Short Term Measures
The EU Digital Services Tax (DST) Proposal v. The Indian Equalisation Levy

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Economy digitalized now – existing rules cannot deal with
- BEPS AP1 – considered this issue – 3 options:
  - Digital PE
  - Withholding taxes
  - Equalisation levy (turnover taxes)
- Equalisation levy – national measures (India – first)
- EU Digital Services Tax Proposal – landmark proposal in
  EU – analyze specifics, compare with Indian law
## Object and Purpose, Legal Basis

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<thead>
<tr>
<th>OBJECT AND PURPOSE</th>
<th>EU DST</th>
<th>Indian Equalisation Levy</th>
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<tbody>
<tr>
<td>Protect integrity of internal market – proper functioning</td>
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<td>PE not suitable for new business; based on BEPS AP1 – levy to have level playing field for digital, other businesses</td>
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<td>Tax bases not eroded – public finances in EU sustainable</td>
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<td>Social fairness – level playing field for all businesses in EU</td>
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<td>Fight ATP - digital companies – no tax where value created Interim tax – “intention”</td>
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<td>Legal basis – Art. 113 TFEU addressing indirect taxes, requiring unanimity - Fragmentation – reason stated for competence - Valid basis? Questioned by States – may change</td>
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<td>Separate Chapter in the Finance Act, 2016 – not in Income Tax Act, 1961 – S. 90 and dualism re: treaties</td>
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Taxable Revenues – EU DST

- Gross revenue (net VAT, other taxes) - situations:
  - Placing ads on websites, software or apps (incl. 3rd party ads);
  - Providing a digital platform – users can find/interact with other users – *may* also facilitate supply of goods/services b/w them;
  - Transmission of user data collected - websites, softwares, apps

- Google Adsense, Uber/AirBnB, Facebook – all covered!
Taxable Revenues – EU DST

- Mere payment or communication services through digital interface – excluded – dependent on support software!

- E-commerce transactions; intra group transactions; investment/trade - crowdfunding – outside scope

- If main purpose of making available own interface – supply digital content to users – excluded (only user-user)
**Taxable Revenues - Comparison**

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| Targeted tax – “specialized” services only where user value creation - user role more complex, monetizing user input | Gross revenue - specified services –
  - online advertisements, any provision of digital advertising space or other facility/service for online advertisement;
  - Any other service as may be notified by the Central Government in this behalf |

**ISSUES:**
- More emphasis on user value creation in EU - EU proposal also covers other businesses (newspapers etc.), but no e-commerce!
- Indian tax – on advertisements or on all services – legal competence under Constitution?
# Taxable Person - Comparison

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<td><strong>Any entity or group service provider</strong> – EU or non EU where:</td>
<td><strong>Resident or Indian PE (of other NR) service recipient</strong> of “specified services” from</td>
</tr>
<tr>
<td>• Total worldwide revenues &gt; EUR 750 million per yr; and</td>
<td>an NR</td>
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<tr>
<td>• Total EU revenues &gt; EUR 50 million per yr</td>
<td><strong>De minimis</strong> threshold of around USD 1400 (INR 1 lakh)</td>
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<td></td>
<td>Exempt if NR – taxable fixed base PE in India, attributable</td>
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<td>Non-business payments exempt</td>
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</table>

**ISSUES:**

- Service provider taxable in EU v. service recipient in India – impact on treaties?
- PE exemption per Art. 5(1) – dependent agent PE/service PE not included?
- Difference in thresholds – very low in India, very high in EU (*de facto* discrimination?)
Place of Taxation and Revenue Allocation – EU DST

- Taxable revenues – deemed obtained – member State where users are located (based on IP/geolocation):
  - For ad services, State where member sees ad on device;
  - For digital platforms, a) State where users use a device and concludes underlying transaction or b) State where user opens account allowing access to interface;
  - For data transmission, if data generated from device in State used to access website, software etc. and then transmitted the same tax year
Revenue allocation – divided again by type of service:

- For ad services, proportion of total revenues attributed to the number of times an ad appears on device in State.

- For digital platforms, proportion of total revenues - number of users - underlying transactions in State; where not applicable, number of users opened account in State.

- For data transmission, proportion of total revenues to number of users – data generated & transmitted – having used a device in State to access.
Place of Taxation - Comparison

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<td>Taxable revenues – deemed obtained – member State where users are located (IP address/other geolocation)</td>
<td>Domestic tax measure – revenues taxable in India based on service recipient and not users – unilateral measure</td>
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ISSUES:
• IP based allocation of taxation rights – issues:
  • VPNs – easy to get around geolocation
  • Food delivery/transportation apps – order can be made by user in EU for services in India!
  • AirBnB – taxing rights to State other than residence/source? Travelling users?
• Privacy concerns – cookie/fingerprinting tracking
• User v. service recipient source tax? – better model?
## Calculation and Tax Rate - Comparison

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<td>DST - proportion of taxable revenues obtained in one tax period by a taxable person as calculated per the Directive - 3% rate applicable</td>
<td>6% tax rate on covered services – to be reduced from service fee by service recipient and paid</td>
</tr>
<tr>
<td>CIT deduction in EU States as cost – recital, not mandated</td>
<td>Exemption for service recipient from income tax</td>
</tr>
<tr>
<td>One stop shop system – one State – find taxpayer, collect tax, allocate tax</td>
<td>Interest and penalty – failure</td>
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### ISSUES:
- Deduction of income tax in both cases (not mandatory in EU) – does this make it an income tax, have impact on treaty coverage?
Case Study

Total taxable revenues – USD 2000 (4 countries)

Austria/Germany share – 2/8 each – USD 500 (tax base) – 3% DST each

Indian levy – 6% on customer (withholding) as well since ad services!

Two new (gross level) taxes apart from US income tax, GST in India (assuming no credit in the US) – even if profits limited
Thank You!

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