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REGULATION AND TAXATION OF DIGITAL SERVICES IN ACCORDANCE WITH THE INITIATIVES OF THE EUROPEAN UNION[1]

Abstract

The article provides an analysis of the institute of digital services with an emphasis on digital services taxation. Firstly, the article deals with the definition of concepts that characterize digital services in EU law and then defines digital services specifically from a tax point of view. The article also deals with the idea of an interim and a comprehensive solution of digital taxation and introduces selected unilateral measures of digital taxation. The above subject of research is analysed by applying basic methods of legal science, especially the method of scientific analysis with the dominant application of the comparative method.

Key words: digitization, tax law, digital tax, digital services.

JEL Classification: K34

1. Introduction

Digitization has been defined in recent years as a key driver of the economy. It is no doubt that the present time is dominated by digital technologies in almost all its aspects and

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further progress in the digitization process can be expected in the future. In connection with the advancing digitization, the corresponding terms are gradually being stipulated in the legislation. Definitions are always a reflection of the times and trends from which they emerge [Bukh, Heeks 2017: 4]. It can be stated that the speed of progress of a certain phenomenon makes it very difficult to try to provide a comprehensive and exhaustive definition of this phenomenon, which as a result may become obsolete in a relatively short time. Nevertheless, with a certain generalization the digitization can be defined as the constantly advancing process of transformation of the operation of socio-economic relationships. The implementation of digital technologies in the operation of society brings with it a wide range of legal institutes which need to be clarified and which need to be paid attention to among other things on a scientific basis. The spread of digital technologies and especially the new way of conducting business activities through new business models brings new challenges for tax policy, tax legislation and last but not least for the science of tax law, which must respond to the transition from the traditional concept of taxable activities to the so-called „digital age". New phenomena and dynamic social relations are for some time implement in practice even without appropriate legal regulation. It is obvious that the legal system reacts to new phenomena only after a certain time since their occurrence [Štrkolec 2021: 370-383]. As stated by the Organization for Economic Co-operation and Development (hereinafter referred as „OECD") in several working documents, because the digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy for tax purposes [OECD 2015: 11].

Given its global and horizontal nature, digitization can be considered as a material source of law which encourages the creation of appropriate formal law not only of tax law but also of other branches of law as well [Hrabčák, Stojáková 2020: 15-28]. It is clear that digitization and new digital business models in addition to the tax law aspects bring challenges for individual branches of law, whereas the need to examine new phenomena in a broader context beyond a single branch of law cannot be underestimated [see also Hučková, Bonk, Rózenfeldová 2018: 125-140]. In this context the paper also points to selected broader issues of digital services regulation in the EU internal market and provides a comparison with a specific approach of tax law to the issue of digital services taxation.

In the introduction, we consider as necessary to point out certain aspects of the digital economy that are relevant to the field of tax law. Potentially decisive aspects of the digital economy for tax purposes include the fact that digitization opens up the opportunity to carry out economic and business activities at a distance, as a result of which the

requirement of the physical presence of the service provider´s permanent establishment in a given territory is relativized. As a result of digitization, the digital service provider shows stronger links to intangible assets, information and the flow of large amounts of data. Another aspect of digitization relevant to tax law is that digitization accelerates the process of value creation and consequently the process of its transformation [OECD 2018: 18].

The introduction of the digital tax is currently the subject of ongoing political and professional discussions at several levels, namely:

- at the international OECD level;
- at the level of the European Union (hereinafter referred to as „EU") and
- at the national level of selected states.

Scientific articles on digital taxation published so far also tend to be structurally divided into chapters dealing with the issue of digital taxation at OECD, EU and subsequently the national level of selected states [ex. Hrabčák, Popovič 2020: 52-69].

With regard to the work on the introduction of digital taxation developed at several levels at the same time, it should be emphasized that the European Commission itself states that the *ideal approach* would be to seek multilateral international solution and reach a global consensus on digital taxation issues [Time to establish a modern, fair and efficient taxation standard for the digital economy 2018: 5]. The European Commission has recently stated in the so-called "Digital Compass", which sets out the EU's digital ambitions for 2030, that the EU will support contribute to common solutions such as the ongoing work at the G20 and the OECD with respect to a global consensus to address the taxation of the digital economy [2030 Digital Compass 2021: 19]. One can agree with the concept that problems of a global nature need to be logically addressed through a multilateral agreement. However, reaching a global solution in the field of digital taxation can be complicated and time-consuming, especially given the complexity and wide range of legal issues that still need to be properly clarified, e.g. taxable nexus and income allocation for new digital business models [more details Hongler, Pistone 2015], new thresholds for permanent establishment based on digital presence [more details Simić 2021: 862-878], value creation process in digital environment [more details Olbert - Spengel 2019] etc.

Following the above facts, the article focuses on digital economy taxation initiatives developed at the EU level with a focus on comparing the material scope of digital services which are to be taxable according to the directive proposals presented so far. Before approaching the material scope of the presented proposals of taxation of digital services, we consider it necessary to point out the theoretical background and legal regulation of

digital services in EU law in general. The main goal of the presented article is to provide an analysis of the institute of digital services with an emphasis on digital services taxation. The aim of the article is also by applying the comparative method to point out the diverse definition of the concept of digital services in the EU legislation in general as well as in the specific proposals for tax regulation. Firstly, the article deals with the definition of concepts that characterize digital services in EU law and then defines digital services specifically from a tax point of view. The article also by applying the comparative method, analyses the material scope of digital services which should be taxable according to the presented directives proposals.

2. Theoretical background and legal regulation of digital services in EU law

Digital services can be thought of as one of the functional components of the expanding digital economy. The establishment of new rules regulating digital services is currently the subject of work on the enactment of a Proposal for a Regulation of the European Parliament and of the Council of 15 December on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final (hereinafter referred to as „**Digital Services Act**").

It can be observed that the Digital Services Act considers digital services synonymously with the familiar term "information society services" which is set out in several EU legal acts. Firstly, the fundamental legal act that regulates information society (digital) services is Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereinafter referred to as „**e-Commerce Directive**"). It should be emphasized that the provisions of the Digital Services Act will be without prejudice to the provisions of the e-Commerce Directive as well as its basic principles, in particular the basic internal market principle. The enactment of new rules regulating digital services is necessary due to the following three main problems such as

- serious societal and economic risks and harms of online intermediaries: illegal activities online, insufficient protection of the fundamental rights and other emerging risks;
- ineffective supervision of services and insufficient administrative cooperation, creating hurdles for services and weakening the single market and

- legal barriers for services: preventing smaller companies from scaling up and creating advantages for large platforms, equipped to bear the costs [Impact Assessment 2020: 10].

The concept of an information society services as stipulated in the e-Commerce Directive is then the same as the concept originally set out in the Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (hereinafter referred to as „Directive 98/34/EC"). Based on the above, it can be deduced that the concept of digital services in the synonymous sense as information society services thus finds its origin already in 1998. The Directive 98/34/EC has been the subject of several amendments which has finally been repealed and replaced. Finally, the concept of information society services is currently defined by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (hereinafter referred to as „Directive (EU) 2015/1535").

Information society (digital) services are in those legislations understood as **any services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services** [Directive (EU) 2015/1535: Art. 1]. The basic features of information society services are also approached in such a way that

- "at a distance" means that the service is provided without the parties being simultaneously present;
- "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means and
- "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request [Directive (EU) 2015/1535: Art. 1].

Despite the closer specification of the terms used, application problems may arise with regard to the abstract nature of the legal definitions in the qualification of certain service as a digital service or synonymously information society service in specific cases. An example of this is e.g. the legal qualification of **intermediary services** provided by online

platforms in a collaborative economy[2]. The legal classification of the intermediary services provided by online platforms in the light of EU law has also been considered by the Court of Justice which has answered the question whether these services should be considered as information society (digital) services[3]. Of course each case needs to be analyze individually, but for some clarity we can approach the qualification of the Court of Justice in the cases of widely known Uber and Airbnb online platforms [see also Rózenfeldová 2020: 894-914].

In the case of intermediary services provided by the **Uber** online platform the Court of Justice provided the following considerations in Case C 434/15. The court first stated in general terms that „*an intermediation service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver who will carry out the transportation using his or her own vehicle, meets, in principle, the criteria for classification as an 'information society service' within the meaning of Article 1(2) of Directive 98/34 and Article 2(a) of Directive 2000/31*" [ECLI:EU:C:2017:981: 35]. Subsequently in regard the facts that Uber i) exercises **decisive influence** over the conditions under which the service is provided by drivers; ii) determines at least the maximum fare by means of the eponymous application; iii) receives that amount from the client before paying part of it to the non-professional driver of the vehicle and iv) exercises a **certain control** over the quality of the vehicles, the drivers and their conduct [ECLI:EU:C:2017:981: 39], the Court stated that intermediary service provided by the Uber online platform „*must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as 'an information society service' within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but as 'a service in the field of transport' within the meaning of Article 2(2)(d) of Directive 2006/123*" [ECLI:EU:C:2017:981: 40].

The Court of Justice has reached a different legal conclusion when it comes to intermediary services provided by the **Airbnb** online platform in Case C 390/18. The basis of the Airbnb online platform is to connect potential guests with professional or non-professional hosts offering short-term accommodation services so as to enable to reserve

[2] The collaborative economy refers to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals [A European agenda for the collaborative economy 2016]. Given the focus of this article, it should be noted that the collaborative economy should be considered as one of the components of the digital economy itself, which is a broader phenomenon.
[3] It is necessary to distinguish between an intermediary service and a subsequent service to which it relates.

accommodation. The conclusion was also justified by the fact that, unlike the above case Uber, the intermediary services provided by Airbnb online platform i) are in no way indispensable to the provision of accommodation services, both from the point of view of the guests and the hosts [ECLI:EU:C:2019:1112: 55]; ii) do not set or cap the amount of the rents charged by the hosts using that platform [ECLI:EU:C:2019:1112: 56] and iii) cannot be regarded as forming an integral part of an overall service, the main component of which is the provision of accommodation [ECLI:EU:C:2019:1112: 57]. With regard to that service which is provide for remuneration, by electronic means and on the individual request of a recipient, the Court of Justice stated that "*such a service meets the four cumulative conditions laid down in Article 1(1)(b) of Directive 2015/1535 and therefore, in principle, constitutes an 'information society service' within the meaning of Directive 2000/31*" [ECLI:EU:C:2019:1112: 49].

3. Taxation of digital services – fundamentals and approaches

In contrast to the definition of digital services according to the above mainly commercial law regulations, a different situation arises in the field of tax law. Tax law is characterized by the special status of its institutes, existence of its own conceptual apparatus and the existence of a wide range of legal definitions [Babčák 2019: 61-63]. For this reason, it can be expected that a definition of digital services will be stipulated separately for the tax purposes. At the same time, it can be expected that the definition and the scope of taxable digital services for tax purposes will be directly subject to tax legislation together with the definition of other elements of the digital tax[4].

The EU following the identification of the challenges posed by digitization to tax law in several European Commission Communications [e.g. A Fair and Efficient Tax System in the European Union for the Digital Single Market 2017] introduced proposals for possible legislative changes in the taxation of the digital economy, by the so-called digital tax. In particular, the following proposals were presented.

- Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services of 21 March 2018 COM/2018/0148 final - 2018/073 (CNS) (hereinafter referred to as „**DST Directive proposal**") was presented as the **interim solution** for the digital taxation

[4] In our opinion, digital tax does not "only" include the introduction of a new legal instrument for the taxation of the digital economy, i.e. special tax introduced into the national tax systems. Digital tax needs to be considered in a broader sense, i.e. it also includes adapting the current rules of corporate taxation to the conditions of the digital economy.

and Proposal for a Council Directive on a common system of digital advertising tax on revenues resulting from the provision of digital advertising services of 01. March 2019 - political agreement (hereinafter referred to as „**DAT Directive proposal**") was presented at the level of a compromise solution, and finally

- Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence of 21 March 2018, COM/2018/0147 final (hereinafter referred to as „**SDP Directive proposal**") was presented as a possible **comprehensive (long term) solution** adopted at the level of EU.

3.1. The idea of the interim and comprehensive (long term) solution for the taxation of the digital economy

The essence of the interim solution is that already when setting up an interim solution (DST Directive proposal), it has been envisaged in advance that it be replaced with a comprehensive solution (SDP Directive proposal). The enactment of interim measures to tax the digital economy should be a prompt solution to ensure tax fairness and equality among market players until a comprehensive solution is adopted. At the same time, the need for a temporary solution is also justified by the risk of fragmentation of the single internal market through the gradual adoption of unilateral measures by individual states (see below).

When choosing a specific interim solution, various types of measures were examined and subsequently excluded such as an increasing the rate of value added tax on selected digital services [Impact Assessment 2018: 56]. Increasing the rate of value added tax to selected digital services would be contrary to the principle applied to value added tax, according to which goods and services can be taxed only by a standard tax rate. Increasing the rate of value added tax on digital services without simultaneously increasing the rate of value added tax on the same services which can be also provided non-digitally runs counter to the principle of **tax neutrality**. In accordance with the principle of tax neutrality, taxes should be indifferent to taxable persons and together with other economic instruments should create equal business conditions [Babčák 2019: 54]. The principle of tax neutrality inherent in the common system of value added tax may be stated by the Judgment of the Court (Sixth Chamber) of 3 May 2001 Commission of the European Communities v French Republic in Case C-481/98, according to which: „*That principle in particular precludes treating similar goods, which are thus in competition with each other, differently for VAT purposes. It follows that those products must be subject to a uniform rate. The principle of fiscal*

neutrality for that reason also includes the other two principles invoked by the Commission, namely the principles of VAT uniformity and of elimination of distortion in competition" [ECLI:EU:C:2001:237: 22]. In order for the interim solution to fulfil its purpose, in addition to the fundamental requirements of compliance with national and international tax law framework [see also Sábo 2020: 64-81] it shall also meet the requirement of its feasibility in a short period of time. The specific aim of the temporary solution is to create a tax focused on new business models that can be implemented easily [Impact Assessment 2018: 53]. A similar idea was expressed in a Report by a group of experts on the taxation of the digital economy from the European Commission already in 2014, stating that partial changes to the existing tax system should be adopted in way to avoid increasing the complexity of regulation [Report 2014: 47]. For this reason, those solutions whose implementation would be associated with significant application problems were excluded from the range of possible interim solutions. The Impact Assessment in this context explicitly states that one of the interim measures considered was the introduction of a transaction tax on digital services that are remunerated by users through the provision of data (e.g. internet searches) [Impact Assessment 2018: 56]. Opting for such measure at the level of the interim solution was refused on the grounds of its complexity.

On the other side, the comprehensive solution is based on the principle of application corporate taxes on the provision of digital services in the EU and adapting the national corporate tax system so that new digital business models are also taxed. The aim of the comprehensive solution is to create a complex and modern legal framework for the taxation of the digital economy. The proposal for a long-term solution involves two fundamental reforms of the rules on corporate income taxation which are i) new thresholds for the existence of a digital permanent establishment in a given jurisdiction and ii) new profit attribution rules for such establishment.

3.2. Selected unilateral measures of digital taxation

In defining the concept of digital services, Hrabčák and Popovič [2020: 52-69] distinguish between digital services in the broader sense which cover several types of digital services (see below) and digital services in the narrower sense which include only digital advertising. In a similar sense, two categories of unilateral measures can be distinguished based on the approach of selected states to the scope of digital services that are / should be subject to digital taxation, namely digital services tax and digital advertising tax. According the OECD, unilateral actions can be grouped into four categories: i) alternative applications of the

permanent establishment threshold; ii) withholding taxes; ii) turnover taxes and iv) specific regimes targeting large multinational enterprises [OECD 2018: 134]. It is not possible to concretely anticipate not yet specified unilateral measures, but there is a clear risk that unilateral measures will keep expanding in the near future [Impact Assessment 2018: 53].

Digital services taxes and digital advertising taxes belong to the turnover taxes group within this classification. The digital services taxes, as well as the digital advertising taxes differ in the issue of material scope (see below), but their common feature is that both these taxes constitute a new special tax introduced into national law systems. A version of the digital tax in the form of digital services tax was presented for example by France. The French digital services tax also tends to be described as the best known because of the US response to this tax. The French digital services tax is imposed at a rate of 3% on annual revenues derived from intermediary services provided through a digital interface and targeted advertising services [France: Draft administrative regulations, scope of digital services tax]. Unilateral measures taken by Member States in the form of digital advertising tax include for example the Austrian tax on revenues resulting from advertising services on a digital interface or any type of software or website in Austria or Hungarian advertising tax the subject of which is the publication of advertising on the Internet, if it participates mainly in Hungarian language or mainly on websites in Hungarian [Taxation of the digitalized economy. Developments summary]. It would be possible to continue in a similar way in relation to other states. The fact is that unilateral measures are inspired by the proposals already presented at EU level. In some cases, identity can also be observed in the basic elements of the digital tax.

For the sake of completeness, we consider it necessary to point out the unique category of unilateral measures of taxation of the digital economy which is the extension of the definition of the permanent establishment in the national regulation of corporate income taxation. This approach is rather exceptional in the cross of unilateral measures adopted so far. For example, in the legal system of the Slovak Republic as a response to changes in the operation of taxable activities, Act no. 595/2003 Coll. On Income Tax was amended by Act no. 344/2017 Coll. with the effect from 1 January 2018. These changes of the Slovak legislation can be briefly summarized as follows. A new definition of **digital platform** was enacted, according to which digital platform means "*a hardware platform or software platform needed for application creation and application management*" [Act no. 595/2003 Coll. On Income Tax: Art. 2] and the concept of permanent establishment was extended [for more details see Cibuľa, Hlinka, Choma, Kačaljak 2019: 155-167] so that repeated intermediary services in transport and accommodation, including digital platforms services

are considered to be activities with a fixed place in the territory of the Slovak Republic within a permanent establishment [Act no. 595/2003 Coll. On Income Tax: Art. 16]. It is appropriate to observe a considerably narrowed definition of intermediary services only in the field of transport and accommodation which corresponds to the most well-known digital platforms such as Uber and Airbnb.

4. Material scope of digital tax according to directive proposals

Among other things, also the issue of the scope of digital services that are to be taxable under the proposed measures is one of the discussed aspects of digital tax. The originally proposed digital services tax covers several digital services. However, France and Germany have also initiated a compromise solution in the form of a tax focused exclusively on digital advertising. The above facts confirm that digital advertising thus represents a certain special type of digital service, among other things due to its great expansion in recent years. The European Commission also agreed that digital advertising has evolved from a simple distribution of e-mails to an enormous industry [Impact Assessment 2020: 8]. It follows from this fact that selected states among all digital services pay eminent attention exactly to digital advertising in the terms of its taxation.

4.1. Material scope of digital services tax

DST is a tax to be levied on revenues resulting from the provision of selected digital services, namely those digital services which are characterized by value creation by their users. It is precisely the capture of this value within the framework of the currently applied taxation rules that is one of the problematic aspects of digitization. It should be emphasized that the subject to taxation is not the user participation itself but the revenues obtained from the valuation of this participation. The taxable revenues to which digital services tax applies is directly related to providing these digital services, which are stipulated in Art. 3 par. 9 of DST Directive proposal as taxable services. While assessing taxable revenues, total gross revenues excluding value added tax and other similar taxes are decisive. The DST Directive proposal defines taxable services by exhaustive enumeration, with different rules for the different types of taxable services as regards the place of their taxation and the distribution of revenues between the Member States.

In connection with the idea of **value creation by users**, the place of taxation is defined by a link to the place where the users of taxable services are located. The rule determining the place of taxation applies regardless of whether these users contributed money to generate

revenue. The value created by digital users does not have to be just a cash payment [DST Directive proposal]. It is assumed that the Member State in which the user´s device is located will be identified by a reference to the IP address of the device or by another geo-location method, provided that this is more accurate. In both cases, for the purposes of applying the common system of digital services tax, only data enabling to identify the Member State in which they are located without the possibility of identifying users may be collected from users. From the total taxable revenues achieved by a taxable person, a specific proportion of taxable revenues decisive for determining the tax liability in individual Member States is then determined according to the above-mentioned rules are to be treated as obtained in that Member state.

Pursuant to Article 3 par. 1 of the DST Directive proposal, taxable revenues are the revenues resulting from the provision of taxable services, which are: i) the placing on a digital interface of advertising targeted at users of that interface; ii) the making available to users of a multi-sided digital interface which allows users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users; iii) the transmission of data collected about users and generated from user´s activities on digital interfaces.

As regards the first taxable service, i.e. the **placing on a digital interface of advertising targeted at users of that interface** this digital service covers the making available space for online advertising by a taxable person and is aimed at users located in the territory of a Member State. As explicitly follows from the normative text of the DST Directive proposal, this service will be taxable regardless of ownership of the digital interface. Thus, the decisive aspect is not whether or not the digital interface is owned by the entity responsible for placing the advertisement. The provider of this service is deemed to be the entity responsible for placing the advertisement on the digital interface. In connection with the taxation of online advertising, Fuchs considers that its taxation can take place by applying the model cost-per-view in the country where the advertisement is viewed to users or applying the model cost-per-click in the country where the user clicks on the online advertisement [Fusch 2018: 80]. In order to assess the place of taxation of a digital service consisting in the placing of advertisement, according to Art. 5 par. 2 letter a) of the DST Directive proposal is decisive that the advertising in question appears on the user's device at the time of its use in that Member State during the tax period in order to access the digital interface. Revenues resulting from placing the advertisement will be divided among Member States in proportion to the number of times the advertisement is appeared on the user´s device during the tax period. Advertisement that have appeared to users

from third countries will be taken into account to determine the proportional distribution of revenue between Member States, but will of course not be taxable subsequently [Impact Assessment 2018: 154].

According to the DST Directive proposal, the second taxable service is the **making available to users of a multi-sided digital interface which allows users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users**. These services are also referred to as intermediary services[5]. The essence of this taxable service vests in making the online platform accessible and to enable connections between users. For intermediary services, the DST Directive proposal distinguishes between two groups of these services. In particular, the DST Directive proposal distinguishes between services that include a multi-sided digital interface that may also facilitate the provision of underlying supplies of goods or services directly between users and subsequently services that include a multi-sided digital interface of a kind that cannot be subsumed under the previous definition, also referred as the *other intermediary services*. In relation to intermediary services within the first group, for determining the place of taxation it is decisive that the user uses the device in a given Member State during a given tax period for access to the digital interface and closes the transaction through this device. Revenues resulting from the provision of intermediary services shall be distributed among the Member States in proportion to the number of users who have entered into a digital interface transaction in a given tax period. It follows from the defined material scope of DST that, outside its scope is digital retail consists of the sale of goods and services directly to consumers through a digital interface. In the case of the so called mixed business models providing services consisting in the making available of a digital interface and at the same time selling goods via a digital interface, revenues resulting from the sale of goods are not considered as taxable revenues under the DST Directive proposal. In that case of the operation of the business model, the value creation lies in the value of the goods or services, and the digital interface is only a means of making the business [Impact Assessment 2018: 155]. As for the so-called "other intermediary services", in order for users to access the digital interface, users are in principle required to register or create a user account. The establishment and existence of this account, whether during the whole or during the part of the tax period only, are also

[5] Intermediaries can be defined as an entities that connect - via an online platform - providers with users and that facilit transactions between them [A European agenda for the collaborative economy 2016].

followed by rules concerning the place of taxation and the determination of the proportion of total taxable revenues which are considered to be received in each Member State.

In this type of taxable service, the DST Directive proposal contains a wide range of services which will not be taxed under the **explicit exceptions** due to their specific nature. These exceptions include e.g. making available a digital interface the sole or main purpose of which is to make digital content available to users. This exemption from taxable intermediary services was adopted on the grounds that any interaction between users is only ancillary to the supply of digital content [DST Directive proposal]. These exceptions are defined in the Art. 3 par. 4 of the DST Directive proposal, including the reference to Annex I to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

The third taxable service under the DST Directive proposal is **the transmission of data collected about users and generated from user´s activities on digital interfaces**. For the place of taxation in relation to that taxable service, it is decisive that the user used the device in that Member State in order to access the digital interface, whether in a given or previous tax period and that the generated data were transferred in a given tax period. In relation to this digital service, it should be emphasized that the collection of data in itself is not a taxable event. The data collected may also be used exclusively for the company´s internal purposes and may not be transferred at all. The digital services tax applies to the transfer of data obtained from the specific activity of users of the digital interface [DST Directive proposal]. The proportion of total taxable revenues per Member State shall be determined by the number of users whose data have been generated.

4.2. Compromise DAT Directive Proposal

Following initial discussions in the relevant working groups as well as discussions at the ECOFIN Council of Ministers, it was established that in the first phase, the negotiations would focus on the DST Directive proposal. However, Member States have not agreed on the introduction of a digital services tax with a wide scope. At the level of a compromise solution, the DAT Directive proposal presents a potential instrument for taxing digital activities with a much narrower scope. Compared to the DST Directive proposal, the material scope of taxable digital activities is significantly narrowed according to the DAT Directive proposal, as it focuses exclusively on the **placing of a targeted advertisement on the digital interface by a taxable person**. At the same time, the proposal defines targeted

advertising, as any form of digital commercial communication for the purpose of promoting a product, service or brand aimed at users of the digital interface on the basis of the data collected about them [DAT Directive proposal: Art. 2].

Negotiations on the introduction of DAT were similarly accompanied by a number of objections. For example, it was argued that the limit values set for taxable persons should also be reduced given the narrower material scope. Some delegations objected to the introduction of DAT as a whole on the grounds that the taxation of the digital economy needs to be approached at the international OECD level given the global nature of digitization.

4.3. Comparison of the definition of digital services according to SDP Directive proposal

The SDP Directive proposal lays down the rules that extend the concept of permanent establishment to include a significant digital presence through which business is carried out, in whole or in part. It is clear from the definition of a taxable nexus that it is based on three main criteria which are linked to provision of digital services. Specifically, the definition of a taxable nexus is based on i) revenues from the provision of digital services; ii) number of users of digital services or iii) number of business contracts for digital services [Impact Assessment 2018: 50]. For the purposes of assessing the income criterion the Art. 3 of SDP Directive proposal specifies the fundamental definitions, which provides also the definition of digital services. This definition includes services which are **delivered over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology** [SDP Directive proposal: Art. 3]. The definition of digital services contained in the SDP Directive proposal is inspired by the definition of *electronically supplied service*, which is applied for the purposes of value added tax [Compare Regulation No 282/2011: Art. 7]. Definition of digital services in Art. 3 par. 5 of the SPD Directive proposal includes the same types of services as the definition of electronically supplied services pursuant to Art. 7 of the Council Implementing Regulation (EU) 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax.

The basic feature of digital services according SDP Directive proposal is that it is about services delivered via the internet or an electronic network, while the provision of such services is simultaneously characterized by the following features:

- the provision of these services is automated;
- the provision of these services requires minimal human intervention, and
- the absence of digital technologies makes it impossible to provide these services.

Human intervention on side of the provider neglecting the need for a human principle on the part of the user is decisive for the provision of digital services. The need for minimal human intervention will be maintained even in the event of the need for regular maintenance and correction of problems associated with the operation of the system [SDP Directive proposal].

Specifically, these digital services pursuant to the demonstrative enumeration in the Art. 3 par. 5 of the SDP Directive proposal includes in particular i) the supply of digitised products generally, including software and changes to or upgrades of software; ii) services providing or supporting a business or personal presence on an electronic network such as a website or a webpage; iii) services automatically generated from a computer via the internet or an electronic network, in response to specific data input by the recipient; iv) the transfer for consideration of the right to put goods or services up for sale on an internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated from a compute etc. [See SDP Directive proposal: Art. 3 par. 5].

The above enumeration of digital services is not complete (exhaustive) so when evaluating a specific digital service, which is not included in the stipulated enumeration, it is necessary to assess the above basic features of digital services.

The negative definition of digital services imply that the material scope of the SDP Directive proposal does not include similar to the DST Directive proposal the sale of the goods themselves or other services made possible by the use of the internet or an electronic network. However, it will be a digital service making the digital market accessible for consideration which will subsequently allow such a sale that will be the subject to taxation.

5. Conclusion

The main aim of the article defined in the introduction was to provide an analysis of the institute of digital services with an emphasis on digital services taxation. When assessing mutual relations, the paper analyzed digital services with regard to the concepts of information society services [e-Commerce Directive] and also electronically provided

services [Regulation No 282/2011]. Digital services can be understood synonymously with the concept of information society services which is historically older concept. The paper also in brief analyzed the case law of the Court of Justice of the EU in the cases of intermediary services provided by Uber and Airbnb online platforms with a different legal conclusion as to the legal nature of these services. At the same time, the individuality of meaning of the concepts from the tax law view was emphasized. The concept of digital services in the SDP Directive proposal was inspired by the institute of electronically supplied services regulated in relation to value added tax.

As emphasized by the European Commission, it must be possible to implement the interim solution easily and in a short period of time. In our opinion, the definition of taxable digital services in the DST Directive proposal does not meet this requirement, especially as regards the definition of the intermediary services. When defining intermediary services, the DST Directive proposal uses unclear terms which leaves space for different interpretations by Member States. At the same time, a relatively confusing definition of exceptions to the general definition of taxable intermediary services seems inappropriate for the concept of an interim solution.

Today, it is clear that no agreement has been reached on an appropriate model for the interim solution for the taxation of digital activities. At the same time, it is possible to think about the fact that a relatively long time has passed since the introduction of the idea of an interim solution. In these circumstances, it is possible to consider whether the idea of an interim solution is still justified or otherwise the basic concept of an interim solution is still maintained. On the other side, especially considering the fact that unilateral measures of individual states are more inclined to a solution in the form of a digital services tax or digital advertising tax as well as an interim solution, it can be expected that once a temporary solution is adopted it could become permanent. After all a similar situation has already occurred in the case of the common system of value added tax and the application of the principle of taxation in the state of destination which was supposed to be replaced by the principle of taxation in the state of origin. The initial date for the introduction of a system based on taxation in the state of origin was to be the end of 1996 [Štrkolec 2018: 257-270].

With regard to the specification of individual challenges of digitization for tax law, it can be stated that the complete suspension of work and negotiations on digital tax seems irrational at this stage. As stated by the European Commission no action in not the preferred option [Impact Assessment 2018: 49]. The challenges posed to tax law by digitization have a global dimension.

The ongoing discussions are mainly focused on the taxation of revenues resulting from the provision of digital services. Most unilateral measures implemented by states also favour this solution. The implementation of the concept of significant digital presence of the taxable person through unilateral measures is unique. In all the proposed possible solutions, the issue of value creation by users of digital services and attributing profit to the new business model in the given jurisdiction comes to the forefront.

As for the material scope of digital tax, the broadest definition of digital services is stated in the proposal for a comprehensive solution which is the SDP Directive proposal. Compared to this proposal, the presented interim solutions have introduced a certain restriction of the concept of digital services. The DAT Directive proposal, as an interim and compromise solution focuses exclusively on the only digital service, which is digital advertising. In conditions of assessing the scope of taxable digital activities, the definition of digital services according to the DST Directive proposal by defining three types of digital services is among these extreme solutions.

With regard to the complexity of the issue of digital taxation, the aim of the article was not to discuss all the problematic aspects of analyzed issue. The main focus was on the proposed EU solutions. A more detailed analysis of OECD measures on digital taxation that address so called “broader tax challenges” in particular the allocation of taxing rights has not been the subject of this paper. Similarly, reference may be made to thresholds below which the entity will be considered as taxable, etc. Following the above facts, it must be stated that the presented article mainly defines digital services and their features and thus represents only a partial analysis of the complex issue of digital taxation which of course requires further research.

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