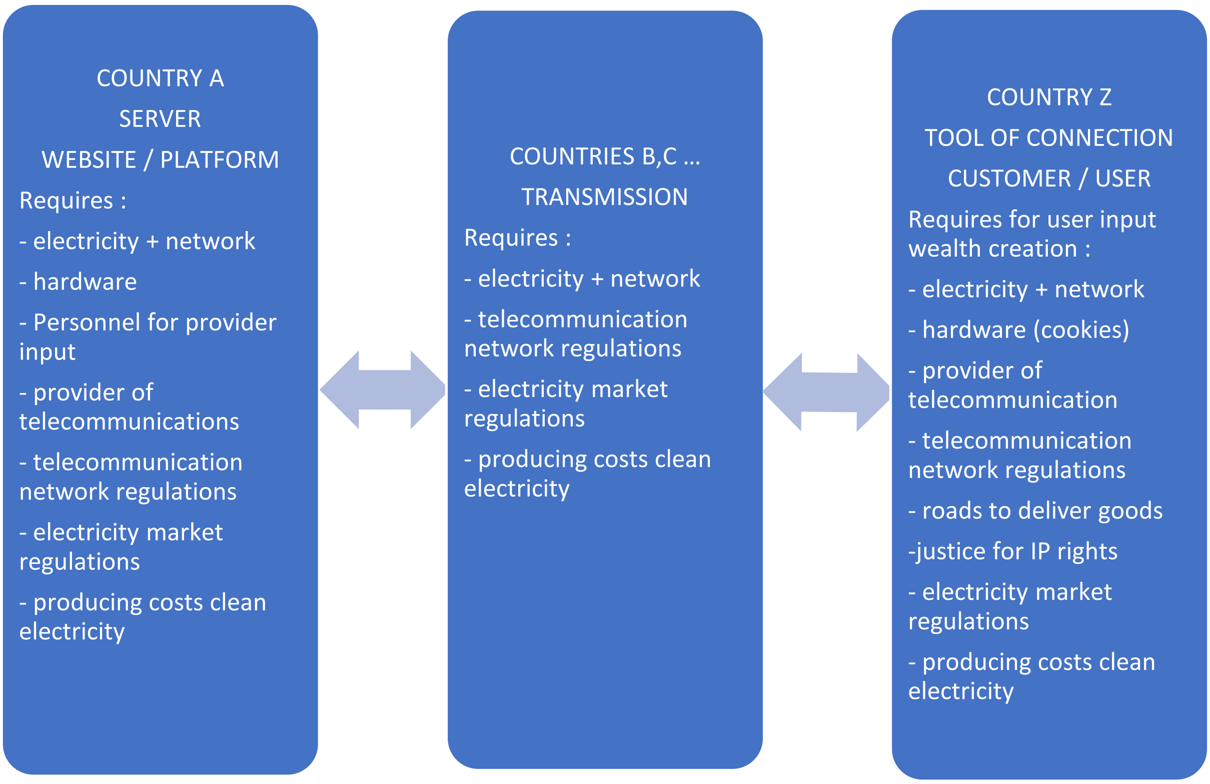
[23] CJEU, 3 March 2020, case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ; CJEU, 3 March 2020, case C-323/18, *Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, C-323/18 and CJEU, 3 March 2020, case C-482/18, *Google Ireland Limited v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága* ; CJEU, 27 June 2019, case T-20/2019, *European Commission v. Hungary*.

24. Then there is the other criterion of the wealth creation that was considered to qualify the digital activities in scope. As Madam Buriak pointed out, there are different levels of wealth creation per type of digital business model that falls within the scope.

The more wealth creation that depends on customers in market jurisdictions, the higher the ability to make revenue. In international taxation, the ability-to-pay theory is accepted as a rationale for both safe harbors and progressive tax rates.

25. In his participation to an ERA-Seminar in May 2019[24], the participant suggested comparable criterions as the ones indicated below :

Digital activities production cost for wealth creation:



It is quite obvious that various 'cost' factors are present in the market jurisdiction. These 'cost' factors relate to the combined use of public infrastructure, costs paid for by users and indirectly wealth creation (expressed through free use of user's data). The more a digital business model uses these 'cost' factors, the fairer it is to require a larger share of the revenue to contribute.

[24] Available free of charge at the portfolio of the www.jus-tax.be website.

26. When issuing payments, bartering tokens or buying and selling financial products through platforms, the user generally pays a commission. These digital activities can use up a lot of energy (f.i. flash trading or bitcoins) but hold little extra wealth creation outside the transaction. One could therefor argue that this type of activities should be left out of the B2B-2C Model.

But when the payment is not collected in the national territory, it escapes taxation that contributes to the use of the factors in that territory. On motives of destination-based taxation that relate to both tax avoidance and prosumption (share of the customer in the production process) this type of activity should be in scope. The B2B -2C Model is split with a sub-business model with a lesser tax base that reflects its lower wealth creation.

Each business model in scope has a different type of wealth creation and a different use of public services in that creation process. The fairness to contribute accordingly in the market jurisdiction can so be expressed through margins. For example:

DIGITAL ACTIVITY	WEALTH	COST	MARGIN
B2B-2C Model for services with few data input (Web-payments / traders / token-platforms.)	LOW	LOW	20 %
B2C E-Commerce Model & B2B-2C Model (Paying personalized services / sales of goods by the internet)	HIGH	LOW	30 %
Digital Media Platforms Model (Paying services for information or standardized communication)	LOW	HIGH	40 %
B2C-2B Model (Free Users of Free services)	HIGH	HIGH	50 %

Applied on the French DST at a tax rate of 3 %, this leads to taxation on corporate revenue between 0,6 % (3% * 20%) and 1,5 % (3% * 50%), but with a larger tax base given the equal treatment applied on more resident French companies. Other margins and percentages can be considered by the USTR if this type of policy option is withheld for recommendation.

27. In short, the suggested adjustments that relate to the scope and taxation of the DST are provided with rationale through the concept of *wealth creation* that is accepted since 1921 in international taxation. Other rationale is based on destination-based arguments (tax avoidance, presence of customer-based intangibles, benefit theory).

It is not comparable to *value creation* that requires to go into accounting details to determine what part of income can be split. It applies the benefit and the ability-to-pay theories to tax on the basis of revenue. It splits revenue between jurisdictions that have wealth creation and support costs of public services that are required for the digital activities to take place.

These adjustments lead to an equal treatment of all companies engaged in comparable digital activities in the market jurisdiction and are an effective remedy to most findings on discriminatory taxation in the December 2nd 2019 report.

28. Other issues on discriminatory taxation that were raised in the December 2nd 2019 report related to :

.. for the sale of Internet advertising data, the service is deemed to be provided " in France" if the data sold concerns a user located in France. It could be that none of the companies involved – neither the seller nor the purchaser of the data – is French.. (p.23),

.. the DST's relationship to other taxes discriminates against U.S. companies.. DST payments will be deductible expenses against French corporate income tax..
.. foreign companies "do not become subject to a country's corporate income tax (CIT) until after they have created a permanent establishment (PE) there.. (p. 35 & 52 & 53),

..users do not create value for the covered companies in a unique significant way.. (p. 78).

These issues were not considered for specific adjustments. The suggested adjustments determine a tax base in the revenue. Revenue is no longer taxed entirely so it has no longer a similar tax cost as a fixed VAT rate calculated on all revenue or as a CIT calculated on income. Taxation is triggered by the size of the activity and not the amount of revenue. A rationale is provided for considering revenue and not net income. Further rationale is provided on these issues in questions for input on possibly unreasonable tax policy (see below).

Question for input on retroactivity.

29. The participant provides no input other than this: when claiming equal treatment, there may arise an issue on taxes for 2019 and 2020 when searching a compromise. It is not legally possible for most countries to tax other companies than under the existing DST for those years.

In case countries do not abandon their DST but are considering an adjustment for future taxation, full or partial tax credit can be considered. DST's levied under discriminatory conditions towards US companies can so be credited against future DST's that comply with equal treatment requirements.

Question for input on possibly unreasonable tax policy.

Sub-question # 1 on the extra-territoriality of DST.

30. Digital activities require the activation of tools of connectivity of users located at that time in a given territory. In order for the digital service to take place, that user must pay for telecommunication services, electricity used, etc.

That electricity is generally produced in that territory and must be transported to the location where it feeds the tools of connectivity of the user (portable phones, tablets, computers, television) and the telecommunication network. The production and sale of that electricity is monitored, regulated and taxed by the authorities in most EU jurisdictions. Urgent carbon free production of electricity under EU and national climate policies need major public investments and incentives in the coming years.

The telecommunication networks need to be constructed, maintained, upgraded and fed with electricity. Telecommunication operators are regulated in the EU by national authorities and EU law.

The company that has control over the server is the only one that gets revenue out of the activation of the digital service. It can provide the digital service through this chain of factors (telecommunication network, electricity network,..) located in the place where the user activates that digital service. That chain is entirely national when the residence of both contracting parties in the same country and revenue is also collected there. It becomes an issue when there is no common residence or collection of the price in the same country ; since then it is possible to escape a minimal contribution to these costs.

It suffices to open the right to tax under a DST that no digital activity could have taken place without these services and facilities provided for in the market jurisdictions.

31. Such tax is not extraterritorial. Stating the opposite is in violation with the Westphalian doctrine that applies in international law since 1648. Prof. Greggi, teaching at the Italian university of Ferrara, reminds this fundamental doctrine when discussing digital taxation[25]. Activities occurring on a nation's territory open the right to tax it by its sovereign: within its territory, the state is free to set taxation in accordance with what it considers being more consistent with its priorities, its political decisions and, eventually, its necessities[26].

Prof. Greggi finds that *value creation* cannot be calculated by specific online services and the competitive advantage granted to them by the principle of the Net neutrality, unless linked through prosumption to user activity in that territory[27]. He finds[28] on the other hand that once a sufficient level of sales occurs, there is an exploitation of the service and/or legal network in that territory. With remote digital sales occurs a free riding of the infrastructure that is needed, the education of people required to access the internet, …

[25] Marco Greggi, 'Rise and Decline of the Westphalian Principle in Taxation: The Web Tax Case.', *EC Tax Review*, 2020/1, p. 6 – 21.

[26] M. Greggi, *l.c.*, p. 6, footnote 10 : A. H. Qureshi, The Freedom of a State to Legislate in Fiscal Matters Under General International Law, Bull. International Fiscal Documentation 16 (1987).

[27] M. Greggi, *l.c.*, p. 10, with reference to footnote 37 : In Italy, e.g. a very successful American provider of online videos and films is successfully competing with an equivalent service granted by the local Telecom company that is the owner of the network used by the former one for free. Without the net neutrality principle, the second company would make the access to the market by the first one more expensive thus recapturing a margin of competitiveness that is currently lost. For this reason, it is, at best, very difficult to assess the actual creation of value of one company in a State as the pricing strategy for services or delivered goods does not consider the impact of Internet free riding by the digital companies (and it never did). And p. 19 on prosumption.

[28] M. Greggi, l.c., p. 16

32. In substance, the earlier cited landmark ruling of 21 June 2018 of the SCOTUS in the Wayfair case did acknowledge that even remote sales have use of public services in the destination State and that this finding opens the right to tax. In that, it is in full alignment with the Westphalian doctrine when overriding its earlier requirements on physical presence in order to tax[29].

It is irrelevant for the Westphalian doctrine what shape and size the activity that *creates wealth* takes, as long as it can be in part located in the territory of that sovereign state by having need of services provided for by that sovereign. The criterions of international taxation of the base of residence, source or even citizenship all relate back to the sovereign territory.

It is the Tax Treaties that have become, through evolving technology, outdated and in their non-evolutionary interpretation inconsistent with the Westphalian doctrine. Hence, the suggested policy option for considering Tax-Treaty-*interpretation* through the CIL rules of interpretation as found by the INTERNATIONAL LAW COMMISSION[30].

33. In his submission to the OECD public consultation for input on Pillar-I, Prof. Elliffe, teaching at the New-Zealand University of Auckland, reminded the concept of wealth creation that inspired nations to conclude tax treaties[31]. He finds :

> "*The four economists involved in preparing the 1923 Report discussed the four elements of economic allegiance describing them as follows:*
>
> *I. The production of wealth;*
>
> *which means all the stages involved up until the wealth comes to fruition, by which they mean "the oranges upon the trees in California are not acquired wealth until they are picked, and not even at this stage until they are packed, and not even at that stage until they are transported to the place where demand exists and until they are put where a consumer can use them."*
>
> *Under this heading, it can be seen that the production of wealth involves both the supply/residence side (manufacturing and production) and the demand/source side (transportation to the market where they are purchased and consumed). This is a more relevant category for business income.*
>
> *II. The location of the wealth;*
>
> *where the wealth is situated. Often this will be the location of the property. Relevant for passive investment income, the location of the investment capital could be in the state of source or the state of residence.*
>
> *III. The possession of wealth;*

[29] The cited author Greggi sees this ruling as in conflict with the Westphalian doctrine. The participant has another view.
[30] See footnote # 10.
[31] C. Elliffe, Submission on the Proposed "Unified Approach" to Pillar One, available on the OECD website on the received input

which means, substantially, the legal framework of society and the place where property rights are enforceable. Under this heading, the right to enforce property rights can be in both the supply/residence side and the demand/source side, such as enforcing intellectual property rights or creditor/debtor obligations.

IV. The disposition of wealth;

which means the stage where the wealth has reached its final owner who can consume it, reinvest it ; but in the exercise of his will to do any of these things it resides with him and his ability to pay taxes is apparent. Under this heading, residence tax is most relevant as the owner consumes or disposes of the property. It could be noted that the property could well be situated in another state.

After analysing the above four principles, the 1923 Report concludes that the stages of production "up to the point where wealth reaches fruition, may be shared in by different territorial authorities".

It is acknowledged by the OECD, that "this "origin of wealth" principle has remained a primary basis for source taxation through the many committees and draft conventions prepared under the auspices of the League of Nations".
(..)

There are at least five major areas where the source country makes a contribution to the carrying on of digitalized business in their jurisdiction:

I. the contribution to the business environment and economy:

this includes the general business confidence, corruption and law and order, affluence and ability to consume. Often goods and services purchased by a resident in the source country are then consumed either in the production of further business activities (requiring a viable fiscal environment) or in private consumption (requiring a consumer with spending power);

II. the contribution to the technological infrastructure:

this includes suitable telecommunications infrastructure, Wi-Fi and broadband, and a population with appropriate devices (computers and smartphones);

III. the contribution to the legal system:

this includes providing reliance to enforce payment for transactions, uphold intellectual property rights (such as trademarks), and maintain a competitive and conducive business environment. The protection of intellectual property rights (for example in the case of computer software) is critical to vendors of intangible products and digitalised services. The ability to deal with fraudulent and criminal behaviour is also important as are consumer protection laws;

IV. the contribution to infrastructure:

modern infrastructure to allow physical delivery of goods in a timely and protected way, provision for waste disposal for packaging materials;

V. the contribution of users to the digital business:

this may take many forms but include the role of users and social media (designing or providing content), the contribution individuals make to the network effect (family, followers and friends), the provision of assets and services as part of the sharing economy (either physically located or physically performed in the source jurisdiction), the process of review, validation and assessment (on services or goods), etc.

It seems clear that the benefit theory retains its credibility as a justification to tax non-residents in circumstances where the non-resident enterprise is enjoying or utilizing the type of contribution made by the source state (or by economic actors, for example, users, in the source state). This is not a modern idea but appears to have been present right from the original theoretical construct in the 1920s compromise. The concept of economic allegiance, while it is admittedly indistinct, clearly encompasses an apportionment of taxing rights between states when the activities carried on by a non-resident enterprise utilize and benefit from public services, legal, and technological infrastructure provided in the source state."

This author also points at the 21 June 2018 ruling of the SCOTUS as applying the benefit theory that considers use of public services, legal and technological infrastructure provided in the source state.

34. All presence that has use of public services provided for by the sovereign to create wealth in a territory fall within that sovereign's right to tax. In our time this right stands but through treaties, be it GATT, GATS or tax treaties; equal treatment must be observed when setting the criterions of taxation.

So, the participant finds in DST no unreasonable tax policy through extra-territoriality in taxing digital activities occurring in a national territory. He supports the 'dug-in' position of EU sovereigns on ending this too long-standing avoidance of their sovereign right to tax these activities. Provided there is a sufficient level of activity there that had need of public infrastructure and services in order to take place. And provided that these EU Member states observe in turn the requirements of equal treatment with their DST.

Sub-question # 2 on taxing revenue, not income.

35. From what has been stated above, it is clear that the participant finds that corporate taxation on the base of income is not fit for a fair taxation in the digital economy. He has also motivated that view in his contribution to the OECD request for public input on Pillar I[32] , p. 32 – 33 :

"In their paper published on 22 October 2019 on the website of CEPS[33], L. Carpentieri, S. Miscossi and P. Parascandolo invite their readers to further reflections on new corporate income taxes needed for the digital and immaterial economy.

[32] submission by Verhaeghe on November 12th 2019 to the OECD request for public input on Pillar I,

[33] L. Carpentieri, S. Miscossi and P. Parascandolo, *Overhauling corporate taxation in the digital economy*, paper published on CEPS website October 22nd 2019 link: https://www.ceps.eu/ceps-publications/overhauling-corporate-taxation-in-the-digital-economy/

Traditional profit determination has become inapt to capture the goal of taxing 'return to capital'. Intangible assets are very difficult to allocate and determine. Something has value in a digital age when used and for as long as it is used. Although one can determine how much the model is used, nobody knows how long that digital business (line) model will endure, making yearly depreciation often meaningless.

Internet and digital platforms have created an 'above territories' territory, inaccessible to national tax authorities, allowing such stateless income not to contribute to public expenditure in the countries where multinational companies sell their goods and services.

That paper also mentions the effect of corporate income tax changes under the Trump administration, that has changed from a 'worldwide' system to a 'territorial' system, thus significantly enlarging the 'above territories' territory for major U.S. enterprises. It implies rethinking corporate income taxes on domestic earnings only and excluding profits that are gained abroad. This will increase tax competition among jurisdictions.

L. Carpentieri, S. Miscossi and P. Parascandolo suggest as a solution for updating the international corporate tax system, to only consider profit or loss as a tax base when maintaining the existing corporate income tax rules. For taxing these new business models, corporate income tax should be determined on destination-based turnover and presumptive taxes. Company activity indicators trigger presumptions of the tax base in that jurisdiction without further need to consolidate results across jurisdictions."

36. The word 'income', as used in the USA, means net receipts, after deduction of costs and before taxes. Even with the same accounting standards in all countries it still causes unequal treatment when applied on digital activities. For example : four companies have equal digital activities in a given territory that yield under a same type of digital business model each one revenues of 400. When they have a resident company there, or a physical permanent established, they will have books that defines income according to that territory's accounting rules. After taxation, the Tax Treaty provides either exemption or tax credit for the physical permanent establishment.

Cpy A is resident and applies CIT rules that provide for depreciation costs, intellectual property cost etc. On the 400 revenue, it reports 120 income and is taxed at 25 % on that = 30 CIT.

Cpy B has a physical permanent establishment and applies CIT rules that provide for the same deductions etc. On the 400 revenue, it reports 120 income and is taxed at 25 % on that = 30 CIT. In its country, Cpy B is granted exemption. It has the same tax outcome as Cpy A.

Cpy C is equal to Cpy B but in its country, there is a tax credit. If CTR there is less then 25 % or when no full tax credit is granted for some reason, it will suffer a different result.

Cpy D however is based in a third country and got 400 without a permanent establishment. The income and CTR will be determined by its country. When established in a low tax jurisdiction, is has a competitive advantage and can set its prices accordingly to have a larger share of that market.

That low tax regime in the jurisdiction of Cpy D may now inspire the group of Cpy's A, B and C to create also subsidiary in a third country similar as D's jurisdiction on low or none CIT. Either by transferring a part of the digital activity there or transferring collecting the income. Resident Cpy's A, B and C become mere 'cost+' entities, working on loss or almost no income. Overall reported income for Cpy's A, B and C becomes now 40 instead of 120. The market jurisdiction loses 3 x 20 income.

This phenomenon has widespread in reality and has disturbed price setting in digital business models. Because digital activities can – by definition – be easily outsourced they incite this kind of behavior. Income is no good basis to work on in the hope of achieving fair taxation through equal treatment in this field. Market jurisdictions with medium or high CTR or more strict rules on deductible costs suffer less tax collected on unchanged wealth creation and use of public services. Such tax planning by Cpy's A, B and C may be addressed through national anti-abuse rules to correct the reported income.

This would not be the case for Cpy D by lack of a permanent establishment. Even when a digital permanent establishment can in time be triggered for Cpy D, this would turn it only into another 'cost+' or almost loss entity when income remains the base for taxation of revenue obtained through digital activities in that jurisdiction.

DST on revenue or Corporate Revenue Taxes (CRT) are an effective answer to all of this problems CIT has with outsourceable digital business models. All 4 entities fall within the scope of a DST the market jurisdiction adopts and levies on that digital business model a 30 % base and a 6 % tax rate. They pay 1,8 % of 400 = 7,2 each. That 7,2 DST can be deducted as a cost. In doing so the net income of 40 is reduced to 32,8. At a 25 % CTR there is now 8,2 CIT collected. The market jurisdiction collects in total 3 x 15,4 (7,2 DST + 8,2 CIT) and one time 7,2 DST instead of 3 x 10 CIT before introducing the DST. It also reduces the tax competition advantage for Cpy D. The market jurisdiction has now a better funding (24,6 CIT + 28,8 DST compared to 30 CIT before) for the public services all four companies use when conducting their digital business in its territory. It still suffers a considerable loss of income after introduction of the DST (3 x 30 CIT = 90 compared to 53,4 CIT & DST combined (24,6 CIT + 28,8 DST)).

The market jurisdiction decides to introduce a digital permanent establishment (dPE) and apply a CRT with a margin of 20 % on revenue[34] on that type of digital business model. The CRT comes on top of existing CIT rules. This tax law provides that CIT levied on revenue taxed under CRT can be credited against CRT.

The tax cost for all four companies (given a digital permanent establishment for Cpy D) becomes : 20 % of the CTR of 25 % = 5 %. After CRT & DST come into effect, these 4 companies pay :

[34] For the rationale for margins in CRT ; see the cañada approach suggested in the submission by Verhaeghe on November 12th 2019 to the OECD request for public input on Pillar I, also available in the portfolio of www.jus-tax.be.

Tax regime / Tax collected on 400 revenue	A	B	C	D	Total
CIT 25 % only – before tax planning 120 income	40	40	40	0	90
CIT 25 % only – after tax planning 40 income	10	10	10	0	30
DST of 6 % with 30 % margin CIT 25 % – after tax planning : 32,8 income	7,2 8,2	7,2 8,2	7,2 8,2	7,2 0	28,8 24,6 53,4
DST of 6 % with 30 % margin CIT 25 % – after tax planning : 32,8 income CRT 20 % margin on revenue: 80 revenue tax-base CIT credit on taxed income in 400 revenue	7,2 8,2 20 (8,2) 27,2	7,2 8,2 20 (8,2) 27,2	7,2 8,2 20 (8,2) 27,2	7,2 0 20 (0) 27,2	28,8 24,6 80,0 (24,6) 108,8
CIT 25 % only – without tax planning and dPE Cpy D	30	30	30	30	120

The outcome is 108,8, collected for 27,2 with each company. When the whole operation started, the market jurisdiction collected 3 x 10 = 30. If all four company had paid their regular CIT taxes on income to start with, the total corporate taxes collected by the market jurisdiction would have been 120. The market jurisdiction still suffers 11,2 loss of corporate taxes (almost 10 %) and may seek further adjustments for that through tax rates or margins.

Is Cpy D subject to discriminatory taxation? Or do Cpy's A, B and C no longer have to pay for the share Cpy D used to freeride on the public services the market jurisdictions provided for all 4 ? Do Cpy A, B and C longer feel the need to engage in excessive tax planning in order to avoid low price setting by Cpy D ?

37. The participant considers the OECD efforts that seek to divide accounted profits on the group level amongst jurisdictions as an effort doomed to fail. In the update provided on Pillar-I and Pillar II in a webinar[35] of the OECD, is was clear for the participant that Pillar I left crumbs to market jurisdictions but that large countries gained substantially more tax-return of the Pillar II concept. This is a bad trade-off for export-oriented but small countries such as Belgium. It stands to lose far more than it may gain.

Using the group result of income is also unfair because if that group decides to concentrate all major investments in one country, this will affect the overall income. Therefor, all jurisdictions that provide revenue will see less taxable income because of investment policy. In the meanwhile, that group keeps using public services. A sovereign nation should not stand for such results.

To set this wrong right and to even the odds, the participant finds that if OECD talks on Pillar I were to retake, they should consider splitting group revenue and not group income.

Sub-question # 3 on the purpose of penalizing particular technology companies for their commercial success.

38. The participant has no specific comment on this topic for any particular DST.

[35] Webinar of 13 February 2020, still available for public on 30 june 2020 on the OECD Website

The participant has made it clear through the suggested adjustments that the fact of being taxed can in no way be considered as penalizing, in as far as that DST is applied equally on all equally sized competing companies in that territory. For the purpose of progressive corporate tax on the base of revenue, it can be requested to pay more per new threshold of revenue. The long-standing ability-to-pay theory in international taxation allows progressive taxation.

The participant is happy for US business to be successful and even very successful but reminds that when they choose to do business in the EU territory in order to obtain revenue from that activity, they must suffer equal taxation as their local competitors.

The successful US businesses that sought to avoid basic fairness have brought about DST on all digital business models and the prospect of a trade war that may now strike all.

Conclusion :

39. The participant hopes this submission may persuade the honorable members of the Committee to present the USTR the two suggested policy options :

a) Determine a list of adjustments to be made on DST's in order to avoid or stop USA trade sanctions, and restart OECD negotiations on Tax Treaty-*change*.

b) Consider evolutionary Tax Treaty-*interpretation* to tackle some of the hottest issues on the short term, so that DST's that give cause to discriminatory taxation issues can be put on hold or be redrawn, and restart OECD negotiations on Tax Treaty-*change* on the long term.

Sincerely,

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