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Digital Services Tax

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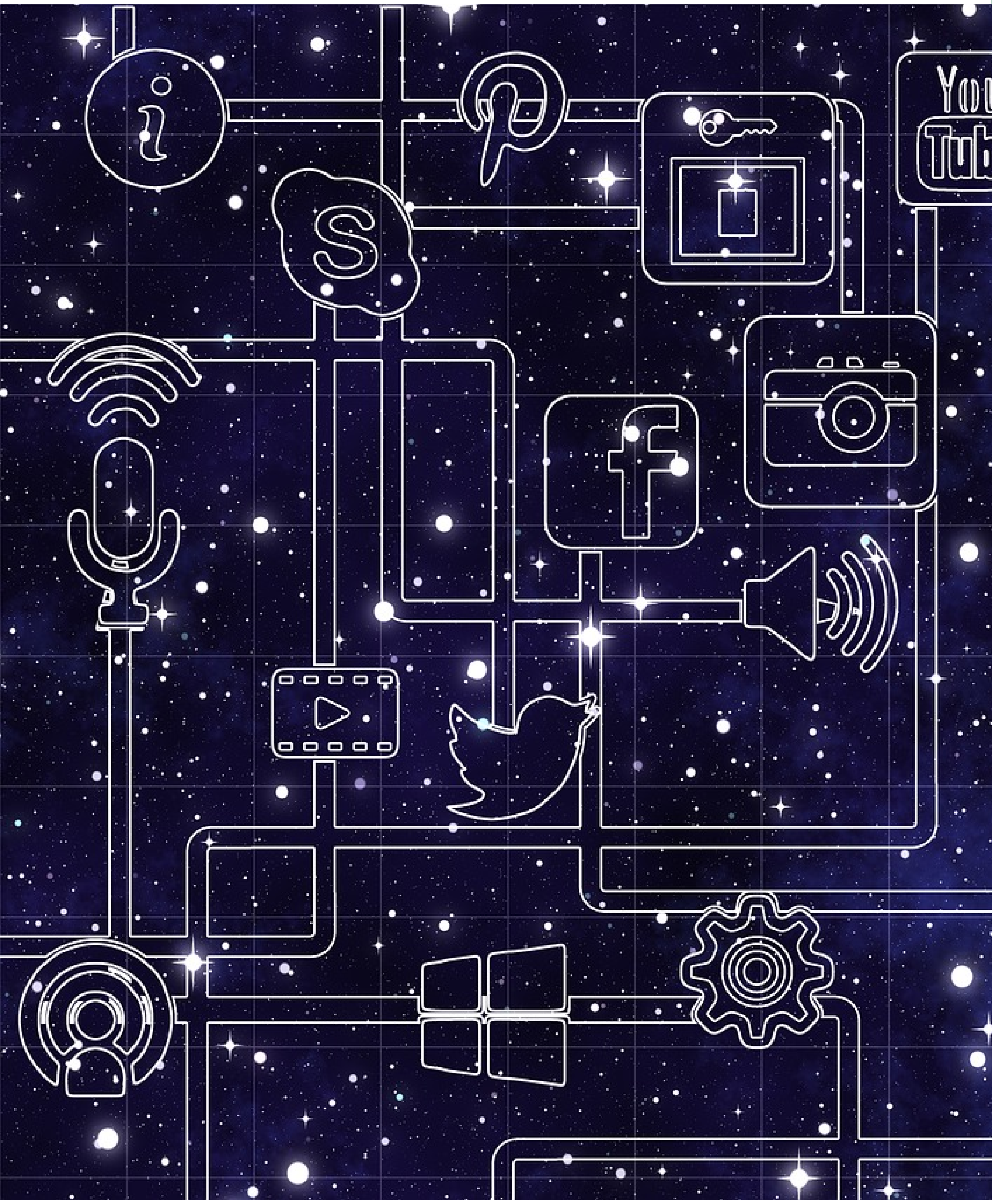

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Summary

Over the last few years there has been a growing consensus among policy makers, academics and businesses that the international tax system has been outpaced by globalisation and the growth and scale of multinational enterprises (MNEs). Since the financial crash in 2008 there has also been widespread public concern as to the scale of corporate tax avoidance that has been facilitated by these trends.

The OECD has co-ordinated efforts to reform the international tax rules through the 'Base Erosion and Profit Shifting' initiative, or 'BEPS' as it is known. In 2015 G20 Finance Ministers agreed a series of recommendations for setting minimum standards in national tax systems, revising international standards for the way those systems interlock, and promoting best practices. In turn the Government has introduced a series of reforms to the UK tax system in line with the BEPS initiative, as well as taking unilateral action to mitigate the risk of tax avoidance by MNEs.

However, there is widespread agreement that these reforms, while significant, have not met the challenges posed to the global tax system by digitalisation and the emergence of major tech companies. At the time of the Autumn 2017 Budget the Government published a position paper in which it set out its approach for addressing this issue – supporting a second OECD-led initiative for an international agreement on taxing MNEs, while exploring the option for a new tax on the UK-generated revenues of specific digital platform business models.[1]

In the 2018 Budget the then Chancellor Philip Hammond confirmed that the Government would introduce the Digital Services Tax (DST) from April 2020, given the relative lack of progress toward an international agreement.[2] The Government launched a consultation exercise on the design of the DST, and in July 2019 confirmed that it would include statutory provision in the next Finance Bill to be introduced after the 2019 Budget.[3] A number of other countries have announced similar plans for digital services taxes.[4]

In June 2019 G20 Finance Ministers agreed proposals drawn up by the OECD to find a consensus-based solution by the end of 2020.[5] In October and November the OECD launched a two-part consultation: first, proposals for determining where tax should be paid and on what basis ('nexus'), as well as what portion of profits could or should be taxed in the jurisdictions where clients or users are located ('profit allocation');[6] and, second, a proposal for a 'global minimum corporate tax level'.[7]

Reaching consensus has proved difficult with a strong division of opinion between the United States and other countries, as to whether there should be a voluntary component to any new international rules,[8] and over the prospect of individual digital service taxes

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1 HM Treasury, *Corporate tax and the digital economy: position paper*, November 2017
2 HC Deb 29 October 2018 cc661-2; HM Treasury, *Digital Services Tax: Budget 2018 brief*, 29 October 2018
3 HMRC, *Introduction of the new Digital Services Tax: tax information & impact note*, 11 July 2019
4 PQ236554, 28 March 2019
5 G20 press notice, *Communiqué,G20 Finance Ministers and Central bank Governors Meeting, Fukuoka*, 8-9 June 2019. See also, OECD, *BEPS Action 1 : Tax Challenges Arising from Digitalisation*, ret'd January 2020
6 OECD press notice, *OECD leading multilateral efforts to address tax challenges from digitalisation of the economy*, 9 October 2019; see also, "OECD takes aim at tech giants with plan to share up global tax" & "Editorial: OECD lays foundation for fairer taxing rights", *Financial Times*, 9 October 2019
7 OCED press notice, *OECD secretariat invites public input on the Global Anti-Base Erosion (GloBE) Proposal under Pillar Two*, 8 November 2019. See also, "OECD proposes global minimum corporate tax rate", *Financial Times*, 8 November 2019.
8 "Brussels steps up pressure on US over global digital tax deal", *Financial Times*, 5 December 2019

being introduced prior to any agreement being reached,[9] although in January 2020 participant countries recently reaffirmed their commitment to reach a "consensus-based long-term solution … working toward an agreement by the end of 2020."[10]

Although the Budget was initially anticipated in November 2019, it was postponed due to the timing of the 2019 General Election. In the event the Chancellor Rishi Sunak presented his Budget on 11 March 2020.[11] The Chancellor did not mention the DST in his Budget speech, but the Budget report confirmed that provision to introduce the DST from 1 April 2020 would be included in the forthcoming Finance Bill.[12]

The Government has said it would disapply the DST if an appropriate global solution was successfully agreed and implemented, and this remains its position,[13] although it is unclear whether the OECD's timeframe is achievable.[14] The Government has estimated that, if implemented, the UK's DST could raise over £400m a year by 2021/22,[15] although there has been some question as to how reliable these estimates can be.[16]

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9 "UK to push on with digital tax in face of US anger", *Financial Times*, 21 January 2020; "Editorial: International agreement on digital taxes is needed", *Financial Times*, 23 January 2020

10 OECD press notice, *International community renews commitment to multilateral efforts to address tax challenges from digitalisation of the economy*, 31 January 2020

11 HC Deb 11 March 2020 cc278-293

12 HMT, *Overview of Tax Legislation & Rates*, March 2020 para 1.16. Provision to this effect is made by part 2 (clauses 38-71) of the *Finance Bill 2019-21*.

13 *Budget 2020*, HC 121, March 2020 para 2.205

14 see, for example, Clifford Chance, *The OECD proposal to rewrite the rules of worldwide taxation: Our take on what it means, and whether it will happen*, 6 February 2020

15 The annual yield from the DST is estimated to be: £70m (2019/20); £280m (2020/21); £390m (2021/22); £425m (2022/23); £465m (2023/24); £515m (2024/25): see, HMRC, *Digital Services Tax*, 11 March 2020.

16 At the time of the 2018 Budget the OBR's assessment was that the Treasury's approach to estimating the yield from this measure was "reasonable and central, but there is a high degree of uncertainty around the central estimates of the yield" (OBR, *Economic & Fiscal Outlook*, Cm 9713, October 2018 para A9-14).

1. Corporate taxes & the challenge of digitisation

Internet companies, as with any multinational enterprise (MNE) with operations in the UK, are liable to tax on that part of its profit that arises from *value created in the UK*. Indeed, this 'source-based' approach is the principle underlying all corporate tax regimes across the OECD. As the Institute for Fiscal Studies has noted, the current tax rules are *not* designed to tax either revenue or sales generated in the UK.[17]

Over the last few years globalisation has made it much harder for individual revenue authorities to determine *where* MNEs profits are created and assess what fraction of those profits are subject to tax in their own jurisdiction. Many transactions within MNEs – royalty payments, loans, the purchase of intermediate goods – need to be priced, to allow a calculation of the profit made by each national subsidiary. International practice for this "transfer pricing" as it is known relies on the 'arms-length principle' – that companies need to account for these transactions as if they were taking place between two unrelated parties.

However, for this type of transaction, which goes on within the company concerned, there *is* no observable market price. For Google and other companies to whom intellectual property is key to profit creation, this is problem is particularly acute. It is often very difficult to give a clear geographical location to a company's creation of new ideas. In addition it is very difficult to price new technologies that are not traded on the market. Finally many MNEs have actively sought to minimise their total tax bill, by exploiting the interplay between national tax systems.

In recent years there have been three major developments at an international and domestic level to tackle these problems, as noted by Treasury Minister Mel Stride, in answer to a PQ in September 2017: the OECD's "Base Erosion and Profit Shifting" (BEPS) project; the UK's Diverted Profits Tax; and the introduction of 'Country by Country Reporting':

> **Asked by Frank Field :** To ask Mr Chancellor of the Exchequer, what steps the Government is taking to prevent multinational companies using the transfer pricing method to avoid paying taxes.
>
> **Answered by: Mel Stride :** The transfer pricing rules set out how transactions between connected parties are priced for tax purposes. In common with most countries the UK rules are based on the internationally recognized arm's length principle. HM Revenue & Customs (HMRC) challenges arrangements that do not allocate the right amount of profits to the UK.
>
> The Government has led the way in taking action to ensure multinational companies pay their fair share of taxes. We played a

17 Helen Miller and Thomas Pope, *What does the row over Google's tax bill tell us about the corporate tax system?*, Institute for Fiscal Studies, 9 January 2016

> critical role in establishing the OECD project to strengthen international tax standards to help counter base erosion and profit shifting.
>
> The Government has gone further by taking a lead in the implementation of measures to address that profit shifting, for example, introducing the Diverted Profits Tax (DPT). This measure encourages businesses that are using contrived arrangements to minimise their tax liabilities, to change those behaviours or face paying tax at a higher rate.
>
> HMRC deploys specialist staff to deal with international tax risks, including transfer pricing and diversion of profits. These experts work with other industry experts and tax specialists to tackle all international tax issues that represent substantial risk of tax loss to the Exchequer. HMRC also works with other tax authorities, sharing information and expertise, to identify risk and challenge arrangements. The recent introduction of Country by Country reporting will also increase the information available to HMRC and assist their risk assessment processes to identify these tax risks.[18]

However, there have been widespread concerns that these initiatives have not dealt with the challenges posed by the digitalisation of the economy, and the activities of businesses such as Facebook providing customers services through online tech platforms.[19] As Heather Self (Blick Rothenberg) has explained, "the problem is that the global tax system was designed at a time when factories manufactured physical goods. The concept of a permanent establishment (PE) sets a threshold below which local activities will not be taxed: there needs to be a fixed place of business, through which the activities of the enterprise are carried on, before a local tax liability arises. But a digital business can make significant sales, and perhaps profits, in a country without having a physical presence there at all."[20]

As part of the Autumn 2017 Budget, the Chancellor Philip Hammond announced the publication of a paper looking at possible approaches to taxing the digital economy.[21]

The Government's position paper noted that the OECD's BEPS project had had a "discernible impact" on the scale of tax avoidance by MNEs but there remained "important weaknesses" in the international tax framework …

> The OECD-G20 BEPS project aimed to respond to identified weaknesses in the international tax framework which were frustrating the principle of aligning profits with value creation and creating opportunities for multinational groups to break that alignment through artificial structures.
>
> The process produced a series of multilaterally agreed recommendations and best practice approaches. This included steps to protect the definition of a permanent establishment against avoidance, act against groups shifting taxable profits

18 PQ7127, 12 September 2017
19 For a discussion of this issue see, "Tax issues for online platforms", *Tax Journal*, 26 October 2018; International Monetary Fund, *Corporate taxation in the global economy*, March 2019
20 "Self's assessment: what's wrong with a digital user tax?", *Tax Journal*, 26 October 2018
21 HC Deb 22 November 2017 c1056

> overseas through interest payments and revise the transfer pricing guidelines to put greater emphasis on real economic activities in determining how profits are allocated between countries.
>
> The significance of the BEPS project should not be underestimated. There is clear evidence that its recommendations, along with the unilateral action undertaken by the UK through the Diverted Profits Tax, are having a discernible impact on multinational groups' behaviour and the viability of complex tax planning structures that unfairly reduce UK tax receipts.
>
> However, as stated at the end of that project, the government believes that important weaknesses remain in the detailed application of the international tax framework which necessitate continued multilateral action.[22]

… in particular, there remained the "fundamental question as to whether the international tax framework is flexible enough to accommodate different business models within the digital economy and ensure fair outcomes that align profits with value creation":

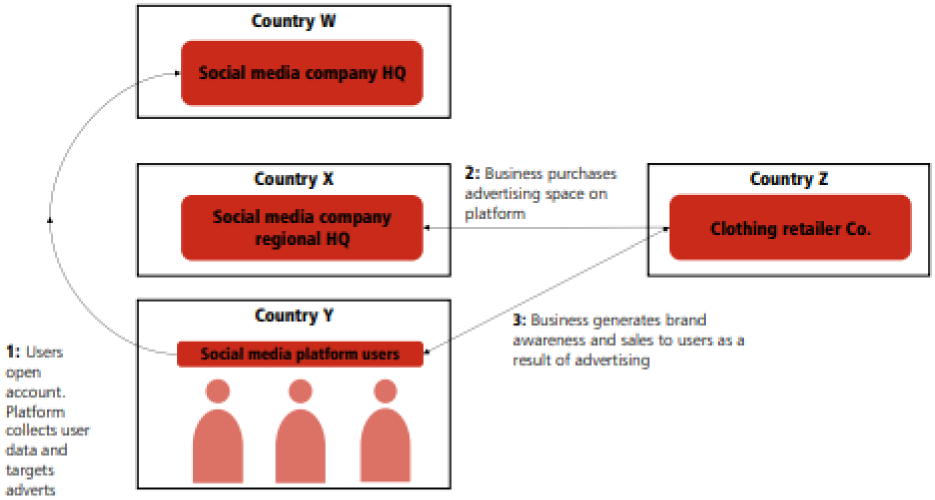
> For many digital businesses that operate in markets through an online platform, the users of the platform (which may or may not be identical to a business's consumers) play a more integral role in the pursuit of revenue and create material value for a business through their sustained engagement and active participation.
>
> Take, for example, a social media platform that generates revenue through directing adverts at UK users who use a free online platform. The success of that business is reliant on the development of a large user base, on the engagement of users and on users' contribution of content.
>
> It is also dependent on the collection of user data from intensive monitoring of that engagement and contribution, which can be sold to third parties or used to generate increased revenues through more precisely targeted adverts.
>
> Equally, take an online marketplace that generates revenue through matching suppliers and purchasers of a good in return for a commission, or a collaborative platform that charges a commission for bringing together supply and demand for assets and possessions owned by individuals. The success of those businesses is reliant on the active involvement of users on either side of the intermediated market and the expansion of that user base to allow the business to benefit from network effects, economies of scale and market power.[23]

The paper illustrates the role of user participation for both types of digital business:

22 HM Treasury, *Corporate tax and the digital economy: position paper*, November 2017 paras 3.1-4
23 *op.cit.* para 3.14-3.18

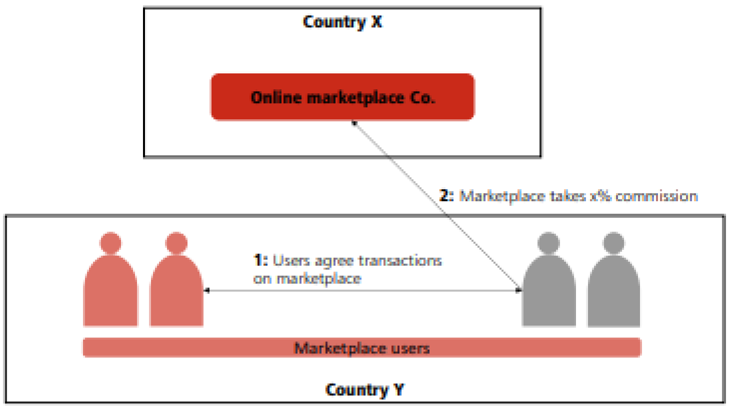
Box 3.A: User participation in digital business models – illustrations

Diagram 1: Social media business mode



A social media business platform gives rise to a number of overlapping relationships. Overall in this model users have an important role in generating value for the social media company, by providing data and content which allows it to better target advertising and increase revenues.

Diagram 2: Online marketplace business model



In this example an online marketplace facilitates interactions between two different sets of consumers e.g. consumers looking to temporarily lease or rent property. There is no requirement for the marketplace to have a business entity or physical presence in the country where the transactions between consumers take place.

However, the marketplace is reliant on having a large and engaged network of users in that country. It does not have a physical limit on its capacity to provide this marketplace function and may be able to intelligently monitor and respond to market outcomes by analysing aggregate trading activity and user data.[24]

The paper noted that although "the desire to maintain an engaged customer base and use information from that customer base to improve

[24] *op.cit.* p10

products and offerings is not new … the success of the businesses outlined above is much more reliant on the activities, decisions and participation of users with whom the business forms a more sophisticated and sustained relationship":

> That participation, which is not under the control of the business, contributes to the creation of the brand, the generation of valuable data, and to the development of a critical mass of users which helps to establish market power and allows businesses to take advantage of the low marginal costs that are typically associated with running such a platform across multiple markets. It also explains why some of these businesses choose to, or are able to, provide innovative services to users for no charge.
>
> This user-generated value is not captured under the existing international tax framework, which focuses exclusively on the physical activities of a business itself in determining where profits should be allocated for corporate tax purposes. This means that the businesses outlined above can generate significant value from a market like the UK without the profits they derive from that value being subject to UK corporation tax.
>
> This needs to be addressed. There is a need to consider the active participation of users, and the value that this participation creates, in determining how the taxable profits of certain digital businesses are allocated between countries for tax purposes – even where that business does not have a physical presence in a user jurisdiction.[25]

The paper acknowledged that "the issues identified [here] … with the international tax framework can be most sustainably and comprehensively addressed through multilateral reforms" but, pending this type of reform, "there is a need to consider interim action in recognition of the growing public dissatisfaction that the corporation tax payments of digital businesses are not commensurate with the value that they derive from the UK market … Of the options that have been put forward in this area, the government thinks the most attractive is a tax on the revenues that businesses generate from the provision of digital services to the UK market."

The paper went on to identify a number of important design decisions that would need "careful consideration" in crafting such a tax: its scope, nexus (that is, the basis on which the UK would have a right to tax these revenues) and rate, as well as provisions to ensure the tax did not have any punitive effects on the businesses who paid it, and that it could be collected from them efficiently and effectively:

> **Scope:** The government believes that the scope of such a tax should align with the specific concern raised above about user participation not being given sufficient recognition by the international tax framework. That concern seems relevant to businesses that generate revenues through intermediation and the provision of online advertising. The concern seems less relevant to businesses that generate revenue through selling self-developed goods to customers through an online platform, selling acquired goods on an online platform, charging customers for the provision

25 *op.cit.* para 3.19-22

> of digital content, or charging customers for the provision of digital software and digital services.
>
> **Nexus:** It would be important to consider what revenues the UK would have a right to tax given the lack of a typical consumer in these businesses models and the possibility of users being located in a different country from consumers (or the users of an intermediation platform being located in different countries). This was partly illustrated in Box 3.A. For example, a social media platform may generate revenue from a non-UK business in relation to adverts targeted at UK users
>
> **Rate:** The rate would need to be set at a level that raises material revenue in a way that is nonetheless fair, non-distortive and applicable to business models with different profit margins
>
> **Collection mechanism:** There are different ways such a tax could be collected. There are potential benefits to collecting the tax directly from the relevant companies, to ensure more efficient compliance and avoid placing new obligations on financial intermediaries, as may be the case under a withholding model
>
> **Detailed design:** It would need to be considered how the possible distortions with a revenue-based tax could be minimised, for example through the provision of double tax relief, de minimis thresholds and mitigating provisions for loss-making and early-stage businesses.[26]

In March 2018 the Government published an updated paper, which stated that in the absence of any international reform, it would consider the introduction of a UK-based tax on the revenues that digital companies made from the use of their digital platforms by UK users:

> The government has since benefitted from substantive feedback from a wide range of stakeholders, who have offered constructive challenge and insight into this issue. It is therefore publishing an updated position paper to reflect on some of the key questions that came out of that process, and provide an update on the government's thinking.
>
> The updated paper sets out the government's view that:
>
> - **the participation and engagement of users is an important aspect of value creation for certain digital business models**, and is likely to be reflected through several channels, such as the provision of content or as a contribution to certain intangibles such as brand.
> - **the preferred and most sustainable solution to this challenge is reform of the international corporate tax framework to reflect the value of user participation.** It is important that the members of the OECD's Inclusive Framework make progress in developing multilateral solutions, and to assist this process the paper sets out some of the government's initial considerations on what this could include.
> - **as set out at Autumn Budget, in the absence of such reform, there is a need to consider interim measures such as revenue-based taxes.** The paper explores some

[26] HMT, *Corporate tax and the digital economy: position paper*, November 2017 para 4.8-10. see also, Chartered Institute of Taxation press notice, *Digital economy – new paper a useful contribution to reform debate*, 22 November 2017; "Why the UK is getting tough on Big Tech's tax", *Financial Times*, 27 February 2018.

> of the important considerations regarding the scope and design of an interim measure, and the steps that could be taken to ensure that it is well-targeted and protects start-ups and growth companies. The government still thinks there are benefits to implementing an interim measure on a multilateral basis and it intends to work closely with the EU and international partners on this issue.
>
> The paper does not look to set out the Government's final position on these issues. It instead sets out the government's updated thinking, with a view to engaging further with businesses and other stakeholders to better understand and resolve some of the outstanding questions.
>
> The government is nonetheless clear that there is a challenge that needs to be solved. The current misalignment between where digital businesses are taxed and where they create value threatens to undermine the fairness, sustainability and public acceptability of the corporate tax system.
>
> The government hopes to find a multilateral solution to this challenge, and believes that the upcoming OECD report and G20 summit in Argentina will be important in setting out a programme of work for achieving that. The government thinks that this paper can help to inform that work, and help to achieve a coherent, proportionate and sustainable long-term solution.[27]

As part of the BEPS project, the OECD had published a report on this issue in 2015,[28] although, as Pascal Saint-Amans, director of the OECD's Centre for Tax Policy and Administration, has noted "no solution was recommended at this time because there was no consensus among countries on what the approach should be."[29] In March 2018 the OECD published an 'interim report' on the tax treatment of digital business, the work of its 'Inclusive Framework', a forum for international tax discussions. Initially this group anticipated producing proposals for consideration by the G20 by 2020,[30] although, as Michael Devereux and John Vella (at Oxford's Centre for Business Taxation) commented, the report found a wide variation in views, with participant countries broadly falling into three groups:

> One group of countries holds the view that there is a need to undertake targeted reform to address the problems posed by 'highly digitised businesses' (HDBs). In particular this group favours reform that allocates taxing rights over the profits of certain HDBs to countries where users are located. A second group holds the view that … reform should extend to the system as a whole and should not be limited to certain limited HBDs … A third group holds the view that the BEPS project largely addresses concerns with double non-taxation [that is, generally speaking where MNEs manage to avoid corporate profits being effectively taxed in any jurisdiction in which they operate, by exploiting the mismatches between national tax systems] … The immediate

27 HM Treasury, *Corporate tax and the digital economy: position paper update*, March 2018 pp2-3. The Government's proposals were the subject of a debate in Westminster Hall at this time: HC Deb 27 March 2018 cc297-319WH.

28 OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, October 2015

29 "Tax challenges of digitalisation: the view from the OECD", *Tax Journal*, 11 January 2019

30 OECD, *Brief on the tax challenges arising from digitisation: interim report*, March 2018

> future of the international tax system depends on which of these views prevails.[31]

Alternative proposals for a turnover-based tax on digital services were published by the European Commission at this time,[32] although these were criticised for targeting only certain types of digital business (specifically, social networks, search engines and online marketplaces),[33] and did not win consensus from Member States. In their assessment of the Commission's proposals, the European Scrutiny Committee noted "a significant number of Member States—led by Ireland and Luxembourg, but also including the Netherlands, Greece, Belgium and Denmark—have indicated that they do not support the proposals. As unanimity is applicable to both measures in the Council of Ministers, it is therefore unlikely that either Directive will ever be agreed."[34] At a meeting in March 2019 European Finance Ministers acknowledged the difficulties in reaching an agreement, noting "the Council presidency will conduct work on the EU position in international discussions on digital tax, in particular in view of OECD's report on the issue."[35]

Nevertheless it is clear that here is a considerable amount of political pressure in many countries for reform, and later in the year Treasury Minister Mel Stride noted that the OECD was planning to bring this work forward to sometime in 2019.[36] Writing in the *Tax Journal* this February three tax specialists working in this area characterised this as an 'arms race' between the OECD and the EU, noting that "challenges from short-term measures driven by political expediency have hampered the OECD's ability to find a consensus solution and, more generally, its sovereignty over international tax setting."[37]

Prior to the 2018 Budget Heather Self (Blick Rothenberg) suggested that the lack of progress at either an OECD or EU level meant it was "increasingly likely that Philip Hammond will announced a UK version of a digital services tax":

> The OECD, following on from its base erosion and profit shifting (BEPS) project, has proposed a new definition of a 'digital permanent establishment (PE)'. However, as the current PE definition is embedded in almost all bilateral tax treaties, to change it would require global agreement. The big problem here is the US, which would be the main loser if its tech companies were to pay more tax elsewhere: why should the US play the role of a turkey voting for Thanksgiving?
>
> More radical options, such as treating a global business as a single entity and apportioning its profits by reference to a formula (unitary tax, with formulary apportionment), or even taxing

31 Devereux & Vella, "Taxing the Digitised Economy: Targeted or System-Wide Reform?", *British Tax Review*, vol 4, 2018 pp387-8

32 European Commission Press release, *Digital Taxation: Commission proposes new measures to ensure that all companies pay fair tax in the EU*, 21 March 2018

33 For example, "A closer look at the EC's proposed digital services tax", *Tax Journal*, 18 May 2018

34 *"Digital revenue tax", Thirty-first report of Session 2017-19*, HC 301-xxx, 19 June 2018 para 4.9

35 Economic and Financial Affairs Council press notice, 12 March 2019

36 HC Deb 11 September 2018 c592

37 "OECD's digital economy tax reform: the race to consensus", *Tax Journal*, 8 February 2019

businesses by reference to where their cashflows arise … are likely to be even harder to agree on a global basis.

So a number of countries are starting to propose 'interim' solutions, which focus on taxing turnover (rather than profits) of digital businesses.

The EU suggestion is for a digital services tax (DST), which would tax the EU advertising sales of large businesses. This would impose costs on businesses such as Google and Facebook, but would not apply to the physical (or electronic) goods sold by Amazon. Levying a tax on turnover gets round the problem of needing to amend double tax treaties, but would bear more heavily on newer and less profitable businesses – so while Google could probably cope with a 3% tax, a newer competitor might struggle. It also assumes that the number of users per country can be tracked – but is a user with a laptop, a work computer and a mobile phone one user or three?

And what if, for security or privacy reasons, a virtual private network (VPN) is being used, which makes it impossible to determine a user's true location? And what about the data protection (GDPR) issues? Even if these issues could be addressed, the measure requires unanimity across the EU, and currently at least six countries are not in favour – so it seems the EU DST is unlikely to make rapid progress.[38]

[38] "Self's assessment: what's wrong with a digital user tax?", *Tax Journal*, 26 October 2018

2. The UK's Digital Services Tax

2.1 Budget 2018

The then Chancellor Philip Hammond presented the 2018 Budget on 29 October 2018, and, as Ms Self had predicted, in his speech Mr Hammond announced that in the absence of any new international agreement, the Government would introduce a new tax on digital services:

> Digital platforms delivering search engines, social media and online marketplaces have changed our lives, our society and our economy, mostly for the better, but they also pose a real challenge for the sustainability and fairness of our tax system. The rules have simply not kept pace with changing business models, and it is clearly not sustainable or fair that digital platform businesses can generate substantial value in the UK without paying tax here in respect of that business. The UK has been leading attempts to deliver international corporate tax reform for the digital age. A new global agreement is the best long-term solution, but progress is painfully slow …
>
> We will now introduce a UK digital services tax. This will be a narrowly targeted tax on the UK-generated revenues of specific digital platform business models. It will be carefully designed to ensure it is established tech giants, rather than our tech start-ups, that shoulder the burden of this new tax.
>
> It is important that I emphasise that this is not an online sales tax on goods ordered over the internet; such a tax would fall on consumers of those goods, and that is not our intention. The digital services tax will only be paid by companies that are profitable and that generate at least £500 million a year in global revenues in the business lines in scope. We will consult on the detail to make sure we get it right and to ensure that the UK continues to be the best place in the world to start and scale-up a tech business. The tax will come into effect in April 2020 and is expected to raise over £400 million a year.
>
> In the meantime, we will continue to work at the OECD and G20 to seek a globally agreed solution, and if one emerges, we will consider adopting it in place of the UK digital services tax, but this step shows that we are serious about this reform, because it is only right that these global giants with profitable businesses in the UK pay their fair share towards supporting our public services.[39]

The Government confirmed the digital services tax (DST) would be set at 2% tax on the revenues of certain digital businesses which derive value from their UK users.

> The tax will:
>
> - apply to revenues generated from the provision of the following business activities: search engines, social media platforms and online marketplaces;
> - apply to revenues from those activities that are linked to the participation of UK users, subject to a £25m per annum allowance;

[39] HC Deb 29 October 2018 cc661-2

- only apply to groups that generate global revenues from in-scope business activities in excess of £500m per annum; and
- include a safe harbour provision that exempts loss-makers and reduces the effective rate of tax on businesses with very low profit margins.[40]

As noted by the Chancellor in his Budget speech, it was estimated that the annual yield from the DST could reach £400m by 2022/23.[41] As with all Budget policy costings, the Office for Budget Responsibility looked at the Treasury's methodology to make these estimates, and in this case, confirmed it was "reasonable and central, but there is a high degree of uncertainty around the central estimates of the yield."[42]

2.2 Consultation on design of DST (Winter 2018)

In November 2018 the Government launched a consultation on the detailed design and implementation of the DST; this asked for views on a number of issues, including:

- the proposed approach to defining the business activities in scope of the tax
- the proposed approach for determining the instances when revenues become taxable
- the detailed design of the 'safe harbour' – a provision to allow businesses to have their liability calculated on a different basis, if the business faced a disproportionate burden paying a tax on their gross revenues because they had very low profit margins or were loss-making.
- the effect of the DST being a deductible expense for corporate tax purposes
- reporting and payment; and,
- the review mechanism and the link to the international process. The Government proposed that there could be statutory provision for the tax to be reviewed in 2025, after its first five years. It also stated that it would disapply the DST if an 'appropriate global solution' was successfully agreed and implemented.[43]

The paper underlined the Government's aim that the DST would "apply from April 2020 and be legislated in Finance Bill 2019-20."[44] The paper also noted that, "the Government recognises that the digital services tax is novel, both in approach and motivation, and is therefore committed to working with stakeholders to ensure it operates as intended."[45]

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[40] HM Treasury, *Overview of Tax Legislation & Rates,* October 2018 para 2.19

[41] HM Treasury, *Budget 2018*, HC 1629, October 2018 p38 (Table 2.1 – item 53); PQ236552, 28 March 2019. As discussed below, updated estimates were published alongside Budget 2020: HMRC, *Digital Services Tax*, 11 March 2020.

[42] OBR, *Economic & Fiscal Outlook*, Cm 9713, October 2018 para A9-14

[43] HMT/HMRC, *Digital Services Tax: consultation*, November 2018 paras 1.19-22

[44] *op.cit.* 1.17

[45] *op.cit.* para 14.1. The consultation closed on 28 February 2019.

In a commentary on the Government's consultation which appeared in the *Tax Journal*, Helen Buchanan, May Smith, Emily Szasz & Will Robinson (all at the Freshfields Bruckhaus Deringer), noted that, in answering the question 'what is the DST?', "it might be easier to start with what it isn't":

> It isn't an online sales tax or a generalised tax on digital businesses, although it will tax revenues from some types of online activities. It isn't a solution to the problem of applying OECD principles to profits from digital businesses, although that is the key driver and the long-term goal. It isn't the 'Google tax' (that's the moniker given to the 2015 diverted profits tax), although Google is one of the main targets. And it isn't the same as the EU's proposed DST: this is the UK taking unilateral action.
>
> Clearly one of the major drivers for the DST has been the concern that Facebook and other digital MNEs are not paying a 'fair' amount of tax, but this piece also suggested that the tax "might be seen as an 'access to market' charge for certain types of digital businesses that don't need boots on the ground":
>
> In effect, the UK is treating its user base (and the infrastructure and legal system that enables it) as a national resource that should only be accessed for a price. Whether £1.5bn is the right price is questionable, but the UK is clearly hoping that the tech giants (as the proverbial geese) can spare a few feathers and will be mollified by the promise that the DST is intended to be temporary. The UK might even hope that a global solution can be achieved before the DST takes effect … [or] … before the sunset clause requires the UK government to report to Parliament on the continued need for a DST in 2025.

In the consultation paper the Government expressed the view that the DST would be 'consistent with its international obligations'; the authors of this piece were less certain:

> The consultation says the tax is not discriminatory, although (as the deductibility examples in Chapter 8 of the consultation show) it may hit international businesses without a UK taxable presence harder than those with UK subsidiaries or branches. The consultation also claims that DST is not a tax on income for double tax treaty purposes because (except where the safe harbour election is made) it taxes gross revenue rather than profit. It's likely that some groups will want to road test the arguments in Chapter 10 of the consultation that DST is treaty-proof, including the rationale for distinguishing DST from taxes on royalties and technical services fees.
>
> There is no mention in the Consultation of European law prohibitions on indirect and turnover taxes. The European Commission is apparently confident that its own version of the DST is neither an indirect tax nor a turnover tax. Presumably the UK is taking a similar view, or it may be relying on the fact that the DST will not kick in until after Brexit.[46]

It is important to emphasize what the DST would *not* target – as some stakeholders have mentioned the tax in relation to concerns about the competition the high street faces from online retailers. Treasury Minister Mel Stride addressed this point at an evidence session on high streets and town centres, held by the Housing, Communities & Local

[46] "The UK's proposed digital services tax", *Tax Journal*, 15 November 2018

Government Committee and the Treasury Committee after the 2018 Budget. The Minister was asked by Teresa Pearce about the benefit that the DST might afford high street retailers:

> **Teresa Pearce:** … We have taken a lot of evidence from high street retailers telling us about business rates and how high a cost there is to trade in the high street. They have pointed to the fact that online retailers can have their warehouse somewhere where values are really low and it is not a level playing field. Is the introduction of the digital service tax an attempt by Government to redress that balance?
>
> ***Mel Stride:*** The digital services tax is not going to be hypothecated directly to high streets. There is no formal link between what is raised in that area and what relief we may be able to apply in the high street business rate context. The digital services tax is about certain types of digital businesses that generate substantial value in the United Kingdom as a direct consequence of the interaction of UK users and those digital platforms; this would be the likes of search engines, social media platforms and certain online marketplaces. It is about making sure that, where that value is generated in that way, the UK taxes that value appropriately.
>
> The current international tax regime, which relies on taxing rights for a particular country in the context of a multinational operator, as is the case with the businesses we are looking at here, tends to allocate those taxing rights on the basis of physical presence—staff, buildings, where the management are, where the risk is taken, where the intellectual property rests—and that does not capture the kinds of businesses that I have described. We are moving to a different kind of tax, and it is about making sure that those businesses pay a fair share.
>
> **Teresa Pearce:** The aim of this digital services tax is to tax the currently untaxable, rather than to redress the imbalance for people trading on the high street.
>
> ***Mel Stride:*** There is a link between the two, in the sense that any tax that raises revenue means that you do not have to raise the revenue somewhere else. To that degree, it allows us greater flexibility right across the tax terrain.[47]

As part of their inquiry on the 2018 Budget the Treasury Committee asked leading professional organisations including the Chartered Institute of Taxation (CIOT), the Institute of Chartered Accountants in England and Wales (ICAEW), and the Association of Chartered Certified Accountants (ACCA) - to highlight and comment on the main tax measures in the Budget. All three raised concerns about the DST:

> CIOT welcomed the Chancellor's commitment to continued UK participation in OECD and G20 work to achieve a long-term global solution to taxing digital multinational companies. But they described the Digital Services Tax as a second-best solution that could provoke retaliation from other countries or inspire less narrowly-targeted copycat measures. ACCA raised concerns about an unfavourable international response, particularly from the United States. ICAEW also expressed a preference for a global

[47] Housing, Communities & Local Government Committee and Treasury Committee, *Oral evidence: High Streets and Town Centres in 2030*, HC 1010, 19 December 2018 Qs 494-5

> solution supported by the OECD and the G20, but it understood the Chancellor's decision to act now.

The Committee noted that in his evidence, "the Chancellor said that he very much hoped that an international consensus would emerge before 2020 (when the Digital Services Tax is planned to start)", and for their part expressed the view that, "it is to be hoped that a global agreement on a fair and sustainable way to tax digital businesses will be reached soon":

> But, until or unless that happens, it is important that the design of the Digital Services Tax takes account of responses to the consultation and ensures that there is a level playing field between digital and physical businesses.[48]

In its response to the report, published in April 2019, the Government noted the OECD had recently launched a consultation exercise, but there remained "significant differences" of opinion:

> The international corporate tax system needs to evolve to address the challenges posed by digitisation. Current rules do not properly recognise the value which certain types of digital businesses derive from user participation. It remains the government's ultimate goal to secure global agreement on appropriate, comprehensive and sustainable, changes to these rules. The government has led this work at the OECD and the G20 and continues to support this process. Most recently, the OECD has published a public consultation document, to which the government has provided input.
>
> The government is supportive of OECD efforts to secure global agreement by 2020. However, there are significant differences between the views of several countries and, while compromise is achievable, agreement may take some time. Pending global reform, the Digital Services Tax is a narrowly-targeted and proportionate interim measure to ensure digital businesses pay UK tax reflecting the value they derive from UK users, and that all types of businesses make a fair contribution to the public finances.
>
> The government recognises the importance of consulting on major changes to the tax system. That is why the government has held an extensive period of consultation on the Digital Services Tax and will aim to ensure the administrative requirements it places on businesses are proportionate. The government will be reflecting on responses to the consultation ahead of drafting legislation.[49]

Apart from this, the Government's proposals have not been the subject of very much comment in the House, although the impetus for countries to take unilateral action to tax tech platforms was mentioned in an answer to a PQ at the time:

> **Asked by Anneliese Dodds :** To ask the Chancellor of the Exchequer, what discussions his Department has had with its

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48 Treasury Committee, *Budget 2018*, HC 1606, 2 February 2019 para 71, 73. For a critical response see, Clifford Chance, *Chancellor Hamond announces radical new tax on internet businesses*, 29 October 2018.

49 Treasury Committee, *Tenth Special Report of Session 2017–19*, HC 2111, 5 April 2019 p8

> counterparts in other countries on the application of the digital services tax proposed in Budget 2018.
>
> **Answered by: Mel Stride :** The government has had discussions with its counterparts within the OECD on the application of the Digital Services Tax, as well as about long-term corporate tax reform. Since the announcement at Budget a number of other countries have indicated they intend to implement their own versions of Digital Services Taxes.[50]

Notably in June 2019 the *Tax Journal* reported that plans for digital services taxes had already been announced in France, Austria, Poland, Czech Republic, Italy and Spain.[51]

In their response to the Government's consultation, the CIOT argued that the DST should be seen as a temporary measure *only*:

> Given the nature of the tax a pragmatic approach will be required in order for it to be implemented effectively. This is because revenue taxes such as this are a blunt instrument that cannot accurately represent the tax on the profits related to user based value on all businesses on which it is imposed. It will inevitably over-tax some companies and under-tax others.
>
> Many companies will not have the necessary information to arrive at a precise answer to how much DST they should pay. In practice the Government will have to rely on companies to arrive at a 'best estimate' of the amount of the DST payable based on a just and reasonable estimate of the UK revenues liable to the DST. Given the economic distortions that may arise and the somewhat arbitrary impact of this blunt solution, we would prefer that the measure is expressly time limited to a period of, say, five years."
>
> Unilateral measures inevitably lead to less alignment of tax bases globally, resulting in double taxation and a significant compliance burden for businesses and, consequently, stifle economic growth and innovation. Multilateral action across the globe is ultimately essential if the aim is to ensure, so far as possible, no double taxation and we hope unilateral measures can be repealed once a global long term solution is agreed.
>
> In practical terms the DST will be based on estimates provided by the digital business themselves[1] and a tax operating in this way could lead to taxpayers with very similar businesses paying different amounts of DST. In our view this result is only acceptable in a temporary tax.
>
> *
>
> [1] The CIOT said it must be recognised that many companies will not have all of the information which would be required to arrive at a precise answer of the DST payable. Although some companies may have sufficient information available to them to provide a detailed method of allocating value/income to users, many will not. The information available to each company will be different and it will come from a variety of sources across the business records and systems of companies. Importantly the figures will not necessarily be subject to audit, if they are not necessary for the production of financial statements.

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50 PQ 236554, 28 March 2019

51 "Taxing the digital economy", *Tax Journal*, 14 June 2019

> The CIOT also raised concerns that the introduction of the new tax might give rise to unreasonable expectations as to the amounts of money that might be raised:
>
> The taxation of user created value ultimately relates to the allocation of taxing rights over the global profits of a business and will not, in itself, raise more taxes overall. The fact that user created value is not currently taxed in the country of the user does not necessarily mean that the profits attributable to it are not taxed, just that under the current framework the right to tax them rests elsewhere …
>
> User created value may raise amounts of tax that are worth collecting for jurisdictions that have a large user base. However, it is unlikely to raise amounts that materially affect the country's finances and a sense of perspective thus needs to be kept when considering whether and when to introduce such legislative change. The Government must manage expectations and the public perception of the taxation of the largest digital businesses, the impact of the DST and what it is intended to achieve and what it can achieve.[52]

2.3 Outcome of the Government's consultation (Summer 2019)

On 11 July 2019 the Government published responses to a series of tax consultations that had been announced in Budget 2018, including the consultation on the DST, alongside draft legislation to be included in the next Finance Bill. Details were given in a written statement, part of which is reproduced below:

> **Digital Services Tax** – the government has previously announced a tax on the UK-linked revenues of certain digital services to ensure that large multi-national businesses pay their fair share towards the public services we all rely on.
>
> Following consultation, the government has made changes to the detailed design to better ensure the legislation delivers on its objectives. The treatment of cross-border marketplace transactions will be changed in cases where a transaction involves a non-UK user located in a country that levies a DST on similar transactions. There will be various changes to the administrative framework. The DST will now be payable annually rather than in quarterly instalments, and it will be assessed on a group-wide basis. An exemption for financial and payment services from the definition of an online marketplace will also be included.[53]

A longer description of the DST was given in a tax information note published by HMRC, along with draft legislation,[54] and draft guidance on its operation.[55] An extract from this note is copied overleaf. The Government's estimate of the yield from the DST was unchanged, though HMRC's note stated that revisions to this assessment, in the light of the Government's changes, would be subject to scrutiny by the Office for Budget Responsibility and set out at the next Budget.

[52] CIOT press release, *Digital services tax must be a temporary fix only, says CIOT*, 1 March 2019
[53] Written statement - HCWS1713, 11 July 2019
[54] HMRC, *Introduction of the new Digital Services Tax*, 11 July 2019
[55] HMRC, *Digital Services Tax draft guidance*, 11 July 2019

HMRC, *Introduction of the new Digital Services Tax*, 11 July 2019

The Digital Services Tax will apply to businesses that provide a social media platform, search engine or an online marketplace to UK users. These businesses will be liable to Digital Services Tax when the group's worldwide revenues from these digital activities are more than £500m and more than £25m of these revenues are derived from UK users.

If the group's revenues exceed these thresholds, its revenues derived from UK users will be taxed at a rate of 2%. There is an allowance of £25m, which means a group's first £25m of revenues derived from UK users will not be subject to Digital Services Tax.

The provision of a social media platform, internet search engine or online marketplace by a group includes the carrying on of any associated online advertising business. An associated online advertising business is a business operated on an online platform that facilitates the placing of online advertising, and derives significant benefit from its connection with the social media platform, search engine or online marketplace. There is an exemption from the online marketplace definition for financial and payment services providers.

The revenues from the business activity will include any revenue earned by the group which is connected to the business activity, irrespective of how the business monetises the platform. If revenues are attributable to the business activity and another activity, the business will need to apportion the revenue to each activity on a just and reasonable basis.

Revenues are derived from UK users if the revenue arises by virtue of a UK user using the platform. However, advertising revenues are derived from UK users when the advertisement is intended to be viewed by a UK user.

A UK user is a user that is normally located in the UK.

Where one of the parties to a transaction on an online marketplace is a UK user, all the revenues from that transaction will be treated as derived from UK users. This will also be the case when the transaction involves land or buildings in the UK. However, the revenue charged will be reduced to 50% of the revenues from the transaction when the other user in respect of the transaction is normally located in a country that operates a similar tax to the Digital Services Tax.

Businesses will be able to elect to calculate the Digital Services Tax under an alternative calculation under the 'safe harbour'. This is intended to ensure that the tax does not have a disproportionate effect on business sustainability in cases where a business has a low operating margin from providing in-scope activities to UK users

The total Digital Services Tax liability will be calculated at the group level but the tax will be charged on the individual entities in the group that realise the revenues that contribute to this total. The group consists of all entities which are included in the group consolidated accounts, provided these are prepared under an acceptable accounting standard. Revenues will consequently be counted towards the thresholds even if they are recognised in entities which do not have a UK taxable presence for corporation tax purposes.

A single entity in the group will be responsible for reporting the Digital Services Tax to HMRC. Groups can nominate an entity to fulfil these responsibilities. Otherwise, the ultimate parent of the group will be responsible.

The Digital Services Tax will be payable and reportable on an annual basis.

The Digital Services Tax will apply to revenue earned from 1 April 2020.

The Government published a detailed assessment of the responses it had had to the consultation; three extracts are reproduced below. First, although most responses supported the moves led by the OECD for an international solution, opinions varied on the design of the tax:

> Consultation responses covered both high-level issues such as the rationale for the DST and the relevant international context, as well as more detailed questions of tax design.
>
> On the former, most responses acknowledged the challenges facing the international tax system, and there was broad support for the ongoing OECD process to seek a consensus-based international solution to the tax challenges arising from digitalisation by 2020. In this context, some respondents cautioned about the risks of unilateral action and noted the challenges posed by revenue-based taxes. This led some to call for a postponement in the implementation of the DST, or to express a desire that it would only be in place for a short period of time.
>
> On tax design, respondents raised a number of issues focusing on the approach to drawing the scope of the DST, the method of defining a UK user and the design of the safe harbour. There was not always a clear consensus on these issues, with some respondents broadly agreeing with the government's proposed approach, but others proposing a series of alternatives.
>
> Nonetheless, there were some common themes, particularly among business respondents. This included the benefit of setting up mechanisms to allow taxpayers to achieve greater certainty when assessing their liability, an emphasis on the importance of guidance in helping businesses understand the DST, and an acknowledgement of some of the technical challenges involved in calculating a DST liability (e.g. identifying user location).[56]

Second, the Government announced a number of changes to its proposals in the light of the responses received:

> The government is confirming its position on certain issues in this document, but also intends to make some changes to the proposed DST design to ensure it is proportionate and works effectively.
>
> It would highlight the following:
>
> - Since the government announced the DST a number of other countries have signalled their intention to introduce Digital Services Taxes. This could result in marketplaces suffering double taxation on some cross-border transactions. The government intends to limit the revenue from a marketplace transaction that is charged to the UK DST where one of the users in relation to that transaction is located in a country which also has a DST that applies to marketplace transactions.
>
> - The government acknowledges that the DST is a novel tax and businesses will require some time to familiarise themselves with the relevant legislation, and to perform the detailed calculations required by parts of the DST (e.g. the safe harbour). As a result, it intends to make the DST payable on an annual basis, rather than in quarterly instalment payments.

[56] HMT, *Digital Services Tax: response to the consultation*, July 2019 pp3-4

> - The government intends to include a financial and payment services exemption in relation to providing an online marketplace in legislation, and welcomes further comments on the legislative detail of this exemption in responses to the next stage of the consultation.
> - At Budget, the government stated its preference to use a UK profit margin in the safe harbour calculation but did not confirm this position. The government can confirm it intends to use a UK profit margin in the safe harbour calculation.
> - The government is revising certain administrative provisions. The DST will now be calculated and reported at the group level in order to simplify administration. The group will be able to nominate a company to undertake the reporting obligations on behalf of the rest of the group. The DST liability and expense will remain with the entities that generate the underlying revenues subject to DST. This will ensure that businesses are able to apply the normal corporate tax rules to determine the DST deduction available against their UK taxable profits.
>
> The government believes that these changes will help in supporting its overall objective for a tax that is targeted, proportionate and ultimately temporary.[57]

Third, as noted, the Government confirmed its plans to introduce the DST from 1 April 2020:

> The government is publishing draft legislation (and draft guidance) alongside this summary of responses and will now undertake a technical consultation on the contents of that draft legislation until 5 September 2019 …
>
> The legislation implementing the DST will form part of the 2019/20 Finance Bill and is due to take effect from 1 April 2020.
>
> HMRC will seek to issue further guidance at or close to Budget 2019 based on finalised legislation for further consultation.[58]

At this time the CIOT published a press notice which argued, as before, that the UK's DST and an equivalent proposed being introduced in France, should be "temporary stop gaps ahead of the forging of an international consensus on how the digital economy should be taxed":

> CIOT president Glyn Fullelove said: … "We welcome the UK government's reaffirmation today of its commitment to continue working through the OECD and G20 to seek global agreement on the taxation of digital companies, and that when this is achieved the UK Digital Services Tax will be abolished. We also note that the draft legislation commits HM Treasury to a review of the DST by the end of 2025. Given the economic distortions that may arise and the somewhat arbitrary impact of this blunt solution, we would prefer that the measure is expressly time limited to a period of, say, five years, and in any event hope that it will be in place for as short a period as possible.
>
> "Given the nature of this tax a pragmatic approach will be required in order for it to be implemented effectively. This is because a revenue tax such as this is a blunt instrument that

[57] *op.cit.* p5
[58] *op.cit.* p42

> cannot accurately represent the tax on the profits related to user based value on all businesses on which it is imposed. It will inevitably over-tax some companies and under-tax others.

The CIOT also raised concerns that public expectations of the revenue yield from such taxes might be inflated:

> The amounts expected to be raised from DST will not materially affect the country's finances and a sense of perspective thus needs to be kept. The government must manage expectations and the public perception of the taxation of the largest digital businesses, the impact of the DST and what it is intended to achieve and what it can achieve.[59]

Writing on the publication of the draft Finance Bill provisions, *Taxation* editor Andrew Hubbard noted that the DTS "very unusually" was "a tax that the government does not really want to introduce", noting the announcement by the US Treasury of an enquiry into the French government's proposed digital services tax: "we can surely expect a similar reaction to this proposed UK tax."[60]

This type of enquiry launched by US Trade Representative (USTR) is known as a 'section 301 investigation', and seeks to assess the potential damage to US companies from the tax, an assessment that may potentially end in the US authorities imposing retaliatory tariffs.[61] At the time, an editorial in the *Financial Times* was supportive of both French and British governments, arguing that these moves "are not an attack on US companies, but an attempt to push Big Tech towards paying fair taxes globally. They carry a risk of fragmentation – but should be a spur to achieve the final goal of a multilateral accord."[62]

As it transpired, in December 2019 the USTR published a highly critical report of the French government's plans for a DST, which found that the tax "is intended to, and by its structure and operation does, discriminate against U.S. digital companies; contravened "prevailing tax principles and imposes significant burdens on covered U.S. companies", while the case made by French officials "rely on incorrect or unproven assertions." The report suggested that "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]."[63]

Following this there was considerable speculation in the next weeks that the Trump Administration would impose tariffs,[64] potentially leading to

59 CIOT press notice, *National digital services taxes should only be stopgaps*, 11 July 2019
60 "Finance Bill 2020 draft clauses: Here we go again", *Taxation*, 25 July 2019
61 "What is behind the US-France tech company tax fight?", *Financial Times*, 11 July 2019. Information on the enquiry is collated on the US Trade Representative's site.
62 "Editorial: France leads the way on taxing tech more fairly", *Financial Times*, 11 July 2019. See also, "Leader: Digital Wars", *Times*, 12 July 2019. For a contrary view see, "Governments should resist taxing tech revenues", *Financial Times*, 12 July 2019.
63 Office of the US Trade Representative, *Section 301 Investigation Report on France's Digital Services Tax*, 2 December 2019 pp76-7. See also, USTR press notice, *Conclusion of USTR's Investigation Under Section 301 into France's Digital Services Tax*, 2 December 2019
64 "US proposes 100% tariffs on French goods over digital tax", *Financial Times*, 2 December 2019

retaliatory action,[65] with prospects of a much wider trade war between the US and the EU,[66] although a number of other countries – Indonesia, Canada, Austria – responded to the USTR's report by reaffirming their plans for their own national DST.[67]

The international efforts to agree an approach to digital taxation are discussed in more detail below, but in brief, on 20 January 2020 it was reported that the United States and France had agreed a 'ceasefire' to the end of 2020, suspending any plans for tariffs while talks continued at the OECD-level; in addition the French government agreed to delay the collection of any payments of their DST.[68]

Since then the outbreak of coronavirus on a global scale has dominated the attention of governments. In its own sphere of influence the OECD's work on tax has, for now, focused on the range of targeted and temporary tax policy and tax administration measures governments could consider as part of their immediate response to the pandemic.[69]

Turning back to the Government's publication of draft legislation for the DST, writing in the *Tax Journal*, George Bull (RSM) suggested that "while there is a widely held view in the tax community that single-country digital services taxes should be regarded as temporary measures only, to be repealed once an OECD initiative has been implemented, the reality is that businesses and consumers in the affected countries will be caught in the crossfire of a tax war."[70]

Reviewing the draft legislation in the magazine, Robert O'Hare and Jefferson VanderWolk (Squire Patton Boggs) noted, "in normal circumstances, it would be certain that the UK DST would enter into force from 1 April 2020", drawing attention to the fact that the legislation did not have any 'sunset' provision; rather HMT would be required to review if the tax was meeting its policy objectives before the end of 2025. "However, politically and economically, current circumstances are anything but normal", and the authors speculated that the tax might be "a small bargaining chip" in future trade-related negotiations with the US following Brexit.[71]

65 "France warns US against digital tax retaliation", *Financial Times*, 2 January 2020
66 "Trump says he is prepared to wait to strike US-China trade deal", *Financial Times*, 3 December
67 "Countries vow to press ahead with digital taxes despite US threat", *Financial Times*, 4 December 2019
68 "France signals breakthrough in US digital tax talks", *Financial Times*, 20 January 2020; "France poised to drop plan to tax tech giants amid signs of US deal", *Guardian*, 21 January 2020
69 For an overview of this work, see, Pascal Saint-Amans (Director, Centre for Tax Policy and Administration, OECD), *Tax in the time of COVID-19*, 23 March 2020.
70 "Is the weaponisation of taxes here to stay?", *Tax Journal*, 26 July 2019
71 "Analysis: the UK digital services tax: ashes to ashes, DST to dust?", *Tax Journal*, 26 August 2019. See also, CIOT, *Planned UK Digital Services Tax fails to convince panel at CIOT/IFS debate*, 27 November 20

2.4 Budget 2020 & Finance Bill 2019-21

As noted, it was anticipated that statutory provision for the new tax would be included in the Finance Bill to be introduced after the 2019 Budget.

On 14 October the then Chancellor, Sajid Javid, announced that the Budget would be presented on 6 November,[72] but reversed this decision on 25 October in anticipation of a General Election.[73] Following passage of the necessary legislation, which received Royal Assent on 31 October, the General Election was held on 12 December.

Following the Conservative Party's election victory, on 7 January Mr Javid confirmed that the next Budget would be presented on 11 March 2020.[74] In its Election Manifesto the Conservative Party set out a number of measures for "building a fairer taxation system"; as part of this, the document stated "major multinational companies should pay their fair share of tax. As part of our approach, we will implement the Digital Services Tax."[75]

At this time Mr Javid was asked about the UK's plans when he attended the World Economic Forum in Davos, following the news of the French and American authorities agreeing a temporary 'ceasefire' in their dispute over France's DST. The then Chancellor reiterated the Government's position that the UK would "go ahead with our digital services tax in April", adding, "it is a proportionate tax, and a tax that is deliberately designed as a temporary tax. It will fall away when there is an international agreement."[76] In turn, US treasury secretary, Steven Mnuchin, suggested, at the same event, that the US might retaliate with tariff on UK car exports if the UK's DST discriminated against US multinationals.[77]

The US authorities did not announce any proposals for the UK being the subject of a '301' investigation, although in a blog post after the outcome of the US investigation into its French equivalent, Glyn Fullelove, CIOT President, suggested it was "very likely that if the Office of the US Trade Representative undertook an investigation into UK DST they would reach a similar conclusion to that in respect of French DST – that the tax is discriminatory – and that would open up the possibility of retaliatory tariffs on UK products":

72 HM Treasury press notice, *Budget 2019: Announcement regarding the date of the Budget*, 14 October 2019
73 HM Treasury, *Chancellor Letter to the Treasury Select Committee on the Budget*, 25 October 2019. See also, Treasury Committee, *Letter from Chair to Chancellor of the Exchequer, relating to the cancelled Budget*, 29 October 2019
74 HMT press notice, *Chancellor launches Budget process to usher in 'decade of renewal'*, 7 January 2020
75 Conservative Party, *The Conservative and Unionist Party Manifesto 2019*, December 2019 p35. See also, "Johnson risks Trump ire with digital tax pledge", *Financial Times*, 3 December 2020
76 "Davos 2020: Prince Charles, Donald Trump and Sajid Javid speak", *Guardian*, 22 January 2020
77 "UK to press ahead with digital tax despite US pressure, Javid insists", *Guardian*, 22 January 2020; "Trade tensions erupt between London and Washington", *Financial Times*, 22 January 2020

> The French DST imposes a tax of three per cent on revenues generated by certain companies on digital services. The services in question are "digital interface" and "targeted advertising" services, and the tax is imposed on revenues from these services being provided in France. However, the tax only applies to companies with global revenues from such services in excess of €750m of which at least €25m is generated in France.
>
> The US administration argues that the selection of activities covered by the tax and the thresholds stipulated mean that the tax falls predominantly on US companies and excludes French companies. The tax is therefore, in their view, discriminatory …
>
> The UK DST covers a slightly different range of activities, being the provision of a social media platform, a search engine or an online marketplace ('in scope activities'); and the tax is at two per cent on revenues arising from the provision of in scope activities to UK users. As in France thresholds apply; global revenues from in scope activities need to be £500m and UK revenues £25m.
>
> Even though the activities covered are slightly different, the tightly defined nature of activities, and the dominance of US companies in these areas suggest it would be surprising if the US did not conclude that the UK DST was also discriminatory. The UK DST is not intended to be retrospective; it will only come in from 1 April 2020 and no doubt whoever wins the election is hoping to have had a Budget and passed a Finance Act by then (although timing could be tight). However, the other aspects of the French DST criticised by the US appear to be equally apparent in UK DST.[78]

At this time an editorial in the *Financial Times* suggested that "a breakdown in the [OECD] talks could trigger a transatlantic trade war"; it went on to suggest that, "the prospect of unilateral measures and the pressure they provide have contributed to the multilateral progress so far. But the UK should follow France's lead in implementing the tax but not yet collecting the revenue. Should the OECD process break down for good, then the back taxes can be collected."[79]

In this context, David Gauke, Treasury Minister from 2010 to 2017, noted on Twitter that "the Government faces a tricky situation":

> There's immense political pressure to tax companies that have very high levels of turnover in your country … The role of a Treasury Minister trying to explain why a big US tech company is not paying much corporation tax is a very difficult one, believe me. But there are a few problems.
>
> First, corporation tax is a tax on profits. Some of these companies are immensely profitable, but not all of them are, and not just because of tax avoidance. Amazon, for example, has traditionally focused on market share not profits. Working out where the value is added for a tech company is more complex but, in reality, much of it will be in the US where most of the clever techy stuff is done
>
> But, as everyone knows, it's not properly taxed there. US tech companies have been able to engage in aggressive tax avoidance to park their overseas profits (that is, profits from revenue overseas) in low/zero tax jurisdictions. If the US system had worked properly, more of these companies would've paid tax -

78 CIOT blog, *Tax Wars: Is the UK next in line for Trump's tariffs?*, 5 December 2019
79 "Editorial: International agreement on digital taxes is needed", *Financial Times*, 23 January 2020

> but not in the UK. There's a genuine competition point here (the US tax system essentially involves an export subsidy, it taxes domestic activity but not profits from overseas).
>
> But shouldn't we tax more on the basis of where the revenues come from? That's the direction the OECD is going and this is probably consistent with what most people think is fair. Is this in the UK's long term interests? We're rather good at creating value - the creative industries, pharmaceuticals, tech, professional services etc. In a world of an ever growing middle class, there are big opportunities for us in the decades ahead in China, India etc.
>
> Wouldn't we rather be able to tax the profits where the value is created not where the customers are? In the long term, that might suit us better. Final point. International cooperation in tax is important. Ideally you want to tax profits once. Without cooperation you might get double taxation and barriers to trade. A properly functioning international tax system is an important requirement for global free trade.
>
> So the Government faces a tricky situation. The political pressure to bring in the DST is strong. The Govt won't want to be seen as being bullied by the US. And they'd like the revenue. But nor is it in our interests to weaken international cooperation on tax.[80]

In a follow-up piece which appeared in the *Tax Journal* in February, Mr Gauke argued "policy is always about trade-offs and nowhere is this more apparent than tax policy":

> Ideally, any change to the tax system would be revenue raising (or at least inexpensive to the exchequer), economically efficient, progressive, simple, administratively manageable and hard to avoid, while encouraging desirable behaviour (or discouraging undesirable behaviour), enhancing international competitiveness and being popular. Not surprisingly, very few options have ever met all of these tests.

Mr Gauke concluded, "for what it is worth, my view is that the UK should be an advocate for multilateral action":

> The US has a good case that most of the profits generated by US tech companies belong in the US, but that allowing overseas profits to be left untaxed gives US companies an unfair trade advantage and a properly functioning WTO would do something about it. As for the UK government's position, the political cost of caving under US pressure would be huge and the chancellor has no choice but to implement the DST, flawed though it may be.
>
> A critic would say that we will end up with more complexity and less coherence in our tax policy; that we will end up making changes that are tactical and not strategic. And they would be right. I would argue that, in the last ten years, strategic and positive changes have been made to our tax system, but it has always been a case of, at best, two steps forward and one step back. Unfortunately, you just cannot get away from those trade-offs.[81]

Writing in the *Financial Times*, John Plender, suggested that given the political pressure to force multinational companies to pay more tax, and variety of financial pressures that face national governments "the

80 David Gauke, [Twitter post 22 January 2020]
81 "Comment – Digital tax reform and the challenges facing policy makers", *Tax Journal*, 14 February 2020

balance between multilateral and unilateral approaches to curbing avoidance may thus be tilting towards the latter":

> What is clear is that the pressure on debt-laden governments to squeeze more revenue out of the corporate sector is increasing. As [Professor Joseph Stiglitz, co-winner of the 2001 Nobel Prize in economics] argues, "the world is facing multiple crises — including climate change, inequality, slowing growth and decaying infrastructure — none of which can be addressed without well-resourced governments". While politicians will carefully weigh the potential cost of US retaliation, the temptation to engage in a unilateral assault on some of the world's richest companies will be hard to resist.[82]

As noted above, the Budget was postponed due to the timing of the 2019 General Election, and in the event the Chancellor Rishi Sunak presented his Budget on 11 March 2020.[83] The Chancellor did not mention the DST in his Budget speech, but the Budget report confirmed that provision to introduce the DST from 1 April 2020 would be included in the forthcoming Finance Bill:

> **Digital services tax (DST)** – As announced at Budget 2018, the government will introduce a new 2% tax on the revenues certain digital businesses earn from 1 April 2020. This will ensure the amount of tax paid in the UK reflects the value these businesses derive from their interactions with, and the contributions of, an active user base.
>
> Legislation will require businesses to pay the DST on an annual basis, consistent with the draft legislation published in July 2019.
>
> The government will continue to give consideration to how the legislation applies to marketplace delivery fees and whether that application is consistent with the policy rationale of the DST. The government remains committed to developing a multilateral solution to the challenges digitalisation has created for the corporate tax system and will repeal the DST once an appropriate global solution is in place.[84]

The Treasury has published revised estimates of the Exchequer yield, including the impact of changing the payment schedule from a quarterly to an annual basis.[85] The DST is estimated to raise over £400m a year by 2021/22, with a total yield over the six year period 2019/20 to 2024/25 of £2.15bn.[86] Provision to this effect is made by part 2 (clauses 38-71) of the *Finance Bill 2019-21*.

An updated description of the DST is given in a revised tax information note published by HMRC, reproduced over the next three pages. HMRC has also published detailed guidance for those companies within the scope of the DST, in a new online Manual on the tax.

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82 "Countries versus corporations: the great global tax race", *Financial Times*, 14 January 2020
83 HC Deb 11 March 2020 cc278-293
84 *Budget 2020*, HC 121, March 2020 para 2.205; HMT, *Overview of Tax Legislation & Rates*, March 2020 para 1.16
85 HMT, *Budget 2020 : Policy Costings*, March 2020 p38
86 HMRC, *Digital Services Tax*, 11 March 2020. See also, "UK aims to raise £500m a year through digital services tax", *Financial Times*, 11 March 2020.

HMRC, *Digital Services Tax*, 11 March 2020

Who is likely to be affected
Large multi-national enterprises with revenue derived from the provision of a social media service, a search engine or an online marketplace to UK users.

General description of the measure
From 1 April 2020, the government will introduce a new 2% tax on the revenues of search engines, social media services and online marketplaces which derive value from UK users.

Policy objective
The application of the current corporate tax rules to businesses operating in the digital economy has led to a misalignment between the place where profits are taxed and the place where value is created. Many of these digital businesses derive value from their interaction and engagement with a user base.

Under the current international tax framework, the value businesses derive from user participation is not taken into account when allocating the profits of business between different countries. This measure will ensure the large multinational businesses in-scope make a fair contribution to supporting vital public services.

The government still believes the most sustainable long-term solution to the tax challenges arising from digitalisation is reform of the international corporate tax rules and strongly supports G7, G20 and OECD discussions on long-term reform. The government is committed to dis-applying the Digital Services Tax once an appropriate international solution is in place.

Background to the measure
The announcement of the Digital Services Tax in Budget 2018 was followed by a consultation which closed in February 2019. Draft legislation was published in July 2019 followed by a consultation which closed in September 2019.

Detailed proposal
Operative date
The Digital Services Tax will apply to revenue earned from 1 April 2020.

Current law
This is new legislation and there is no current law in this area.

Proposed revisions
Legislation will be introduced to establish a Digital Services Tax.

The Digital Services Tax will apply to a group's businesses that provide a social media service, search engine or an online marketplace to UK users. These businesses will be liable to Digital Services Tax when the group's worldwide revenues from these digital activities are more than £500 million and more than £25 million of these revenues are derived from UK users.

If the group's revenues exceed these thresholds, its revenues derived from UK users will be taxed at a rate of 2%.

There is an allowance of £25 million, which means a group's first £25 million of revenues derived from UK users will not be subject to Digital Services Tax.

HMRC, *Digital Services Tax*, 11 March 2020 **2/3**

The provision of a social media service, internet search engine or online marketplace by a group includes the carrying on of any associated online advertising service. An associated online advertising service is an online service that facilitates online advertising and derives significant benefit from its association with the social media service, search engine or online marketplace.

There is an exemption from the online marketplace definition for financial services providers.

The taxable revenues will include any revenue earned by the group which is connected to the social media service, search engine or online marketplace, irrespective of how the business monetises the service. If revenues are attributable to the business activity and another activity, the group will need to apportion the revenue to each activity on a just and reasonable basis.

Revenues are usually derived from UK users if the revenue arises by virtue of a UK user using the service. However, there are some exceptions to this general rule.

Where one of the parties to a transaction on an online marketplace is a UK user, all of the revenues from that particular transaction will be treated as derived from UK users.

When the transaction involves accommodation, land or buildings in the UK, revenue from that transaction will be treated as derived from UK users. When the transaction involves accommodation, land or buildings not in the UK, revenue from that transaction will only be treated as derived from UK users if the consumer of the relevant service is a UK user.

The revenue charged will be reduced to 50% of the revenues from the transaction when a user in respect of a marketplace transaction is normally located in a country that operates a similar tax to the Digital Services Tax.

Advertising revenues are derived from UK users when the advertisement is viewed or otherwise consumed by a UK user.

A UK user is an individual that is normally located in the UK, or other type of user established in the UK.

Groups will be able to elect to calculate their Digital Services Tax under an alternative calculation. This is intended to ensure that the Digital Services Tax does not have a disproportionate effect on business sustainability in cases where a business has a low operating margin from providing in-scope activities to UK users.

The total Digital Services Tax liability will be calculated at the group level, but the Digital Services Tax will be charged on the individual entities in the group that realise the revenues that contribute to the total. The group consists of all entities which are included in the group consolidated accounts, provided these are prepared under an acceptable accounting standard.

Revenues will consequently be counted towards the Digital Services Tax thresholds even if they are recognised in entities which do not have a UK taxable presence for corporation tax purposes.

A single entity in the group will be responsible for reporting the Digital Services Tax to HMRC. Groups can nominate an entity to fulfil these responsibilities. Otherwise, the ultimate parent of the group will be responsible.

The Digital Services Tax will be payable and reportable on an annual basis.

HMRC, *Digital Services Tax*, 11 March 2020 **3/3**

Summary of impacts

Exchequer impact (£ million)

2019/20	2020/21	2021/22	2022/23	2023/24	2024/25
+70	+280	+390	+425	+465	+515

These figures are the total of figures set out in Tables 2.1 and 2.2 of Budget 2020 and have been certified by the Office for Budget Responsibility. More details can be found in the policy costings document published alongside Budget 2020 and 2018.

Economic impact
This measure is not expected to have any significant macroeconomic impacts.

Impact on individuals, households and families
This measure has no direct impact on individuals as it only affects businesses. The measure is not expected to impact on family formation, stability or breakdown.

Equalities impacts
This measure has no direct impact on individuals as it only affects businesses. It is not anticipated that this measure will have any impacts for groups sharing protected characteristics.

Impact on business including civil society organisations
The measure is expected to have an impact on a small number of large multinational groups by bringing into scope of Digital Services Tax the proportion of their revenue that is derived from UK users of social media, search engines or online marketplaces. The policy will be delivered through a Digital Services Tax charge reported and collected under new provisions.

As with any new tax, there will inevitably be an increased admin burden on the affected groups. The customer experience for the businesses in scope of the Digital Services Tax will change due to the additional requirements placed on them from complying with a new tax. HMRC will provide clear and targeted guidance to support businesses further.

One-off costs will include familiarisation with the new rules. Ongoing costs may include keeping records of revenue referable to UK users and making payment to HMRC. Businesses in scope will also use a new service to make their annual return of the tax due.

This measure is not expected to impact on civil society organisations.

Operational impact (£ million) (HMRC or other)
HMRC will incur costs of up to £8 million to enable both new IT systems and processes to be developed as well as additional staff to monitor and administer the new tax.

Other impacts
Other impacts have been considered and none have been identified.

Monitoring and evaluation
The measure will be monitored through information collected from receipts.

Further advice
If you have any questions about this change, please contact the Digital Services Tax team by email: dst.mailbox@hmrc.gov.uk

3. The prospect of an international agreement on digital taxation

3.1 The OECD's public consultation & 'Road Map' (Spring 2019)

In February 2019 the OECD launched a short consultation exercise on its proposals to find an international consensus.[87] In broad terms, the OECD grouped its proposals into two 'pillars': the first to cover changes to the rules regarding the allocation of taxing rights between countries; the second to cover the continued risk of companies 'profit shifting' – that is, exploiting the mismatches between national tax systems to reduce the total amount of tax they pay.[88] The proposals were also discussed in a two-day public consultation exercise the following month:

> **What's proposed?**
>
> The current OECD proposals, as outlined in the consultation document issued on 13 February 2019, has two main pillars.
>
> Pillar 1 contains three proposals
>
> - a 'user participation' proposal, i.e. a tax on the profits of certain ringfenced businesses, including social media platforms, online marketplaces and search engines, closely modelled on the UK's digital services tax (albeit the latter is applied to revenues, not profits);
> - a 'marketing intangibles' proposal, possibly incorporating some recognition of user value creation, which provides a more generalised approach and is not restricted to highly digital businesses but potentially applies to all data, relationships or promotional activity; and
> - a high level proposal for a digitalised permanent establishment. (This proposal was, by all accounts, a last minute addition, which might restrict its status as an equal contender at this stage.)
>
> Pillar 2 is a combination of two further proposals
>
> - a minimum taxation of targeted businesses; and
> - a restriction on base eroding payments.
>
> **What was the consensus of opinion at the public consultation?**
>
> Whilst a range of views was expressed, some high level conclusions are possible:
>
> Most of those present agreed that, to have the breadth and depth of consensus required to ensure durability, any solution must have a clear purpose and be built on a foundation of agreed principles.

[87] OECD press notice, *OECD invites public input on the possible solutions to the tax challenges of digitalisation*, 13 February 2019

[88] OECD, *Addressing the Tax Challenges of the Digitalisation of the Economy Public Consultation Document*, February 2019 . see also, "OECD's consultation on the tax challenges of digitalisation", *Tax Journal*, 22 February 2019

> The principles most consistently advocated were those of certainty, consistency and simplicity.
>
> The 'user participation' model seemed to hold the least appeal. It was widely considered to be conceptually flawed, i.e. too narrowly targeted on certain revenue streams that may be impossible to ringfence in practice. There were also practical concerns: the inherent difficulties of identifying 'users' and allocating 'value' to such users could render the tax unworkable.
>
> There was a preference for a modified variation of the 'market intangibles' model, whether implemented via a formulaic method or by building out from the existing transfer pricing rules.
>
> Pillar 2 raised existential questions that seemed to put into doubt its inclusion in any immediate solution. Opinions ranged from whether it should be incorporated into a pillar 1 solution, whether it would be best left for now and whether there was any need for it at all.[89]

In May the OECD published a 'road map' agreed by the Inclusive Framework, a work programme for reaching a "consensus-based long-term solution by the end of 2020":

> The 129 members of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) [have] adopted a Programme of Work laying out a process for reaching a new global agreement for taxing multinational enterprises …
>
> The Programme of Work will explore the technical issues to be resolved through the two main pillars. The first pillar will explore potential solutions for determining where tax should be paid and on what basis ("nexus"), as well as what portion of profits could or should be taxed in the jurisdictions where clients or users are located ("profit allocation"). The second pillar will explore the design of a system to ensure that multinational enterprises – in the digital economy and beyond – pay a minimum level of tax. This pillar would provide countries with a new tool to protect their tax base from profit shifting to low/no-tax jurisdictions, and is intended to address remaining issues identified by the OECD/G20 BEPS initiative …
>
> The Inclusive Framework agreed that the technical work must be complemented by an impact assessment of how the proposals will affect government revenue, growth and investment. While countries have organised a series of working groups to address the technical issues, they also recognise that political agreement on a comprehensive and unified solution should be reached as soon as possible, ideally before year-end, to ensure adequate time for completion of the work during 2020.[90]

The work programme said a little more about the impact assessment to be made:

> While the economic analysis will be carried out throughout the course of the entire period of the programme of work, the timing of this work will need to be phased in such a way as to deliver members of the Inclusive Framework with the information required to take decisions at key milestones. Building upon the preliminary economic analysis already undertaken, the programme

89 "The OECD's public consultation on digital tax reform", *Tax Journal*, 21 March 2019
90 OECD press notice, *International community agrees on a road map for resolving the tax challenges arising from digitalisation of the economy*, 31 May 2019

> of work will require further Secretariat-led analysis to be provided to members of the Inclusive Framework by the end of 2019.
>
> This analysis will be designed to support members of the Inclusive Framework to take decisions in relation to the future direction of the overall programme of work. Continued work will be carried out during 2020, to ensure that the Inclusive Framework can be kept fully informed of the impact of key technical decisions relating to the design of the proposals.[91]

Subsequently G20 Finance Ministers agreed to this work programme,[92] although, as the *Financial Times* noted, "there are still big differences to resolve, with the US, home to most of the world's digital giants, opposed to rules that treat digital companies differently to others."[93]

In a briefing on the OECD's proposals the law firm Clifford Chance argued that the OECD's timeframe was "extremely ambitious"; "the trouble, of course, is that while the economics are difficult, the politics are nigh impossible":

> Crucially we do not yet have an economic analysis or impact assessment of the proposals … This is all very uncontroversial if the answer is simply that digital and other businesses pay more tax everywhere. However the result is unlikely to be so straightforward.
>
> Two key questions are: *What are the expected effects of the proposals on the level and distribution of tax revenues across jurisdictions?*
>
> The almost inevitable consequence of the proposals is a redistribution of taxing rights from the home of large corporations (particularly the US) to the "market" jurisdictions where they make their sales (the rest of the world). It is not obvious why the US would agree to this.
>
> *More specifically: what economic impact will the various proposals have for different types of MNEs, sectors and economies (e.g. developing countries; resource-rich countries, etc.)?*
>
> Many of the non-OECD countries involved in the process, and many NGOs, want to see a fundamental redistribution of taxing rights away from the developed world and towards the developing world. They, not unreasonably, see the BEPS focus on taxing "where the value is created" as in practice allocating taxing rights to rich countries. However this creates some difficulty for developed-world policymakers, whose populaces expect OECD initiatives to result in more tax being paid to their treasuries, not less.
>
> Without this analysis, it does not seem plausible for countries to give the "political steer" that the OECD requires by January 2020. How can countries agree to something before they understand its distributional effect, or how it impacts the relevant sectors of their economy?[94]

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91 OECD, *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, 31 May 2019 par 83

92 G20 press notice, *Communiqué,G20 Finance Ministers and Central bank Governors Meeting, Fukuoka*, 8-9 June 2019; see also, OECD, *OECD Secretary-General Report to the G20 finance ministers and central bank governors Fukuoka, Japan*, June 2019

93 "Digital giants face tax setback after G20 agreement", *Financial Times*, 9 June 2019

94 Clifford Chance, *The OECD proposal to revolutionise worldwide taxation: our assessment*, 5 June 2019 pp1-2

3.2 The OECD's consultation on 'Pillar One' & 'Pillar Two' (Winter 2019)

In October and November the OECD launched two consultation exercises. The first of these asked for views on its proposals for determining where tax should be paid and on what basis ('nexus'), as well as what portion of profits could or should be taxed in the jurisdictions where clients or users are located ('profit allocation').[95] A summary of the OECD's proposed 'Unified Approach' is set out below:

> **Scope.** The approach covers highly digital business models but goes wider – broadly focusing on consumer-facing businesses with further work to be carried out on scope and carve-outs. Extractive industries are assumed to be out of the scope.
>
> **New Nexus.** For businesses within the scope, it creates a new nexus, not dependent on physical presence but largely based on sales. The new nexus could have thresholds including country specific sales thresholds calibrated to ensure that jurisdictions with smaller economies can also benefit. It would be designed as a new self-standing treaty provision.
>
> **New Profit Allocation Rule going beyond the Arm's Length Principle.** It creates a new profit allocation rule applicable to taxpayers within the scope, and irrespective of whether they have an in-country marketing or distribution presence (permanent establishment or separate subsidiary) or sell via unrelated distributors. At the same time, the approach largely retains the current transfer pricing rules based on the arm's length principle but complements them with formula based solutions in areas where tensions in the current system are the highest.
>
> **Increased Tax Certainty delivered via a Three Tier Mechanism.** The approach increases tax certainty for taxpayers and tax administrations and consists of a three tier profit allocation mechanism, as follows:
>
> - **Amount A** – a share of deemed residual profit6 allocated to market jurisdictions using a formulaic approach, i.e. the new taxing right;
> - **Amount B** – a fixed remuneration for baseline marketing and distribution functions that take place in the market jurisdiction; and
> - **Amount C** – binding and effective dispute prevention and resolution mechanisms relating to all elements of the proposal, including any additional profit where in-country functions exceed the baseline activity compensated under Amount B.[96]

It is worth underlining that this Approach is the work of the OECD's secretariat, and the launch of the consultation was not any indication of consensus political support from the governments participating in the BEPS initiative. As the *Financial Times* reported, the potential winners would be "large countries including the US, China, UK, Germany,

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95 OECD press notice, *OECD leading multilateral efforts to address tax challenges from digitalisation of the economy*, 9 October 2019

96 OECD, *Public consultation document: Secretariat Proposal for a "Unified Approach" under Pillar One*, October 2019 pp 5-6. On 15 November the OECD published a summary of comments received.

France, Italy and developing economies … while the companies themselves, tax havens and low tax jurisdictions such as Ireland would lose."[97] An editorial in the paper suggested "the big fight … is still to come … principles have been articulated, but putting them into a consensus framework will take some time."[98] A leader in the *Times* observed that "a deal to reform corporation tax rules would send a powerful signal that international co-operation is not dead … [though] the fate of the proposals will hinge in large part on how they are received in the US."[99] For its part the CIOT reiterated earlier concerns about the unilateral development of national digital taxes, and argued that the Government should "indicate a delay to at least 2021 for the Digital Services Tax to allow work to progress and avoid having to take 'reimbursement' measures as are proposed in France."[100]

In the *Tax Journal*, Brin Rajathurai & Murray Clayson (Freshfields Bruckhaus Beringer) noted that there was widespread acknowledgement that there would be "no point pressing on with these proposals if the major players ... will not agree", but went on to argue that "whatever the critics may say, progress is being made on a grand scale":

> Pascal Saint-Amans, director of the OECD's Centre for Tax Policy and Administration has said that the US is on board and 'that is the game-changer' …
>
> It has been suggested that the OECD proposals do not go far enough and that the OECD is 'canonising gradualism'. … As the saying goes, you can't turn a tanker with a speedboat turn. And this is indeed a gargantuan tanker to turn. For some, it seems progress is not being made fast enough: the day after the OECD Secretariat's proposal was published, Austria passed its unilateral digital advertising tax. It is measures like this that the OECD is striving to avoid …
>
> Huge shifts in thinking have already taken place. Formulary apportionment, previously rejected when floated in relation to the original BEPS project, is now front and centre of the proposals. The acceptance of nexus without physical presence marks a move towards destination-based tax, something discussed by economists in the 1990s but without ever gaining traction. And yet here we are. The tanker is turning.[101]

Writing in the magazine Michael Devereux (at Oxford's Centre for Business Taxation) argued the proposal was "a step in the right direction" but "with two strong caveats":

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97 "OECD takes aim at tech giants with plan to share up global tax", *Financial Times*, 9 October 2019

98 "Editorial: OECD lays foundation for fairer taxing rights", *Financial Times*, 9 October 2019

99 "Leader: Tax International", *Times*, 10 October 2019

100 CIOT press notice, *OECD progress makes case for keeping UK Digital Services Tax on ice*, 10 October 2019. Following US concerns, the French Government has pledged to reimburse affected companies any excess taxes once an international deal is in place. As the CIOT explain, "any amount of tax paid under the French digital tax which would not have been paid under whatever international framework is agreed through the OECD would be refunded to the company in question."

101 "Unify and conquer: the OECD's 'unified approach' to pillar one", *Tax Journal*, 18 October 2019

> First, the proposal is overlaid on top of the existing system, without any detail as to how the allocation under the existing system will be modified, as it must be – so the proposal is only half of the story. Second, since the existing structure will remain, complexity will be even greater.[102]

In its response the Tax Faculty of the Institute of Chartered Accountants published suggested there was a "real risk that it may not be possible to reach a consensus on the approach as proposed in this consultation":

> The proposals in the consultation document highlight that the difficulties faced in reaching a broad consensus in these areas. Consensus will need to be reached not just on the detailed technical aspects of the proposals but also, and more importantly, a political consensus on the proposals.
>
> Given the need for the latter, this makes it difficult to comment meaningfully on the technical and/or practical implications of the proposed approach.
>
> There is a real risk that it may not be possible to reach a consensus on the approach as proposed in this consultation. That being the case, we would also recommend that OCED continues to consider possible alternative approaches to resolving these problems which might command support.
>
> We are concerned that the approach has resulted in a very complex proposal that incorporates elements of both a formulaic approach and the arm's length principle. However, there is concern that, by taking various elements of existing principles, the proposed approach does not articulate a clear principle around which agreement might be reached.[103]

The Chartered Institute of Taxation published a detailed response, which argued that "the principles underlying the Unified Approach must be articulated":

> The Unified Approach to Pillar One presented in the consultation document (the proposal) contains some profound ideas which challenge the existing principles that underpin the current international fiscal philosophy and which, if adopted, would result in considerable upheaval within the international tax system. However, as currently presented, the proposal does not set out a coherent vision of the principles underpinning the solution to address the challenges that have been identified.[104]
>
> Before substantive progress can be made, we suggest that there must be clarity and consensus at a political level as to the how the challenges should be addressed, rather than seeking to address the impact of several different challenges simultaneously that are not underpinned by a unifying principle (and may not be pulling in the same direction). The temptation to move to a formulary (or partially formulary) system is understandable given the different

102 "Reaction to the OECD's proposals", *Tax Journal*, 18 October 2019. See also Professor Devereux's blog post: "The OECD Pillar One Proposal", *Centre for Business Taxation blog*, 22 October 2019

103 ICAEW (Tax Faculty), *ICAEW REP 126/19 Base erosion and profit shifting (BEPS): a unified approach under Pillar One*, 12 November 2019 p2

104 The challenges identified in paragraphs 16 and 17 of the consultation document are, primarily, that the allocation of taxing rights can no longer be exclusively circumscribed by reference to physical presence and that the arm's length principle is becoming an increasing source of complexity (particularly around 'non-routine' profits from intangibles) and simplification would be welcome to contain administration and compliance costs.

> challenges being addressed at the same time, but without a single underlying principle, a partial move will be inherently unstable.

The CIOT also argued that "the practical challenges arising will require a bold solution":

> Notwithstanding these broader concerns regarding what it seeks to achieve, we welcome the opportunity to comment on the actual proposal made by the secretariat, as there are a number of design choices available with different trade-offs. The challenges involved in working through the proposal, firstly in order to achieve political agreement as to what is within scope, and agreeing the scale or amount of profits reallocation and, then, translating the concepts into something that is practicable, should not be underestimated; although the proposal seems in some respects conceptually simple, it is legally and technically complex, and a significant departure from the current international tax framework.
>
> We cannot over-emphasise the very real technical and practical difficulties that will arise from implementing the proposal and these are discussed below. It is our suggestion that, in order to address the practical challenges it may be necessary for the proposed solution to include administrative systems and multilateral cooperation that is even bolder than currently envisaged. A fresh approach is required to solve the issues that have been identified, and a radical change may be preferable than an attempt to shoe-horn a solution into existing concepts.[105]

The following month the OECD published its proposal for a 'global minimum corporate tax level'.[106] As the consultation document explains, its 'Global Anti-Base Erosion' (GloBE) initiative would have four components:

> **The four component parts of the GloBE proposal are:**
>
> **a) an income inclusion rule** that would tax the income of a foreign branch or a controlled entity if that income was subject to tax at an effective rate that is below a minimum rate;
>
> **b) an undertaxed payments rule** that would operate by way of a denial of a deduction or imposition of source-based taxation (including withholding tax) for a payment to a related party if that payment was not subject to tax at or above a minimum rate;
>
> **c) a switch-over rule** to be introduced into tax treaties that would permit a residence jurisdiction to switch from an exemption to a credit method where the profits attributable to a permanent establishment (PE) or derived from immovable property (which is not part of a PE) are subject to an effective rate below the minimum rate; and
>
> **d) a subject to tax rule** that would complement the undertaxed payment rule by subjecting a payment to withholding or other taxes at source and adjusting eligibility for treaty benefits on certain items of income where the payment is not subject to tax at a minimum rate.

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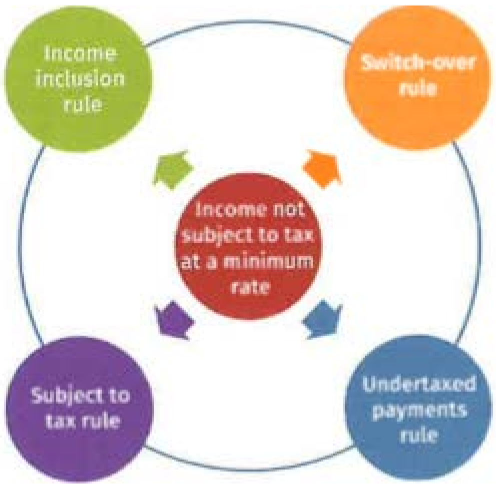
105 CIOT, *OECD Secretariat Proposal for a 'Unified Approach' under Pillar One*, 11 November 2019 pp1-2

106 OCED press notice, *OECD secretariat invites public input on the Global Anti-Base Erosion (GloBE) Proposal under Pillar Two*, 8 November 2019. See also, "OECD proposes global minimum corporate tax rate", *Financial Times*, 8 November 2019.

> These rules would be implemented by way of changes to domestic law and tax treaties and would incorporate a co-ordination or ordering rule to avoid the risk of double taxation that might otherwise arise where more than one jurisdiction sought to apply these rules to the same structure or arrangement.[107]

In the *Tax Journal*, Brin Rajathurai & Murray Clayson (Freshfields Bruckhaus Beringer) observed that, "unlike pillar one, the launch was not heralded by a fanfare of announcements and webcasts … [but] one should not underestimate the significance … the issues raised involve huge politico-economic questions for the 135 members of the Inclusive Framework." The authors noted that "one of the most fundamental questions is how these four components [of the GloBE] will interact":



> Obviously the four components are not intended to apply at the same time, but which rule will take priority? It has previously been indicated that, conceptually, the scheme is intended to work in a similar way to the hybrid mismatch rules, i.e. if the income inclusion rule applies, then there is no need to apply the other rules but, if not, then you may need to deny deductions or apply withholding tax. What is less clear is which rule would be the primary rule here?

The authors went on to observe that "an enormous elephant in the room is the level of the minimum rate that would apply":

> The consultation document notes that the rate will be discussed once other key design elements are fully developed. In all likelihood, this is a deliberate move to keep as many countries round the table for as long as possible, for the level of the minimum rate could be the deal breaker for many jurisdictions. The lower the rate it is, the less it will achieve its objective of changing taxpayer and government behaviours. The higher it is, the harder it will be to convince some Inclusive Framework members to agree to it.
>
> While the consultation document does not officially give any indication of the rates that are being discussed, the use of 15% in the examples in the annex (despite being 'simply for illustrative purposes only') perhaps gives an unofficial hint at the level being contemplated. Based on the latest OECD statistics on effective tax

107 OECD, *Public consultation document: Global Anti-Base Erosion Proposal ("GloBE") - Pillar Two*, November 2019. On 3 December the OECD published details of the responses it had received.

> rates (from 2017 …) 19 of the 75 countries listed (i.e. just over a quarter) had effective tax rates below 15%, which gives some insight as to how challenging it will be to get consensus on this.[108]

In its response the Tax Faculty of the Institute of Chartered Accountants argued that "overall Pillar 2 leaves much that is open to interpretation and is inherently over engineered", and that "if the OECD is looking for a unified consensus-based approach (which is a must and not an option) for countries to comply with Pillar 2, simplicity needs to be the guiding principle."[109] As an alternative the Faculty proposed a 'jurisdiction level solution' which would focus "the responsibility for, and therefore the compliance burden of, eliminating profit shifting on the jurisdiction rather than on taxpayers, since it is local tax rates and rules which make profit shifting for tax desirable":

> One model could involve the OECD creating and managing a new blacklist of those territories which fail to satisfy certain criteria determined by the OECD. These criteria could include low corporate tax rates among other criteria.
>
> The consequences of a territory being on the blacklist would be that taxpayers based there would have to apply rules along the lines of those set out in the GloBE proposal to the extent they have operations in those territories.
>
> Any territory not on the blacklist would not be subject to the GloBE rules. In this way, only those seeking to abuse the principles would be faced with the complexity of the rules.
>
> The OECD would monitor jurisdictions to mitigate the risk of taxing jurisdictions artificially inflating their tax rates and then providing other reliefs and incentives that yield similar economic outcomes for taxpayers. The OECD would therefore be monitoring compliance of a jurisdiction with the criteria that it sets on an ongoing basis, and countries may come onto or come off from the blacklist as their policies change over time. This is similar to how other blacklists are already being managed by the OECD.
>
> The outcome is likely to be similar to that proposed by the current consultation, as territories will be motivated to stay off the blacklist to protect inward investment. Taxpayers would reflect more carefully on using blacklisted jurisdictions within their structures due to the relative decreased benefit and enhanced compliance burden.[110]

In its detailed response, the Chartered Institute of Taxation argued that the consultation presented "too many potential permutations and ramifications which could arise from the open policy and key design questions", and that, "the next step may be for the focus of the work to be on what is practically achievable around the overall policy objectives, which options could be accepted by individual countries and which could achieve a broad, even if not global, consensus."[111] More

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108 "Going GloBal: the OECD's consultation on pillar two", *Tax Journal*, 22 November 2019. See also, "Two supporting pillars", *Taxation*, 28 November 2019

109 ICAEW (Tax Faculty), *ICAEW REP 125/19 Global anti-base erosion proposal (Globe) - Pillar Two*, 2 December 2019 para 9-10

110 *op.cit.* p1, para 16-20

111 CIOT, *Global Anti-Base Erosion Proposal ('GloBE') – Pillar Two*, 2 December 2019 para 2.7, para 1.4

specifically the CIOT raised concerns as to what, fundamentally, the GloBE proposal was designed to deliver:

> **It is not clear whether the fundamental principle underlying the proposal is to achieve a minimum effective tax rate for any entity, either in that entity or at shareholder level; or whether it is to allow countries to protect their own tax base from base eroding payments.**
>
> In our view pursuing one of these aims should be sufficient, as succeeding in that one goal should lead to the other also effectively being addressed. The four component parts of the GloBE proposals could be constructed as to address either or both of these policy objectives, but they will not do so without an upfront agreement on which are the primary goals.
>
> Any one of the four components would be difficult and complicated to implement effectively; the added challenge of the GloBE proposal is to address how these rules could be made to work effectively together (and with existing rules and Pillar One), without giving rise to significant levels of double or multiple taxation, and a compliance and administrative burden out of all proportion to the issues which are being addressed.[112]

The CIOT was also concerned that the consultation had not addressed "the most fundamental question", namely "how the four components will interact … Clearly they are not intended to apply at the same time, but no decision has been made as to which rule will take priority."[113]

More recently the Oxford Centre for Business Taxation has sought to model how additional tax revenue that the GloBE could raise if introduced on a worldwide basis, and which countries might benefit from the additional revenue.[114] In a blog piece on their report the authors note that data limitations mean their results should be interpreted with caution …

> Our analysis combines macro and micro data. We use macro (country-wide) data on the profit and tax of affiliates of foreign multinationals located in each country. We combine this with micro data at the subsidiary level, which allows us to account for variation in in effective tax rates within a country. Using only micro data is not possible as they are not available for all affiliates of multinationals, and generally not for affiliates located in low-tax countries. Both sources of data present significant challenges, which are set out in the report, and which means that the results should be interpreted with caution.

… although their conclusion is that "to the extent that the aim of the tax is to raise additional tax revenue from profit, then it does not appear likely to deliver significant gains":

> Introducing a minimum tax worldwide would be complex, create new uncertainties, and inevitably involve large transition costs. To the extent that the aim of the tax is to raise additional tax revenue from profit, then it does not appear likely to deliver significant gains. On our best estimate – conditional on the caveats

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112 *op.cit.* para 2.3. **Emphasis added.**
113 *op.cit.* para 2.4
114 Michael P. Devereux, François Bares, Sarah Clifford, Judith Freedman, İrem Güçeri, Martin McCarthy, Martin Simmler and John Vella, *The OECD Global Anti-Base Erosion proposal*, Oxford Centre for Business Taxation, January 2020

> mentioned here and explored further in the report – the country-by-country approach with a threshold of 10% would raise the taxes paid by affiliates of foreign multinational by 14%. A similar blended approach would raise them by 4%.
>
> These are small relative to total revenue from taxes on profit; even the country-by-country approach would raise additional revenue of less than 2%. If a substance carve-out were included as part of the package, the additional revenue would be lower. To put this in context, a one percentage point rise in corporation tax in the UK would raise tax revenue by around 5%.
>
> The likely revenue from the minimum tax proposal therefore seems small relative to the likely costs that would be associated with it. The revenue gains from a minimum tax do not therefore seem to be a convincing rationale for introducing it.[115]

In a follow-up post, Michael P. Devereux & John Vella also addressed the question of whether the GloBE could work in practice, given the fact that companies, unlike customers, are relatively mobile:

> Customers – especially individual consumers – are relatively immobile. Parent companies are not. Subject to anti-inversion rules and exit taxes, companies can move their headquarters, and of course new businesses can set up anywhere. This mobility may fundamentally undermine the GloBE for two related reasons.
>
> First, all – or certainly most – countries would need to implement it. If one country did not, multinationals would have an incentive to move their parent company to that country. And there would also have to be considerable harmonisation of the details, including, for example, the rules to calculate the threshold rate.
>
> Second, as part of tax competition, individual countries would have an incentive to resist implementing the proposal – and if they joined, they would have an incentive to defect …
>
> We should aim for a tax system which countries have an incentive to join – rather than one into which they have to be strong-armed and from which they have a continuing incentive to defect.[116]

3.3 Recent developments

On 3 December 2019 US Treasury Secretary Steven Mnuchin wrote to the Secretary General of the OECD, Angel Guirra, setting out the US Administration's position on these discussions, briefly suggesting that Pillar One goals could be achieved by making it a 'safe-harbour regime', (that companies should be able to opt into or out of the 'unified approach' under Pillar One, provided they abide by some other agreed measure). He also reiterated the United States view that the proliferation of unilateral measures, like digital services taxes, "threaten the longstanding multilateral consensus on international taxation", and that DSTs had "a discriminatory impact on US-based businesses and are inconsistent with the architecture of current international tax rules."[117]

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[115] Michael P. Devereux, "The GloBE proposal: revenue consequences of a minimum tax on foreign profits of multinationals", OCBT blog 7 February 2020
[116] Michael P.Devereux, "What problems might the GloBE solve?", OCBT blog 18 February 2020
[117] "US suggests safe harbour regime for OECD pillar one proposal", *Tax Journal*, 9 December 2019

In his response Mr Guirra expressed surprise at Mr Mnuchin's suggestion regarding Pillar One:

> We fully share your sense that the international tax system is under intense strain and that a global solution is needed to stop a proliferation of unilateral measures and to help us return to a stable international tax system that avoids double taxation and taxes net rather than gross income.
>
> Let me also thank you personally for your involvement over the last 2 years in moving us forward in this process. To a large degree, it was the US tax reform that set the framework conditions within which we have advanced. It was also your personal involvement as well as that of your delegates that steered the international community away from seeking a narrow digital solution and introduced innovative proposals into the discussions. And it was also your personal interventions at G20 meetings that moved the discussions to a broader scope using a more formulaic approach and a new nexus concept that moved us beyond the tax rules as they currently stand.
>
> We have already held two public consultations attended by stakeholders from around the world and like you, while noting broad support for existing rules, clearly identified the need for greater tax certainty and administrability. This is why the OECD proposal on a "Unified Approach" contains a very strong tax certainty dimension.
>
> Without it, there would be no conditions for achieving a consensus. Throughout the extensive consultation process, however, we had so far not come across the notion that Pillar 1 could be a safe-harbour regime. We raise this concern, as it may impact the ability of the 135 countries that are now participating in this process, to move forward within the tight deadlines we established collectively in the Inclusive Forum.[118]

In a blog post at this time Glyn Fullelove, CIOT President, raised concerns that the Treasury Secretary's comments might, in fact, lead to the chaos of a proliferation of competing DSTs:

> The process of international tax reform can be likened to a long journey at sea being undertaken solely under sail; at any one time, you can only go as far as the winds and your supplies allow. The "next port of call" must surely be completing Pillar One and Pillar Two, before we contemplate another voyage. If we do not reach that port, as current events show, the alternative is not being becalmed at sea, but being buffeted on all sides by winds of storm force; with companies and tax authorities alike struggling to keep the ship afloat.
>
> It is thus concerning that in recent days, the US Secretary of the Treasury, Steven Mnuchin has written to the OECD expressing doubts around the Pillar One proposals, and essentially suggesting they suffer from the same issues as DSTs. This is despite the fact that the US has been closely involved with their development to date. Secretary Mnuchin made a somewhat enigmatic proposal that Pillar One could be recast as a "safe harbour regime" without giving further detail of what that might look like.

118 OECD, *Letter from OECD Secretary-General Angel Gurría for the attention of The Honorable Steven T. Mnuchin, Secretary of the Treasury, United States*, 4 October 2019

> The Secretary of the Treasury did give guarded support for Pillar Two, which is the Pillar which should ensure multi-nationals pay a minimum amount of tax somewhere. There is a theoretical view that this is actually the most important result; however, in practical and political terms, European governments in particular need to demonstrate they have obtained greater taxing rights over the US digital companies in particular. An agreement on Pillar One is thus vital; otherwise we will see full on tax wars with a proliferation of DSTs and counter-measures from the US and possibly others.[119]

As noted above, the taxation of digital companies was an issue that arose at the World Economic Forum at Davos in January 2020, with reports that the US authorities were actively planning to impose tariffs on France if it insisted on imposing and collecting its own DST.

On 20 January it was reported that the United States and France had agreed a 'ceasefire' to the end of 2020, suspending any plans for tariffs while talks continued at the OECD-level. The *Financial Times* quoted Mr Guirra as saying that "the negotiating process was back "on track" … The aim is to agree an international tax framework by the end of this year. Mr Gurría said that "a lot of political will and a great spirit of compromise" was still needed to reach an international agreement. Failure, he added, would lead to a "cacophony" of national actions."[120]

Writing in the paper just before Davos, John Thornhill was cautiously optimistic as to the prospects for an agreement: "How this snarly bilateral dispute and entangled multilateral negotiation now play out is unclear. European negotiators privately express frustration with their seemingly "random interlocutors" in Washington. But it could yet be that Mr Trump's erratic theatrics are the necessary political prologue to a deal."[121] In a subsequent piece in the *Tax Journal*, Eloise Walker (Pinsent Masons) argues, "given that Plan B is an international trade war, implementing Plan A becomes the only viable option."[122] By contrast, in a second briefing on the OECD's proposals the law firm Clifford Chance suggest that retaliation by the US – even a trade war – is "now a very plausible outcome":

> While the economics are difficult, the politics are nigh impossible. Crucially we still do not have an economic analysis or impact assessment of the proposals. The latest statement alludes to data limitations and suggests that analysis of the investment and growth impacts will wait until March 2020 …
>
> The OECD warn publicly, their proposal is Plan A, there is no Plan B, and Plan C is chaos – the proliferation of unilateral tax measures and trade barriers. But it is hard to see how the major actors, particularly in Europe and the US, can align by the middle of 2020 on core elements of proposal, while the economics remain uncertain. Any agreement to proceed may, therefore, be highly provisional, with the "real" political agreement having to

119 CIOT blog, *Tax Wars: Is the UK next in line for Trump's tariffs?*, 5 December 2019
120 "France signals breakthrough in US digital tax talks", *Financial Times*, 20 January 2020
121 "Curbing 'exorbitant tax privilege' is harder than it looks", *Financial Times*, 10 January 2020
122 "Digital taxation: a bluffer's guide", *Tax Journal*, 7 February 2020

> be sought much later in the process, when the economic consequences of the proposals are more clear.[123]

The OECD hosted a meeting of the Inclusive Framework on BEPS on 29/30 January, at which participants reaffirmed their commitment to reach a "consensus-based long-term solution", although there appears to have been a clear division of opinion with regard to the United States' position on a 'safe harbour regime':

> Participants agreed to pursue the negotiation of new rules on where tax should be paid ("nexus" rules) and on what portion of profits they should be taxed ("profit allocation" rules), on the basis of a "Unified Approach" on Pillar One, to ensure that MNEs conducting sustained and significant business in places where they may not have a physical presence can be taxed in such jurisdictions. The Unified Approach agreed by the Inclusive Framework draws heavily on the Unified Approach released by the OECD Secretariat in October 2019.
>
> Endorsement of the Unified Approach is a significant step, as until now Inclusive Framework members have been considering three competing proposals to address the tax challenges of digitalisation. A Programme of Work agreed in May 2019 has been replaced with a revised Programme of Work under Pillar One, which outlines the remaining technical work and political challenges to deliver a consensus-based solution by the end of 2020, as mandated by the G20. Inclusive Framework members will next meet in July in Berlin, at which time political agreement will be sought on the detailed architecture of this proposal.
>
> The Statement by the Inclusive Framework on BEPS takes note of a proposal to implement Pillar One on a "safe harbour" basis, as proposed in a December 3, 2019 letter from US Treasury Secretary Steven Mnuchin to OECD Secretary-General Angel Gurría. It recognises that many Inclusive Framework members have expressed concerns about the proposed "safe harbour" approach. The Statement also highlights other critical policy issues that must be agreed under Pillar One before a decision can be taken. The "safe harbour" issue is included in the list of remaining work, but a final decision on this issue will be deferred until the architecture of Pillar One has been agreed upon.
>
> The Inclusive Framework also welcomed the significant progress made on the technical design of Pillar Two, which aims to address remaining BEPS issues and ensure that international businesses pay a minimum level of tax. They noted the further work that needs to be done on Pillar Two.[124]

The *Financial Times* quoted the OECD's director of tax administration, Pascal Saint-Amans, observing that the US/France dispute was an important factor in reaching concessions: "the prospect of trade wars triggered by tax disputes is clearly pushing countries to compromise", although Mr Saint-Amans also suggested that without US agreement to

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123 Clifford Chance, *The OECD proposal to rewrite the rules of worldwide taxation: Our take on what it means, and whether it will happen*, 6 February 2020 pp2-3

124 OECD press notice, *International community renews commitment to multilateral efforts to address tax challenges from digitalisation of the economy*, 31 January 2020. For more details see, OCED, *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, January 2020.

effectively ditch its 'safe harbour' proposal the chances of a final agreement would be "very low, extremely low, or close to nil."[125]

In recent weeks the global outbreak of coronavirus has dominated the attention of governments and shaped the priorities of international organisations. Clearly this has had an impact on this particular initiative, and there do not appear to have been any major developments recently.

On 23 March the OECD's director of tax administration, Pascal Saint-Amans wrote a piece on the organisation's current priorities, explaining that "while the OECD will keep working on long-term projects like tax co-operation among countries, international standards to eliminate double taxation, and the mobilisation of domestic resources, we have prioritised work on a range of targeted and temporary tax policy and tax administration measures governments could consider as part of their immediate response."[126]

[125] "Talks over global digital tax are back on track, says OECD", *Financial Times*, 31 January 2020
[126] OECD, *Tax in the time of COVID-19*, 23 March 2020

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