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EBF comments on the proposal for a Digital Services Tax

Executive summary

The EBF recognises that the digitalisation of the economy questions the standard international taxation principle based on the concept of "Permanent Establishment", which requires a physical presence.

Such a challenge definitely needs to be addressed in a consistent and coherent way and from a global perspective. The efforts of the OECD in order to elaborate comprehensive solutions need to be supported much more than short term reactions with possibly unintended negative consequences for the European economy.

European banks are fully taxed according to prevailing international standards and, due to applicable regulations, their taxable profits arise where the real economic activity is undertaken. Any additional taxes for European banks would eventually affect their ability to compete globally and to finance the European economy and households.

It is the EBF's understanding that Article 3(4)(b) of the proposed Directive on the common system of a digital services tax (DST) on revenues resulting from the provision of certain digital services contains an exemption for "the supply by a trading venue or a systematic internaliser of any of the services referred to in points (1) to (9) of Section A of Annex I to Directive 2014/65/EU (MiFID)". However, we are concerned that this exemption appears to be limited in scope, especially since it applies only to trading venues that are regulated under MiFID. Consequently, any venues which are not regulated by MiFID, including all third country venues, would remain under the scope of the DST. This would appear to bring into scope non-MiFID instruments where they are traded via such venues.

If a DST were introduced in the EU as an interim measure, then a clear exemption must be provided not only ad hoc for payments, trading venues or crowdfunding, but for all types of financial and banking services. In respect of the latter, consideration should notably be given to the list of activities subject to mutual recognition in Annex 1 of the CRD IV. We urge the Council to carefully consider the wording of this exemption to avoid any legal uncertainty and ensure that it is future-proof.

As an alternative for ensuring that only large digital service providers would be subject to the DST, the EBF recommends that the calculation of the thresholds should only take into account the activities and commissions targeted by the taxation, and not the global turnover of companies.

Need for global actions

Digitalisation creates widespread changes in the economy and the way businesses operate. As large digital corporations develop new valuable business models that allow them to supply new digital services or products, they are featured by a limited physical presence. However, where value mainly stems from user interaction and the use of data from such interaction, it is acknowledged that existing principles of international taxation may fall short to appropriately tax income derived from such new business models, i.e. to tax income in those jurisdictions where value is actually created.

In order to ensure a fair taxation of revenues generated by such new business models, a thorough rethinking and redesign of the principles of international taxation (in particular nexus and profit allocation) as embedded in international tax treaties is needed. The DST, as it is currently proposed, does not sufficiently cover the risks of double taxation.

The EBF welcomes the idea that a reform is needed in the corporate tax rules, but would like to underline that any initiatives taken to address the tax challenges should preferably be internationally coordinated and aligned with the work performed by the OECD in the context of the BEPS Action Plan. The taxation of the digital economy is a global issue and it should be considered as such by the legislator. Non-global actions will cause legal uncertainty and fragmentation to the applicable international tax rules.

We therefore urge the Council to consider in priority the development of a global framework at the level of the OECD so as to align any European initiatives with the work performed in the context of Action 1 of the BEPS Action Plan.

Why banks are different

If it is still considered necessary to introduce short term measures, as is the case with the proposed DST, the EBF urges that such an interim measure is applied in a targeted manner and does not impact the European banking industry.

Banks, are indeed inherently different from other businesses, including "pure" digital corporates, in the sense that they have, as a rule, a regulated / licenced presence in the jurisdictions in which they operate. In addition, retail banks generally do not seek to service their customers across many jurisdictions. There is therefore no need for an additional gross revenue-based tax on income from banking services and products and any concerns that are raised regarding a fair taxation of revenue generated from new digital business models by large digital players do not apply to banks.

Technology advancement by itself has not fundamentally changed how banks generate their revenues. Rather technology and automation may increase operational efficiencies or replace certain business functions that are becoming more mobile:

- Banks, acting in an agile way, are currently adapting the way in which they address their clients by using new technological means and, as such, are responding to quickly evolving market circumstances proper to the Digital Economy. However, their functions and main operations remain the same, regardless of whether they operate online or in the physical world. Digital transformation allows banks to keep pace with new digital developments and to provide financial services in a way that best suits rapidly changing clients' needs in the digital world (e.g. by offering online applications next to 24/7, call centre access and traditional physical distribution channels).

- In a banking context, data may allow banks to derive value from its use to produce information on how to best tailor/complement the banking experience for customers and the ability to offer other useful banking services and products. For that reason, banks are increasingly investing in analytics to best drive value from the data they hold. But while digital developments allow banks to make better use of data (ex. construction of brands' reputation online, better customer experience), the collection and analysis of data by banks is not new and keeps being ancillary to the business of selling financial services and products. The recitals of the draft Directive also explicitly confirm that the DST is not meant to be "a tax on the collection of data, or the use of data collected by a business for the internal purposes of that business, or the sharing of data collected by a business with other parties for free".

Given the fact that the proposed DST takes the form of a non-creditable gross revenue based tax, it is absolutely key that the measure is appropriately targeted and that the DST scope does not include any revenues from financial services or products that are already appropriately taxed. If this were not the case, the DST would lead to actual double taxation and to an additional administrative burden for the financial sector in Europe.

We encourage the Council to recognise that the provision of financial services does not derive significant value from user participation. Therefore, revenues derived from these activities should not be within the scope of any EU DST as they are often subject to unique tax and regulatory regimes already.

As an alternative for ensuring that only large digital service providers would be subject to the DST, we encourage the Council to consider calculating the €750 million consolidated turnover threshold based on revenue from digital services only. This would meet the initial intention of the proposal to target large digital players only and it would avoid that industries for which existing principles of international taxation already lead to an appropriate taxation of their revenue would unintentionally be targeted by the DST.

Trading venues and other financial services platforms

The proposal for a Directive on a DST covers under its scope revenues from online advertising, the sale of raw data and intermediation services.

Particular concerns arise with regard to the exemption for listed intermediation services, which are currently considered to be too narrow to exclude the different types of digital platforms and interfaces through which banks provide financial services and products

(while any revenues from such digital platforms or interfaces are already subject to regular corporate income taxation).

It is the EBF's understanding that Article 3(4)(b) of the proposed Directive contains an exemption for "the supply by a trading venue or a systematic internaliser of any of the services referred to in points (1) to (9) of Section A of Annex I to Directive 2014/65/EU (MiFID)". However, we are concerned that this exemption appears to be limited in scope, especially since it applies only to trading venues that are regulated under MiFID. Consequently, any venues which are not regulated by MiFID, including all third country venues, would remain under the scope of the DST. This would appear to bring into scope non-MiFID instruments where they are traded via such venues.

In the explanatory memorandum, the Commission stated that "multi-sided digital interfaces which allow users to receive or to know about the existence of trade execution services, investment services or investment research services", and, in particular, those which "provide a safe environment for financial transactions" should not fall within the scope of the DST. Indeed, reference is made to the importance of such financial services, as they facilitate transactions between buyers and sellers of financial products "which would not occur otherwise" and provide the "specific conditions" needed to achieve the "essential and distinct objective of facilitating funding, investments or savings". It is therefore apparent from the explanatory memorandum that the Commission does not intend the DST to apply to services supplied by trading venues.

We encourage the Council to extend the existing exemption under Article 3(4)(b) to cover venues which are not regulated by MiFID, including all third country venues. This appears to be in line with the Commission's intention to carve out all financial services, as stated in its explanatory memorandum and would avoid a position where the rules could discriminate between services provided by EU and non-EU trading venues.

In the same line of thinking, the scope of exclusions must further be expanded in order to ensure that all types of financial services platforms that are operated by banks (including trade finance platforms, M&A platforms, securities brokerage platforms etc.) are clearly excluded.

If a DST were introduced in the EU as an interim measure, then a clear exemption should be provided not only ad hoc for payments, trading venues or crowdfunding, but for all types of financial and banking services. In respect of the latter, consideration should notably be given to the list of activities subject to mutual recognition in Annex 1 of the CRD IV. We urge the Council to carefully consider the wording of this exemption to avoid any legal uncertainty and ensure that it is future-proof.

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About the EBF

The European Banking Federation is the voice of the European banking sector, bringing together 32 national banking associations in Europe that together represent a significant majority of all banking assets in Europe, with 3,500 banks - large and small, wholesale and retail, local and international – while employing approximately two million people. EBF members represent banks that make available loans to the European economy in excess of €20 trillion and that reliably handle more than 400 million payment transactions per day. Launched in 1960, the EBF is committed to a single market for financial services in the European Union and to supporting policies that foster economic growth.

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