



TITHE AN OIREACHTAIS

**AN COMHCHOISTE UM AIRGEADAS, CAITEACHAS POIBLI AGUS ATHCHÓIRIÚ,
AGUS TAOISEACH**

Tuairim Réasúnaithe

**COM(2018)147 Togra le haghaidh Treoir ón gComhairle lena Leagtar Síos Rialacha
a Bhaineann le Cánachas Corparáide ar Láithreach Dhigiteach Shuntasach**

agus

**COM(2018)148 Togra le haghaidh TREOIR ón gCOMHAIRLE maidir leis an
gComhchóras Cánach Seirbhísí Digiteacha ar Ioncaim a Thig as Seirbhísí
Digiteacha Áirithe a Sholáthar**

Bealtaine 2018

HOUSES OF THE OIREACHTAS

**JOINT COMMITTEE ON FINANCE, PUBLIC EXPENDITURE AND REFORM AND
TAOISEACH**

Reasoned Opinion on

**COM(2018)147 Proposal for a Council Directive Laying Down Rules Relating to the
Corporate Taxation of a Significant Digital Presence**

and

**COM(2018)148 Proposal for a COUNCIL DIRECTIVE on the Common System of a
Digital Services Tax on Revenues Resulting from the Provision of Certain Digital
Services**

May 2018

Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach

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Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach

JOINT COMMITTEE ON FINANCE, PUBLIC EXPENDITURE AND REFORM AND TAOISEACH

Report under Dáil Standing Order 114 and Seanad Standing Order 116 on COM(2018)147 and COM(2018)148 - Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence and a Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services.

1. Introduction

1.1 The principle of subsidiarity is defined in Article 5(3) of the Treaty on European Union (TEU) as follows:

"Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

Article 5(3) also gives specific responsibility to national parliaments to ensure that EU institutions apply the principle in accordance with Protocol 2 on the application of the principles of subsidiarity and proportionality.

1.2 The test established by Article 5(3) TEU is, in effect, a "comparative efficiency" exercise, involving a "necessity" test and a "greater benefits" test:

- (i) *Necessity* - Is action by the EU necessary to achieve the objective of the proposal? Can the objective of the proposal only be achieved, or achieved to a sufficient extent, by EU action?
- (ii) *Greater Benefits* - Would the objective be better achieved at EU level – i.e. would EU action provide greater benefits than action at Member States level?

1.3 To assist national parliaments in their evaluation of subsidiarity compliance, Article 5 of Protocol 2 provides explicitly that

"Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States..."

1.4 Therefore, any new draft legislative act,

- must be supported by a sufficiently 'detailed statement' to allow a judgment to be made by national parliaments on its compliance with the principle of subsidiarity
- must clearly satisfy both the *necessity* and *greater benefit* tests
- must, under the principle of conferral set down in Article 5(2) of the TEU, show that the Union is acting 'only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.'

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2. Scrutiny by the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach

The Joint Committee (hereafter referred to as the "Committee") has scrutinised these proposals at three meetings on 26 April 2018, 1 May 2018 and 3 May 2018.

2.1 At its meeting of 1 May the Committee agreed that COM(2018)147 and COM(2018)148 warranted further scrutiny and agreed to invite Irish MEPS, officials from the Department of Finance and the Office of the Revenue Commissioners to a meeting of the Committee to further discuss and to be briefed on the technical aspects of the proposals. The Committee also agreed to invite stakeholders/experts to discuss the wider implications of the proposals on Ireland's corporate tax structure.

2.2 Respective witnesses attended Committee meetings on 26 April 2018, 1 May 2018 and 3 May 2018. Following the Committee's consideration of these matters, the Committee agreed a reasoned opinion on the proposal at its meeting on 10 May.

2.3 The Joint Committee wishes to thank the witnesses for their assistance in relation to the Committee's work on these significant proposals.

3. Opinion of the Joint Committee

The Committee has had specific regard to the Treaty provisions and is of the opinion that these proposals do not comply with the principle of subsidiarity. The reasons are set out in the following paragraphs:-

3.1 The digitalisation of the global economy is having a transformative impact and this impact presents challenges in terms of the applicability of the existing global tax framework.

3.2 The existing global taxation system requires modification to respond to challenges posed by digitalisation of the economy.

3.3 The established corporate tax framework, which taxes profits based on where value has been created has not evolved to match the digitalisation of global business and that the current Permanent Establishment (PE) Test does not reflect modern business models.

3.4 The Committee is cognisant of the long-standing role played by the OECD/G20 in developing and publishing the Base Erosion and Profit Shifting [BEPS] initiative. Furthermore, the Committee is aware that taxation of the digital economy features prominently in the BEPS Action Plan published in 2015 and that on-going reviews on the challenges posed by digitalisation are currently being examined with a view to a global solution being identified and reported in 2020.

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- 3.5 However, the Committee notes that there is no single definition of what constitutes the Digital Economy. The Committee refers to publications by both the OECD and the IMF reflecting that there are no agreed definitions of the digital sector, products or transactions. In that regard, the Committee notes the difficulties involved in calculating the size of the digital economy and in ring-fencing elements of the digital economy for taxation purposes.
- 3.6 The Committee is of the view that the EU proposals introduce a narrow solution as regards the concept of digital permanent establishment for taxing profits from the sale of digital services, when other goods and services can use many of the same mechanisms to avoid tax and are not addressed by these proposals.
- 3.7 The Committee reiterates that taxation and the rights of Member States to impose, administer and repeal taxes is a sovereign right enshrined in law and is therefore a national competence.
- 3.8 The Committee is of the opinion that the implications of the proposals fall generally within the area of tax policy and thus impinges on a national competency.
- 3.9 The Committee notes that taxation of the Digital Economy will also have implications as regards the allocation of profits and that the proposals do not explicitly state the method of allocation. If the allocation method is based on an apportionment formula similar to that proposed in the CCCTB proposal or attributed to end users of online digital services, this approach will naturally favour and advantage large member states with large population and customer bases. Therefore, it is the view of the Committee, that in the absence of any impact assessments for individual member states, it is probable that these proposals will impact disproportionately and negatively on the finances of smaller members states.
- 3.10 The Committee has particular concerns regarding the EU acting unilaterally in proceeding to introduce proposals designed to tax the digital economy when existing international reviews are as yet not completed. Specifically, the Committee notes the on-going studies and analysis of the OECD Task Force on the challenges arising from the digitalisation of the global economy. The Committee deems that it is necessary that all parties work together towards a durable and global based consensus approach and in this vein supports the fact that all 113 countries in the OECD BEPS inclusive framework have agreed that a global rules based system based on international agreement is critical.

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- 3.11 The Committee notes that concerns have been raised at an international level with regard to unilateral action by the EU in this domain. The narrow application of the interim tax focusing primarily on technological companies gives the perception that these companies are being treated exceptionally. It could be construed that the proposals are arbitrary and discriminatory in practice in pinpointing a particular sector of the wider economy. This perception has the potential to escalate global trade tensions that may impact adversely on the EU economy.
- 3.12 The Committee has reservations that the EU acting unilaterally could increase the administrative burden and costs and may lead to a position whereby Member States will have to embark on renegotiating tax treaties with Third Countries.
- 3.13 The Committee is of the view that the Digital Services Tax (DST) or turnover tax is a blunt and crude instrument – to be derived from gross revenue that takes no account of whether a business is profitable or loss making.
- 3.14 The Digital Services Tax as designed poses a significant threat to the viability of start-ups and small business enterprises (SMEs) and is contrary to the stated EU objective of job creation and wider economic growth.
- 3.15 The Committee has concerns as to the legality of the mandatory application of a 3% annual levy where Member States have no discretion in either increasing or decreasing the tax rate. The set rate of 3% determined at a centralised level raises issues concerning the legality of the proposal and whether it is in violation of the principle of tax sovereignty.
- 3.16 The Commission estimates that €5billion in additional revenue will accrue on an annual basis from the imposition of the Digital Services Tax. However, the underlying data used in calculating this figure is not published. The Committee considers it difficult to verify or conduct a robust assessment of the impact of the proposal in the absence of such data.
- 3.17 The Committee expresses reservations that the proposal introducing a Digital Services Tax does not contain or provides for a “sunset clause”. The Committee notes that temporary levies or taxes can become permanent and that Member States can become dependent on such revenue streams. The Committee deems this problematic in view of the fact that such a mechanism has the potential to create economic uncertainty for businesses.
- 3.18 The Digital Services tax has the potential to lead to some form of Double Taxation. As the DST is not creditable against corporation tax paid, the scope for some form of double taxation occurring is increased.
- 3.19 The Committee recognises the ongoing work and studies in relation to what constitutes “added value” in the Digital Economy and Digital Services realm. The Committee notes that the concept of “added value” requires careful analysis and that no specific definition or recognised label/standard currently exists. In the

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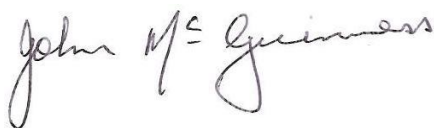
absence of clarification and a recognised standard, the Committee deems it premature to devise a taxing model in the absence of defined concept criteria.

- 3.20 The Committee notes that the timeframes for both the publication of the OECD/G20 Report on the Taxation challenges posed by the Digital Economy and the implementation/enactment of the EU proposals coincide. The Committee has concerns about the development of two divergent and incompatible taxation models which have the potential to engender a two-tier system adding greater uncertainty and fragmentation.
- 3.21 In that regard, the Committee deems that the OECD should be fully supported in completing its analysis and review of taxation and the digital economy with the ultimate objective of global consensus and alignment achieved on the implementation of a new global taxation framework that has international acceptance. The Committee believes this approach offers the best way forward in formulating a global response to the global issue that is taxation of the digital economy.
- 3.22 The Committee is satisfied that the above points, taken together, clearly demonstrate that the proposed Directives breach the principle of subsidiarity.

4. Recommendation of the Joint Committee

The Committee agreed this Report under Dáil Standing Order 114 and Seanad Standing Order 116 on 10 May 2018.

The Committee, pursuant to Standing Orders recommends the reasoned opinion contained in Section 3 above for agreement by Dáil and Seanad Éireann.



John McGuinness T.D,
Chairman,

10 May 2018

Appendix 1

**Membership of the Joint Committee on Finance, Public
Expenditure and Reform and Taoiseach**

Deputies: John McGuinness TD (FF) (Chairman)
 Peter Burke TD (FG)
 Joan Burton TD (Lab)
 John Deasy TD (FG)
 Pearse Doherty TD (SF)
 Michael McGrath TD (FF)
 Paul Murphy TD (IND)

Senators: Gerry Horkan (FF) (Vice-Chairman)
 Paddy Burke (FG)
 Rose Conway-Walsh (SF)
 Kieran O'Donnell (FG)

Appendix 2

Transcripts of Joint Committee Meetings

The Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach met with Irish MEPs, officials from the Department of Finance and the Office of the Revenue Commissioners and representatives of the Irish Tax Institute and Irish Christian Aid in public session to discuss the proposals COMs(2018)147 and 148. Details of the meetings with a link to the meeting transcripts, is set out below.

[26 April 2018](#)

1 May 2018

3 May 2018

Appendix 3

Orders of Reference

a. Functions of the Committee – derived from Standing Orders [DSO 84A; SSO 70A]

- (1) The Select Committee shall consider and report to the Dáil on—
 - (a) such aspects of the expenditure, administration and policy of a Government Department or Departments and associated public bodies as the Committee may select, and
 - (b) European Union matters within the remit of the relevant Department or Departments.
- (2) The Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann for the purposes of the functions set out in this Standing Order, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.
- (3) Without prejudice to the generality of paragraph (1), the Select Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments, such—
 - (a) Bills,
 - (b) proposals contained in any motion, including any motion within the meaning of Standing Order 187,
 - (c) Estimates for Public Services, and
 - (d) other mattersas shall be referred to the Select Committee by the Dáil, and
 - (e) Annual Output Statements including performance, efficiency and effectiveness in the use of public monies, and
 - (f) such Value for Money and Policy Reviews as the Select Committee may select.
- (4) The Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies:

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- (a) matters of policy and governance for which the Minister is officially responsible,
 - (b) public affairs administered by the Department,
 - (c) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,
 - (d) Government policy and governance in respect of bodies under the aegis of the Department,
 - (e) policy and governance issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,
 - (f) the general scheme or draft heads of any Bill,
 - (g) any post-enactment report laid before either House or both Houses by a member of the Government or Minister of State on any Bill enacted by the Houses of the Oireachtas,
 - (h) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,
 - (i) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,
 - (j) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in subparagraphs (d) and (e) and the overall performance and operational results, statements of strategy and corporate plans of such bodies, and
 - (k) such other matters as may be referred to it by the Dáil from time to time.
- (5) Without prejudice to the generality of paragraph (1), the Joint Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments—
- (a) EU draft legislative acts standing referred to the Select Committee under Standing Order 114, including the compliance of such acts with the principle of subsidiarity,

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- (b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,
 - (c) non-legislative documents published by any EU institution in relation to EU policy matters, and
 - (d) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.
- (6) Where a Select Committee appointed pursuant to this Standing Order has been joined with a Select Committee appointed by Seanad Éireann, the Chairman of the Dáil Select Committee shall also be the Chairman of the Joint Committee.
- (7) The following may attend meetings of the Select or Joint Committee appointed pursuant to this Standing Order, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:
- (a) Members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,
 - (b) Members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and
 - (c) at the invitation of the Committee, other Members of the European Parliament.
- (8) A Select Committee appointed pursuant to this Standing Order may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department or Departments, consider—
- (a) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and
 - (b) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select.

b. Scope and Context of Activities of Committees (as derived from Star Orders) [DSO 84; SSO 70]

- (1) The Joint Committee may only consider such matters, engage in such

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activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders; and

- (2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil and/or Seanad.
- (3) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Standing Order 186 and/or the Comptroller and Auditor General (Amendment) Act 1993; and
- (4) any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Orders [DSO 111A and SSO 104A].
- (5) The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—
 - (a) a member of the Government or a Minister of State, or
 - (b) the principal office-holder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request made to the Ceann Comhairle / Cathaoirleach whose decision shall be final.

- (6) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Dáil Standing Order 28. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.