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KMLZ VAT NEWSLETTER

EU Commission draws up a proposal for a new “digital service tax”

1. Introduction

The taxation of the digital economy is one of the EU Commission's most important issues, within the framework of its “Digital Single Market Strategy”. The EU Commission has now made a proposal for a Directive concerning a new “digital service tax” (proposal of 21.03.2018 – COM (2018) 148 final). The EU Commission's aim is to fill in the current gaps in the taxation of revenue. These result from the fact that, as regards the digital economy, the place where the taxable person is established often deviates from the place where the value is created. Here, the EU Commission uses the means available under VAT law. On the one hand, the tax base for the digital service tax is determined based on turnover (rather than profit). On the other hand, taxation is based on the customer's place of establishment, rather than on the taxable person's place of establishment. It is estimated that the proposed digital service tax may generate additional tax revenue in the amount of almost € 5 billion.

2. Content of the proposed Directive

In the following, we will answer the most important questions concerning the new digital service tax.

VAT plus 3% for the digital economy

In the EU Commission's view, the existing corporate tax law has failed when it comes to the taxation of revenue generated by the digital economy. An interim tax of 3% on specific online revenues should be levied until the OECD has remedied the situation. Companies with a world-wide revenue exceeding EUR 750 million would be affected. The placing of online advertising, the facilitation of online sales portals and the sale of user data would all be taxed. Thus, the digital service tax would be focused on the USA's internet giants.

2.1 Which activities will be taxed?

The digital service tax is intended to impose a tax on revenues, where the user (B2B and B2C) creates the value, i.e. income, which is generated by the taxable person through the users' activities. The directive is limited to revenue related to so called “digital interfaces”. This means any kind of software, incl. websites and mobile applications. The following activities would be subject to taxation:

- The placing of advertising on a digital interface.
- The making available of “multi-sided” digital interfaces, which allows users to interact with other users, as well as to sell goods or services.
- The transmission of data collected about the user.

There are some exceptions. For example, revenue generated by regulated crowdfunding service providers does not fall within the scope of digital service tax.

2.2 How will the tax amount be determined?

The tax rate shall be 3%. It will be levied on the “revenues” resulting from the abovementioned activities. Here, “reve-



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nues" mean the "gross revenues", less VAT. Thus, this amount corresponds to the taxable amount as defined by VAT law.

2.3 Who will be taxed?

So called "entities" shall be liable for the payment of the tax. The term "entity" in the Directive means any legal person or legal arrangement. Further, the total amount of worldwide "revenues" reported by the entity must exceed € 750 million, whereas at least € 50 million must be obtained within the EU.

2.4 Place of taxation?

The revenue shall be taxable where the user is established. The users will be deemed to be located in the Member State of the IP address of the device used by the user at the time of supply. If more accurate, taxable persons shall be permitted to use other methods of geolocation. When determining the user's location, taxpayers are not permitted to identify them.

2.5 How will taxes be levied?

As soon as an entity becomes taxable in one of the Member States, it would be required to register for tax purposes there (so called "Member State of identification"). If a taxable person is liable for the payment of the digital service tax in more than one Member State, he may choose one Member State of identification among them. The notification must be made no later than 10 working days following the end of the first tax period. A registration with retroactive effect will not be possible.

The EU-wide revenue earned in one year would have to be

reported to the Member State of identification by no later than 30 working days following the end of the respective calendar year. The tax would also have to be paid by this time. The Member State of identification will be responsible for forwarding both the reported data and the paid tax to the respective Member States of consumption.

2.6 When will this regulation enter into force?

The Member States would have to implement the Directive by 31.12.2019. The digital service tax would become due as of 01.01.2020. If the Directive is adopted, both the Member States and companies will only have very little time to implement the Directive. It is left open to question whether this rather short period will afford sufficient time for the implementation of a completely new tax. In comparison, the expansion of the pre-existing MOSS-System to distance sellers will take until 01.01.2021. The completely new reporting system for digital taxes, however, will have to already be implemented as of 01.01.2020.

2.7 Will the Directive be adopted?

This is difficult to say. Member States are certainly eager to increase their tax revenue. On the other hand, the USA and German industry have already raised opposition to the digital services tax. Thus, presently it seems questionable whether the digital services tax will be implemented. Further, to date it is unclear as to whether the Directive can be deemed to be in conformity with EU law. The Directive seeks to implement a new indirect tax, which is legally based on Art 113 of the TFEU. The EU may only implement further indirect taxes if this is necessary for the functioning of the internal market and to avoid distortions of competition. It will be for the courts to clarify, whether or not this is the case.