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Tax challenges arisen from the digital economy: compliance of the French DST with European Union Law

by

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Summary

In this new era where an important part of the economy is made through digital services, the existing tax laws are lacking and thus gives possibility to base erosion and aggressive tax planning. For many it feels like huge undertakings are legally escaping their duty to pay taxes. In response many talked about new ways of taxing this ‘new economy’ but world wide taxation on digital economy is not yet achieved and at the European Union level it is yet not harmonized. It results that many Member State felt frustrated and could not wait any longer. Like France other Member State introduced a Digital Service Taxation (hereinafter DST)[1] to fulfill the aim of a more fair taxation in regards of digital services. These DSTs are enacted and implemented until a world wide or at Union level measure will be insured.

[1]Digital Service Taxation

Abbreviation list

ABBREVIATION TEXT	EXPLANATION
Art.	**Article**
Cf.	Latin:*conferatur*Used to indicate an indirect quote. It referes to the general idea of another written statement
DST	Digital Service Tax
The Commission	The Commission of the European Union
EU	The European Union
EU-Law	European Union Law (including all sources of law on the level of the EU)
Ibid.id.	Latin: *ibidem* Used to reference to a quoted work which has been already mentioned in previous references
Market State	State of Economical Activity (State in which domestic market the actual provision of the digital advertisement service takes place)
No.	Number

OECD	Number
OECD	Organization for Economy Cooperation and Development
p.	Page
para.	Paragraphe
PE	Permanent Establishment
Resident State	State of Residency (State where the Multinational-Enterprise is registered for tax purposes)
SMNE(s)	
Source State	State of the Source of Income (State where the source of the income of the company is located)
TFEU	Treaty on the Function of the European Union
VAT	Value-Added-Tax

1. Introduction

1. Topic.

Digitalization is the new era, it is the' new economy'. Digitalization gives the chance to companies to grow and establishes themselves everywhere but at the same time gives companies the freedom to choose the best resident State (with low rate taxation) and still grow their businesses all around the world without even having a physical presence elsewhere. This economy is blooming and tax laws are not following this is why the OECD and the European Commission, each at their levels tried into introduce proposal on 'new taxation for the new economy'.

This thesis does not focus on the issues of missing taxation, tax gap or even tax planing as these topics have been exhaustively researched by much competent authors. Rather this thesis focuses on the birth of a new taxation that has seen the day in different Member States of the European Union exactly because the lack of modernization of the 'old' taxation system left States with tax revenue loss because of this new era of digital economy.

The main issue at an international (as well perhaps Union level) will be the territoriality principle. Under DSTs source states will have the possibility to tax income made through their state or nationals even though undertakings will not have any physical presence in the source state[2]. This goes beyond what we knew until now, it goes beyond the jurisdictions fallen upon each states. Naturally, no state can possibly exercise jurisdiction in another states jurisdiction[3].

In reality, the services targeted by the French DSTs are: "advertising targeting, the sale of personal data and certain forms of online

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[2] C. Brokelind, An Overview of Legal Issues Arising from the Implementation in the European Union of the OECD's Pillar One and Pillar Two Blueprint, 1 75 Bull. Intl. Taxn. 5 (2021), Journal Articles & Opinion Pieces IBFD (accessed 3 May 2021)

[3] *See* UK: Opinion of Advocate General Jääskinen, 20 Nov. 2014, Case C-507/13, *United Kingdom v. Parliament and Council* , EU:C:2014:2394, para. 39.
See also the decision of the Permanent Court of International Justice (PCIJ) in FR/TU: PCUJ, 7 Sept. 1927, *France v. Turkey* (the *Lotus Judgement* 927), Ser. A, No. 10, para. 225, available at www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm (accessed 22 Apr. 2021). For a comment on the extent in tax law, *see* S. Kingston, *Territoriality in EU (Tax) Law: A Sacred Principle, or Dépassé?* , in *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism* sec. 2.1. (J. Englisch ed., IBFD 2016), Books IBFD.

intermediation" Article 299 II 1 ° and 2 ° of the Code General des Impôts (French Tax code). The French Government through this tax has two main objectives: first of all to harmonize the average tax rate for small and medium-sized businesses (which are in reality subject to higher taxes, 23.7%) and large groups (17.8%). Secondly, to set an example within the European Union.

The French tax has its limits and will not affect all companies. The French government wants fairer taxation and therefore does not want to penalize smes and start-ups. Thus, only large companies are affected by this tax because of the establishment of thresholds. A company is liable in the context of this tax when during a financial year its turnover exceeds the limit of EUR 750 million worldwide revenue and crosses the threshold of EUR 25 million revenue in France. The problem is that the vast majority of its large digital companies are foreign.

As a result, comes to question of the compatibility of the tax with European Union law, in particular with the freedom of establishment[4] and the freedom to provide services[5].

This investigation will try to explain and show whether the French Digital Service Tax (hereinafter DST) (Member States that have introduced DST do not diverge a lot from one another, except for Hungary and Austria) is in compliance with Primary European Union Law.

[4]art 49 and 54 TFEU

[5] art 56 TFEU

2. Method and material

This research will be concluded via various legal research methods. In particular, legal dogmatic, evaluation and comparative analysis of case law will be employed. This research will be focused on Primary Union law however, relevant secondary Union Law might be mentioned for the purpose of bringing light to the comparison and the compliance of the French DST and European Union law. Additionally, the core of this investigation will be the Courts case-law.

The air of this thesis will be achieved by exploiting the relevant legal material reasoning and argumentation of the Courts Case-law.

The main question of this thesis - the Compatibility of the French DST with Union law - will be analyzed in an analytic way following case-law founding, and Advocate General Kokott opinions on relevant recent cases on the matter.

3. Delimitation.

The research is focused on compatibility of the French DST with Primary Law in the context of the fundamental freedoms guaranteed by the Treaty, especially free movement. However, this topic of digital economy and taxation of the digital services has been exhaustively studied by far more competent author, this thesis will be delimited to European Union relevant laws, as well as the case-law of the Court and the French DST. It will need a much more exhaustive investigation to further focus this thesis on the international issues arisen by the French DST. It is a very interesting subject that in the view of the author needs it own investigation. As such, this paper will be delimited to the study of the compliance of the French DST with the European Union Law only. The thesis does not discuss exhaustively the legal remedies under EU law as well. The research does not go deeper to cover every aspect of the issue. The specificities will be analysed only as much as it is necessary to answer the research question and assess the compatibility with the Primary European Union Law.

4. Outline

The thesis comprises six chapters. The first Chapter introduces the main issues and the second chapter brief introduces the characteristics of the French DST.As almost all EU Member States DST are similar. The third chapter is more deep and touches the core of the thesis.

COMPLIANCE OF THE FRENCH DST WITH EUROPEAN UNION PRIMARY LAW.

1. Introduction.

A number of issues could arise from new DST law throughout Europe, especially regarding their compatibility with European Union law. Those DST introduced in many European member state already, like France and Spain may be subject to challenges under EU law. The giants of tech, the so called (hereinafter « GAFA »), Google, Apple, Facebook and Amazon (Microsoft, AirBnb etc) that are mainly U.S. companies, will have the possibility to challenge these DST's under European Union law by their subsidiaries established in the European Union as such European nationals. Undoubtedly, many cases will end up at the Court of Justice of the European Union (hereinafter CJEU).

2. Characteristic of the French DST in parallel with European Union fundamental Freedoms.

2.1. Compliance with European Union primary law: The fundamental freedoms.

Freedom of Establishment and freedom to provide services are two of the fundamental freedoms that could be violated by the French DST. They are the most relatable in regards of the French DST. Challenges in front of the CJEU will potentially occur under these fundamental freedoms laid down in the Treaty on Functioning of the European Union[6] (hereinafter TFEU). In these provisions it is forbidden for Member States to adopt any measure that could violate the freedom of establishment or the freedom to provide services of any European Union nationals.
Legislation adopted by a Member State, in regards, to install a restriction in economic activities on other nationals of other Member State in 'host'

[6] Treaty on the Functioning of the European Union (TFEU) and EU Treaty (as amended through 2007), OJ C 115 (2008), Primary Sources IBFD.

country[7] or even in their own country[8] has been declared by the Court[9] several times and such in corporate tax law in many landmark cases where the freedom of establishment [10].

The economy attractiveness of the Union is primal and national measures making it less attractive by putting additional burdens on European Union's nationals is against the free movement of the Union itself. In this context the French DST might be challenged. In relation, the French DST in its article 299 III, underlines that the tax will be levied even on companies that « are not physically present in the French territory » as such, the freedom to provide services is also an issue.

It is constant case law of the CJEU[11] that in order for a national measure to be non-discriminatory and in accordance with the fundamental freedoms, four conditions must be met[12]. The four conditions being, that the national legislation or measure must be implemented without discrimination, must be justified by imperative conditions of public interest, must be appropriate for securing the achievement of the goal they seek, and must not go above what is required to achieve it.

In this aspect, the French DST will be 'tested' and see if these conditions are respected in section 2.1.1.

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[7] Treaty on the Functioning of the European Union (TFEU) and EU Treaty (as amended through 2007), art. 107(1), OJ C 115 (2008), Primary Sources IBFD.

[8] id, art.56 « TFEU ».

[9] The Court of Justice of the European Union

[10] Hervis Sport Divatkereskedemi, C-385/12, EU:C:2014:14:47

[11] Case Gebhard, C-55/94, ECLI:EU:C:1995:411, para 22, 30 37, Case Kraus v Land Baden-Württemberg, C-19/92, ECLI:EU:C:1993:125 para 30-32

[12] Case Gebhard, C-55/94, ECLI:EU:C:1995:411, para 22, 30 37, Case Kraus v Land Baden-Württemberg, C-19/92, ECLI:EU:C:1993:125 para 30-32

2.1.1. The French DST in respect to the freedom of establishment.

This section is completely theoretical and a personal point of view developed with the help of research and articles in the subject[13].

Could the French DST constitute a de facto discrimination prohibited by primary law? In order to be 'qualified' as discriminatory they are conditions that should be fulfilled. As mentioned above the four conditions are a result of the Courts case law and the court will assess the French DST in light of the case-law.

Correlates with the structure of the study in this section will follow the same process.

Firstly, it should be assed if the French DST does indeed discriminate between French nationals and nationals of other Member States. As well as, determine if the DST is discriminatory towards certain/specific businesses.

In the Courts case law regarding discrimination, such violations fundamental freedoms could only be found when « through the application of different rules to comparable situations or the application of the same rule to different situations » [14]).

It must be argued that the French DST discriminates against foreign-owned companies that conduct their operations either by having a permanent establishment in France concerning the freedom of establishment. Freedom of establishment that is core to the Union and prohibited in article 49 of the TFEU additionally, underlined in Hervis case. Or by 'exporting' into France from another Member State regarding the freedom to provide services article 5§ of the TFEU.

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[13] C. Brokelind, An Overview of Legal Issues Arising from the Implementation in the European Union of the OECD's Pillar One and Pillar Two Blueprint, 1 75 Bull. Intl. Taxn. 5 (2021), Journal Articles & Opinion Pieces IBFD (accessed 3 May 2021)
S. Kirchmayr & S. Geringer, State Aid Issues Regarding National Digital Taxes, 60 Eur. Taxn. 7 (2020), Journal Articles & Papers (accessed 17 June 1 2020).
B. Zegarra, The Interaction between VAT and the Digital Services Tax Regime in Market Jurisdictions: Is the DST Filling the Gap Regarding the 1 Taxation of the Digital Economy?, 60 Eur. Taxn. 7 (2020), Journal Articles & Papers (accessed 17 June 2020).
Taxation of the Digital Economy – An EU Perspective, Björn Westberg* 2014
CFE ECJ Task Force, Opinion Statement ECJ-TF 2/2018 on the ECJ Decision of 7 September 2017 in Eqiom (Case C-6/16), Concerning the Compatibility of the French Anti-Abuse Rule Regarding Outbound Dividends with the EU Par- ent-Subsidiary Directive (2011/96) and the Fundamental Freedoms, 58 Eur. Taxn. 10, p. 471 (2018), Journal Articles & Papers IBFD. as well as Opinion Statement ECJ-TF 2/2020 on the ECJ Decision of 3 March 2020 in *Vodafone Magyarország Mobil Távközlési Zrt.* (Case C-75/18) on Progressive Turnover Taxes

[14] Finanzamt Köln-Altstadt v Roland Schumacker, C-279/93, ECLI:EU:C:1995:31, para 30

The French DST does not in the law discriminate against nationals of another Member State. Nevertheless, the French DST does indirectly in its form de facto discriminate by imposing a threshold. As a result most of the tax revenue will be generated by multinationals outside of the national territory. In Hervis, the CJEU enforced that de facto discrimination produced by national measures that at first hand did not present discrimination but did in fact discriminate by differencing criteria could be enough to provide grounds on violation of fundamental freedoms. In the case of the French DST the de facto discrimination could be found to be in violation of the fundamental freedoms[15].

1. The prominent case law applicable here starts with Hervis [16] where the CJEU found that indeed the national legislation in this case was de facto discrimination against foreign owned business because it was taxing those companies higher and continues up until Vodafone[17] and Tesco[18] where the Court change the course of the case-law and enlarged the scope of Hervis[19] and instated another condition under examination.
   On the other hand, for this particular argument France might argue that it is not the same since the French DST is different from the Hungarian one. Starting by the fact that the Hungarian tax in Hervis case, was progressive rates taxation on turnover. Whereas, the French tax applies a flat rate of 3% . A contrario, the French tax does have a threshold that arguably creates the same effect as the Hungarian tax in Hervis.
   Notwithstanding, in recent cases[20] the Court put a limit to when the de facto discrimination is satisfactory to establish violation of fundamental freedoms. In Tesco the Court established if the fact that foreign and owned or controlled businesses were mainly targeted by the national legislation was sufficient to declare it in violation to the fundamental freedoms. The Court found that Member State still have a sovereign right and that they have a « wide discretion » to adopt a taxation scheme that best suit their needs. As a result, taxation borne by other Member States

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[15] Ruth Mason and Leopoldo Parada, « Digital Battlefront in the Tax Wars », Tax Notes Int. 1183. November 2018.

[16] Hervis Sport Divatkereskedemi case, C-385/12, EU:C:2014:14:47

[17] id

[18] id

[19] id

[20] Tesco global Aruhazak Art, C-323/18 , para 52&72
Vodafone C-75/18

nationals cannot by itself be discriminatory[21].

The Court added in Tesco, that 'turnover tax' is a 'neutral criterion' and not a 'substitute' for national origin [22]. It is a result of the fact that the market in Hungaria, it is "dominated by such persons, who achieve the highest turnover in that market" and that such a situation is fortuitous, if not a matter of chance, which may arise, even in a system of proportional taxation, whenever the market concerned is dominated by foreign undertakings.[23]"

Non-nationals companies were mostly hit by this Hungarian tax because they were the ones making the higher turnover because they dominated the market. As a result, the Court underlined here that the term 'turnover tax' is a neutral criterion because if national companies would have dominated the market then they would have been the ones paying the most tax. In conclusion, the result of the burden of the tax is only the result of the market (in the country in question).

France could draw parallels with this situation and conclude that the French digital services industry is simply controlled by 'giants of the tech world': multinational corporations, which is the result of the market and the reason the tax mainly affects them. Thus, under these precedents, the fact that multinational companies pay a disproportionate share of the DST may not constitute in itself a discrimination.

As a result, in following the recent cases then and the founding of the court, it is clear that no direct discrimination could be found since the french DST does not discriminate on the bases of nationality. It does not in any clear way discriminate between different undertakings. However, as it has been at issue in Vodafone[24] regarding the free movement especially freedom of establishment [25] covert discrimination of foreign-owned companies. In contrast with the relevant last cases it is not about the progressively of the tax but rather the threshold imposed by France, that covert or de facto discrimination could be found in the DST. it is in parallel of State Aid discrimination. There are divergent arguments and comments on the subject but it is a core point of the liaison between for

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[21] id, para 52.

[22] Trade-Lab-and-Georgetown-Law-A-Legal-Analysis-of-DSTs-Final-Draft-Additional-Footnotes-Added1.pdf

[23] Tesco global Aruhazak Art, C-323/18 , para 72

[24] Vodafone C-75/18

[25] article 49 and 54 TFEU

instance Vodafone, Tesco, Google, Hungary cases[26]. Especially Vodafone as clearly pointed out by the Advocate General Kokott in her opinion of the case[27].

Nonetheless, in these cases challenged in front of the Court, turnover based taxes were challenged, which were based on progressive rate which only concerned domestic revenues. In respect to the French DST it could be challenged that it indeed not only regards the domestic revenue but has a bigger criterion which is worldwide revenues in such all revenues of the companies are involved. It must be mentioned here that there is a threshold of EUR 750 millions threshold on world wide revenues but another threshold is involved which is EUR 25 millions domestic revenue.

Meaning companies that have a world wide revenue of 750 millions or higher and 50 millions or higher domestic revenue (in France then) are concerned by the French DST. Still the discrimination could be argued in the fact that the world wide threshold in itself is discriminatory as it by its high amount disqualifies from the scope of the tax French corporates[28]. Furthermore, when the European Commission in 2018 presented their own proposal on taxation of the digital economy it was affirmed that in order to not be discriminating and essentially to not violate fundamental freedoms of the Union the « thresholds have to be set in such a way as to not systematically exclude domestic companies from the scope of the tax [29] ».

In overall, the Court usually looks at the 'factual circumstances' of the case, the tax treatment towards all companies at issue, the market and the corporate tax matters at national levels[30].

Regarding the violation of the freedom of establishment and the freedom

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[26] Vodafone Global C-75/18
Tesco global Aruhazak Art, C-323/18

[27] AG Kokott opinion of Vodafone and Tesco cases.

[28] Report on the new tax, French Minister of Finance, Press conference, 2019.

[29] The European Commission: Impact Assessment, COM (2018) 147 final, at 148

[30] Commission v. Spain, C-487/08, ECLI:EU:C:2010:310, para 48-51;
Commission v. Italy, C- 379/05, ECLI:EU:C:2007:323, para 51–52;
Denkavit Internationaal and Denkavit France, C- 170/05, ECLI:EU:C:2006:266, para 34–36.
For a summary of the case law: Rita Szudoczky, *Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms*, 3 *European State Aid Law Quarterly*, 357, 365 (2016).
Arnoud Gerritse v Finanzamt Neukölln-Nord, C-234/01, ECLI:EU:C:2003:154, para 27;
D.M.M.A. Arens-Sikken v. Staatsecretaris van Financien, C-43/07, ECLI:EU:C:2008:170,para 55–57

to provide service, it is quite difficult to presume which way the Court will be answering to the question of de facto discrimination or even indirect discrimination. It may seem that with the latest relevant cases the Court did not really take position on digital taxation. It could be a political stand.

If the French DST is in fact found discriminatory by the Court, not if but when it will be challenged in front of the CJEU then it will be a matter of « legitimate Public policy matter » and if it is indeed justified proportionally to the level of discrimination. « provided that it is appropriate for ensuring the attainment of the objective pursued and does not go beyond what is necessary to attain that objective [31] ». France will have to provide the justification of such a discriminatory legislation (once again, this is hypothetical) by demonstrating that the DST is a public interest policy as well as that it is indeed proportionate and suitable to achieve the national object that is of public interest!

2.1.2. « The ability to pay »: one of the core argument of DSTs.

As it has been mentioned many times in articles of law as well as by the French government, if there is differential treatment it could be justified by the « ability to pay » public interest policy. The DST targets high revenues companies which have the highest ability to pay taxes.

In contrast, as many legal authors and economics pointed out, many companies have high revenues but it does not mean that they have a likewise high ability to pay. Some may have low profit margin and as such a 'low ability to pay'. [32].

But to recall the relevant cases Tesco and Vodafone, it could be argued that revenues could indeed determine 'ability to pay'[33].

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[31] Hervis Sport- és Divatkereskedelmi, *supra* note 213, para 42
Commission v *Spain*, C-400/08, EU:C:2011:172, para 73
CaixaBank France, C-442/02, EU:C:2004:586, para 17

[32] (inserer REF DE L'ECONOMISTE FRANÇAIS AFFIRMANT CELA)
Commission stand on the matter, see notes on the state aid case, see Rita Szudoczky, Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms, 3 European State Aid Law Quarterly, 357, 365 (2016)

[33] In Tesco and Vodafone cases, the Court seemed to approve the arguments of Hungary « to impose a tax on taxable persons who have an ability to pay that exceeds the general obligation to pay tax » issued from the case; Tesco-Global Áruházak Zrt., *supra* note 218, para 71.

Indeed, in Vodafone and Tesco[34], the Court focused on indirect discrimination under fundamental freedoms of the EU and as well the compatibility of sector-specific turner-over taxes. As Advocate General Kokott mentioned the question raise in Vodafone « at the same time have particular importance for the turnover-based digital services tax currently being proposed by the European Commission »[35] and already enacted in interim by Member States in the wait of a unified provision. In the case of the French DST it will then be more suitable to focus on the findings of Vodafone[36] on the assessment of indirect discrimination, has this discrimination in the light of freedom of establishment has been argued plenty of times by legal authors and the U.S. government.

The Court in Vodafone diverged from previous case law (Hervis) and did not in fact find the Hungarian tax in violation with the freedom of establishment under article 49 and 54 of the TFEU, as for the Court there was no indirect discrimination.
However, Advocate General Kokott went beyond the Court and extensively inquired on the topic of indirect or covert discrimination in direct taxation if « indirect discrimination is to be taken to exist in any case if the distinguishing criterion was intentionally chosen with a discriminatory objective [37]».

Additionally, The Court already previously recognized that a company could rely on the restriction of the freedom of establishment of another company as soon as a direct link or connection between those two companies exist and as well as that the tax of the second company is directly affected[38]. Based on this case law objective we could argue that a foreign-owned parent company of a European Union national (company in another Member State or even France) could challenge the French DST in national Courts that could ask the CJEU a preliminary question, regarding the challenges made in this case as per example violation of the free movement protected by the

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[34] Vodafone C-75/18
Tesco global Aruhazak Art, C-323/18 ,

[35] id

[36] Vodafone C-75/18

[37] AG Kokott opinion in Vodafone case.

[38] Vodafone C-75/18 para 40-41
Felix-Stowe Dock and Railway and Others v. the Commissioners for Her Majesty's Revenue&Customs C-80/12, 2014, para 23.

treaty[39].
This being said, in Vodafone the Court did not qualify the tax as a overt discrimination of the fundamental freedoms because the tax itself did not explicitly establish any distinction between undertakings nationalities operating in Hungary[40].
However, the Court refereed to Hervis[41] and Anged [42] and confirmed by saying that« the application of other criteria of differentiation lead in fact to the same result[43] » that indeed the TFEU does not just prohibits direct or overt discrimination but it does prohibit covert discrimination as well.
It was a response from the Court to the challenges addressed in this case.

Indeed, the core argument here was that the progressivity of the tax being a covert discrimination, because it does give an advantage to companies owned by nationals. It is interesting to mention here the opinion of Advocate General Kokott on the case, because the Advocate General went to great length to 'determine the factual discrimination existence and the role that legislative intent might play in choosing distinguish criteria [44]'.
Comments on this point of the Advocate General opinion: The intent of the legislator should be looked at, or the « discriminatory intent [45]» because it is indeed very important and helpful in qualifying discrimination, violation of fundamental freedoms.

In the case of the French DST we have the 'government' expressing that the same and especially French sme[46] should be 'protected' and that the 'giants of tech' should be the one paying the taxes, because of the ability to pay principal but not only. For the legislator the aim of the tax is to put fairness into the mix, to reduce base erosion and to make the ones with higher revenue pay their 'fair share of taxes' that they have been avoiding to do until now.

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[39] TFEU

[40] Vodafone C-75/18 para 42 & 44

[41] Hervis C-385/12 para 30

[42] Anged C-236/16 and C-237/16 para 17.

[43] Vodafone C-75/18 para 43

[44] see extensive analysis of the Advocate General Kokott in the case Vodafone C-75/18 para 5è - 103.

[45] Advocate Generale Kokott opinion on Vodafone C-75/18, para 93-102.

[46] (pme en français) small and medium-sized enterprises

In a way, the intention of the legislator might be moral and just but legally speaking, if we did pay attention to the intent of the legislator as Advocate General Kokott suggest then it might have been qualified as a discriminatory provision.

However, the Court did not follow the Advocate General and did not go this far as to recognize this potential relevancy in 'finding' of discrimination (Court's narrow approach v. Advocate general wider approach). Instead, the Court underlined that each Member State is sovereign and they have discretion to establish the best tax system for the purpose of bettering the resource their nation. It did point out that the amount of turnover is neutral (non- discriminatory criterion) and that turnover is indeed an 'indicator' of the taxable persons ability to pay taxes[47].

The Court did indeed widen (Hervis) the scope of criteria that are non-discriminatory but as well opened a new and large path for Member State to enact any type of taxes as long as they could create it without meeting all the characteristic of different types of tax or even characteristic to be met to be qualified as discriminatory [48].

This being said, the corroboration between this argument of covert discrimination in Vodafone and the interim DST provisions of Member States is the fact that they both potentially are indirectly discriminating a group of undertakings that are foreign-owned (nationals or different Member States). In respect to the French DST, not only 'foreign' EU-owned companies but more likely non EU-nationals.

The concerns regarding the unilateral DST are not the progressively of the tax, as French DST as a flat rate of 3%, but whether their thresholds for taxability[49].

The French DST as mentioned as two different thresholds, like the Commission proposal. It was additional underlined by the U.S. that Frances DST is discriminatory not only in its intent but in its structure as well. Since it does set up a selection level of services covered as well as threshold[50]. That theoretically are not direct discrimination, as it does not discrimination on nationality of companies. However, in practice it might hide indirect discrimination as it was put forward that except a minimal number of

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[47] Vodafone C-75/18, para 49.

[48] id. para 42 and 43

[49] The Commission acknowledge the issue in the threshold already in its proposal in 2018.

[50] 84 Fed.Reg. No. 235.66956, 2019.

European owned companies (Spotify) no French companies will be counted in the scope of the tax. Mainly U.S.A companies will be touched by the tax. We will have to wait on future case challenging the « validity » of this tax, as it is for the Court to decide and put light on the issues at hand.
Nevertheless, until then it is fair to assume that covert discrimination could be qualified in this case, as it is well settled case law that different forms of covert discrimination could « arise from criteria that do not formally constitute nationality [51]».
In conclusion, in following the current cases, France could potentially argue that the DST could be justified by the 'ability to pay', on the other hand the challenger could positively argue that the tax is discriminatory (indirectly).

2.1.3 « Fair and Balanced allocation of taxing rights »: is it a valid justification for possible violation of EU fundamental freedoms ?

France did enact this legislation in the pursue of fairness and balance. For France, after the Google case[52] was 'lost' in national administrative Court, it was the time to rebalance the market and tax this new economy that was taking advantages of the 'old' tax legislations. France like many other Member States (Germany in the very beginning, Spain, Italy, Austria) did wish for a union wide legislation or even a world wide legislation.
But it seemed that this was premature then France and other Member States enacted their national DSTs in the light of the European Commissions

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[51] DE: ECJ, 14 Feb. 1995, Case C-279/93, Finanzamt Köln-Altstadt v. Roland Schumacker, para. 26
EU:C:1995:31, Case Law IBFD; BE: ECJ, 22 Mar. 2007 Case C-383/05, Talotta, EU:C:2007:181, para. 17 Case Law IBFD
FR: ECJ, 8 July 1999, Case C-254/97, Société Baxter, B. Braun Médical SA, Société Fresenius France and Laboratoires Bristol-Myers-Squibb SA v. Premier Ministre, Ministère du Travail et des Affaires sociales, Ministère de l'Economie et des Finances and Ministère de l'Agriculture, de la Pêche et de l'AlimentationEU:C:1999:368, para. 13, Case Law IBFD
DE: ECJ, 12 Dec. 2002, Case C-324/00, Lankhorst- Hohorst GmbH v. Finanzamt Steinfurt, EU:C:2002:749, paras. 27-30, Case Law IBFD
NL: ECJ, 18 Mar. 2010, Case C-440/08, F. Gielen v. Staatssecretaris van Financiën, EU:C:2010:148, para. 37
Hervis (C-385/12), para. 30; and ANGED (C-233/16), para. 30.

[52] GOOGLE CASE IN FRENCH COURT , arrêt Google ireland du Tribunal Administratif de Paris en date du 12 juillet 2017

digital economy taxation proposal. The main purpose of these DSTs is for tech giants, digital companies to « pay their fair share of taxes[53] ».

The French take on this 'new economy' is that digital companies do generate revenues in France even though they do not have a 'physical presence' in France. As a result of this absence of physical presence, those companies do not pay taxes on source-based corporate income under national laws (pre-DST). In this aspect, France argues that taxing rights should belong to the country where the revenues are generated in other words where the users of those digital services are located and not in the state where the physical presence is (or where it has its permanent establishment: inventory, personnel, intellectual property are).

It is a delicate topic, because permanent establishment, where there is an actual physical presence is a well established system of taxation not only in the European Union but internationally.
Thus, it could seem illegitimate even contra legem to enact these DST that will violate bilateral treaties (and OECD model) laws. [54]
This argument could brought immense criticisms and even the Court could not possibly accept the « balanced allocation of taxing rights » as a justification.

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[53] Joint Initiative of European Ministers on the taxation of companies operating in the digital economy, http://www.mef.gov.it/inevidenza/banner/170907_joint_initiative_digital_taxation.pdf

[54] Ruth Mason and Leopoldo Parada, *supra* note 216 *at 1196* (November, 2018) (balanced allocation of taxing rights goes against internationally accepted tax principles)

3. Third fundamental issue: prohibited State Aid provision.

Article 107 and 108 of the TFEU prohibits Member States to enact legislation or measures that could be qualified as state aid. Article 107(1) TFEU defines state aid as : « any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the provision of certain goods is incompatible with the internal market, in so far as it affects trade between Member States ».

As a result, to be qualified as an aid from the state the measure must be an intervention «by the State or through the State resources»(1), must be liable to affect trade between member states(2), to confer a selective advantage on an undertakings(3) and to distort competition(4).

3.1. French DST: could it be qualified as an Intervention by the state?

According to article 107(1) of the TFEU the first condition to be qualified as a state aid provision, the measure has to be «imputable to the State and through the state resource». The French DST does in fact result from an Act of the parliament, it is a legislation as such it is attributable to the French state. In respect to the financing part of the condition, the Court suggested that when an advantage is indeed established the first criterion is «presumed to be fulfilled». In The Court put forward that, « a measure by which the public authorities grant certain undertakings a tax exemption which, although not involving a positive transfer of State resources, places the persons to whom it applies in a more favorable financial situation than other taxpayers constitutes State aid » [55].

Concluding, that the French DST does de facto satisfies the first condition.

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[55] Commission Decision in case on the state aid implemented by Poland for the tax on the retail sector, C (2017) 4449 (final) para 36
Commission v. Government of Gibraltar and United Kingdom, C-106/09 P and C- 107/09 P, EU:C:2011:732, para 72

3.2 French DST: confers advantages to French undertakings.

In this case the advantage 'given' is not a transfer but rather an exemption. It is settled case-law that advantages can be granted by various form of tax reduction or even exemption. A measure that reduces or exempt the tax burden of a company is qualified as an advantage because it creates 'distortion' and puts the company to which the advantage applies in a favorable financial position by not paying taxes or paying less than other companies. As well as creating a loss for the State[56].
It is arguable that the French DST in this aspect does indeed confer advantage to companies especially French companies (sme/small businesses).

3.4. French DST: a selective advantage qualified?

Article 107(1) of the TFEU defines a measure to be selective if it favors predestined companies rather than other because of their production or goods. It follows that the CJEU established in its case-law a three step analysis[57] to evaluate the selectivity of state aid schemes.
Starting by identifying what is the « reference system » which is really the common national tax legislation.
Then, after identifying the normal tax regime of the Member State in question, the Court then determines if the measure 'being challenged' is in fact a derogation from the normal regime. By assessing this, the Court use 'companies' in comparable factual and legal situation in light of the normal regime and in light of the measure being challenged. If there is a derogation in the measure that is different from the common regime of the State then it is prima facie selective. Otherwise it is not selective.
Finally, if the derogation is qualified, then the question is, if it is justified? If yes, then it falls out of the scope of the TFEU[58].

Arguably the French DST does refer and define to the 'reference system' by

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[56] Air Liquide Industries Belgium, C-393/04 and C-41/05, EU:C:2006:403, para 30
Banco Exterior de Espana, C-387/92, EU:C:1994:100, para 14.

[57] Commission v Netherlands, C-279/08 P, EU:C:2011:551

[58] Commission Notice on the application of the State aid rules to measures relating to direct business taxation, 1998 O.J. (C 384).

laying down the objectives of the tax itself in its article 38[59] as « a tax on certain services provided by large corporations in the digital industry ».
In Poland v. Commission[60], it was put forward that when regimes are targeted to individual classes of taxpayers then the reference system in that Member State is agreed to be referred or defined by the measure itself.

As such, it could be concluded that in the French DST there is no such derogation (from the national reference system) for the benefit of a group of companies (French companies) since the same rules and flat rate is applied to all companies with the scope of the tax.
However, for the Commission, it is not enough to assess a measure in regards to the reference system of the Member State concerned. It must as well, examine if the limits of the reference system were « defined consistently or on the contrary in a clearly arbitrary, biased manner, as to favor some undertakings[61] ». There, the CJEU did accept the de facto discrimination in State Aid cases!
Is the French DST designed to favor French companies? It could definitely be argued that it is. By its design and then by governments statements which clearly argued that French she must be levied in contrast to larger undertakings.
However, if the measure is justified with the principle of proportionality and shown that a less aggressive measure could not have been created to attain the objective pursued[62]. (It is here again a three step analysis undertaken by the Court,(selective test) it is similar to the test of interest public policy). Again the ground for justification of the French DST is the ability to pay[63].

If we follow this analogy, the French DST could then be qualified as a selective advantage conferred to French owned companies -mostly-.
In truth prior to the State aid cases[64], relevant here, the French DST could have been, most likely, would have been qualified as giving selective

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[59] CGI article 38, II para 2. French Tax Code.

[60] Cimmission v. Poland case C-596.19 P, para 68

[61] Commission Decision on Polish retail tax, *supra* note 233*, para* 46;
Commission and Spain v Government of Gibraltar and United Kingdom, C 106/09 P and C 107/09 P, EU:C:2011:732, para 106

[62] Paint Graphs, C-78/08 & C-80/09, ECLI:EU:C:2011:550, para 75.

[63] French National Council: see Conseil d'État sur le présent projet de loi, point 32. http://www.assemblee-nationale.fr/dyn/15/textes/l15b1737_avis-conseil-etat.pdf.

[64] Commission v.Poland C-596/19 P and Commission v.Hungary case C-562/19 P

advantage. However, with the ruling of the Court in the joined cases Commission v. Poland and Commission v.Hungary; it is unlikely that such a measure will be qualified as in violation to EU State aid rules.

3.5. French DST: Does the new tax distort the competition and affect the Intra-Union market.

Firstly, if selective advantage is established, has studied in previous sections then it is presumed that there is a distortion of competition and in parallel the effect on intra trade union is also presumed.
The French DST does apply to all companies gaining revenues from digital services in France (not necessary with a physical presence)users using the platform which creates profits in the Member State.
France is of course an open market for digital economy and other companies in the domain are owned by the Member State or more commonly by the U.S.A. But regarding the European nationals if such a distortion is qualified, and affects one of Europeans national, then it is most definitely liable to affect intra union trade.
As mentioned previously, it is settle case law that tax relieves or tax advantages are qualified as state aid. As such selective aid should be considered to distort competition or to potentially threaten to distort the competition (only in regards to European nationals).

3.6. French DST part VI: exhaustive list of compatible exceptions with the internal market.

Article 107(2) and article 107(3) of the TFEU presents list
of categories of exceptions that render state aid provisions compatible with the internal market and as such 'non discriminatory'. The burden of proof lies with the Member State[65]. However in the case of the French DST, it is not likely to fall into one of those categories.
In order to skip all this possible issues, It was asked to the State by legal authors and Courts (after their reports) to notify the Commission before implementing the provision. The government indicated that such

[65] Olympiaki Aeroporia Ypiresies v Commission, T-68/03, EU:T:2007:253, para 34.

notification to the Commission will not take place the reason being that for the government the DST does not constitute a state aid. The parliament was firmly against this decision and asked from the government to inform them why this notification was not sent to the European Commission. There is still no report on why the provision was not notified to the Commission and yet the law was adopted.

Nonetheless, there is still the possibility to companies to file a compliant to the Commission[66]. And If this DST is challenged (by companies in front of French Courts that could then 'forward' a preliminary question to the CJEU for interpretation, which The Court refuse to answer in preliminary rulings for more see interesting article of Rita Szudoczky and Balàzs Kàrolyi[67]) on arguments including state aid, and state aid will be qualified then it will be «full aid» because there was no notification to the Commission prior to the implementation of the tax.

Even if state aid will be qualified in the case of French DST, since no aid is actually given, no positive transfer, no economical advantage or such is given because it is an exemption of tax burden for a certain undertakings then there will not be any recovery. The 'remedy' here could be that France would have to reform the DST, or as Rita Szudoczky and Balàzs Kàrolyi studied largely in the article on 'Progressive turnover taxes under the prism of the State Aid rules' it will be a better solution if the Member stat themselves found an appreciate remedy when state aid rules have been violated. For exemple when there are no when the recovery will be that the taxpayers that did not pay taxes because f exemption shall pay taxes.. it will be more relevant if the member states jurisdiction could decide on the appropriate recovery. All decisions of the Commission are subject to review by the General Court and the CJEU[68] as we can see with the cases Commission v.Poland and the Hungary case.

Important to mention, that the CJEU held in Tesco case that companies challenging the provision on grounds of state aid in Courts does not give them the right to not pay the tax: "even if an exemption from a tax is unlawful under State Aid rules, that is not capable of affecting the

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[66] Article 108(2) TFEU

[67] see: Rita Szudoczky and Balàz Kàrolyi article on Progressive turnover taxes under the Prism of the State Aid rules: Effective Tools to Tax high financial capacity or inconsistent Tax design granting selective advantages? EStAL 3/2020; European State Aid Law Quarterly.

[68] book, Introduction on european direct tax law, Lang, Chapter 21,
For more details on the state aid procedure, *see* https://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html

lawfulness of the actual charging of that tax, so that a person liable to pay that tax cannot rely on the argument that the exemption enjoyed by other persons constitutes State aid in order to avoid payment of that tax [69] ».

3.7. Part VII of the French DST: The ability to pay principle and its relevance.

The ability to pay principle if one of the core argument of the DSTs, as it is in French DST. Does this mean that it is a valid argument? and does it justifies the important differences between the taxpayers in the regards to this digital taxation?

Progressive taxation is unmistakably consistent with the ability-to-pay concept, according to tax law literature. The notion of ability to pay has been recognized as a basic principle of EU law since the Bevola decision. It can be used to justify discriminatory tax measures at the level of comparability analysis and justification. It is relevant to enterprises, according to the Court.

According to tax law literature, progressive taxation is consistent with the ability to pay principle. This principle has been recognized as a general principle of EU law since the findings in Bevola case[70]. It can be used to justify discriminatory tax measures as well as at the level of comparability analysis. The Court did not calm the water as it did rule that the principle is applicable to undertakings[71].

For many, in academic literature[72] high level of turnover does not fairly mirror the high ability to pay. In contrary the Advocate General Kokott in her opinions[73] as well as the Court in the joined cases of the Commission v.Poland and Hungary, high turnover serves as « an indicator of greater financial capacity » to pay taxes, as such, « a progressive tax rate measure is

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[69] Tesco Global Áruházak, *supra* note 218, para 36.

[70] Bevola case C-650/16

[71] Lang and Englisch, A european legal Tax order based on Ability to pay' A.Amatucci edition, International Tax Law (2nd edn, Kluwer, 2012) p 267.

[72] Schön, 'International Tax Coordination for a Second best World' part 1, 2009, World Tax J, IBFD Journals, p 74.

[73] mainly of Vodafone C-75/18 Tesco and Commission v.Hungary C-562/19 P

not inconsistent with the objective of those taxation in accordance with the ability to pay »[74]; High turnover results in high profits. This is the view of the Court but it is not agreed by the academical fiscal doctrine. Authors like Rita Szudocky disagrees mainly by pointing out that the turnover is not the correct reflection of the ability to pay of a tax payer, for instance of an undertaking. Even if one of the main reason in the opinion of the author, for the Court and the AG to agree that high turnovers results in high profit, it is because turnovers unlike, profit is not easily shifted as such tax planning is not quite easy to achieve in this case. But it does not fairly reflect the ability to pay as in turnover there are no deduction incorporated. As such, it could be that some undertakings that have high turnovers do not make any profit. Again for Rita Szudocky[75] the Member States clam to aim fair taxation rather than redistribution but for the author it is hardly fair taxation because for example in the French DST, the threshold do not put some taxpayers in higher tax rate and other in lesser tax rate, it does exempt lower undertakings that do not met the threshold from the scope of the taxation. It is more selective than anything else. However, even if this is a doubtful method, the ability to pay principle in synchronization with turnover based taxes, is yet the most appropriate indicator to help achieve the objectives put down by the Member States in the DSTs.

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[74] Hungary v.Commission para 88 and Commission v.Poland para 73-75. case T- , and Opinion AG Kokott para 121.

[75] *see*: Rita Szudoczky and Balàz Kàrolyi article on Progressive turnover taxes under the Prism of the State Aid rules: Effective Tools to Tax high financial capacity or inconsistent Tax design granting selective advantages? EStAL 3/2020; European State Aid Law Quarterly.

3.8. Conclusion on State-Aid prohibition.

Undoubtedly, the most debated topic of those DST has been the threshold incorporated and the specificity of the tax, as it is intended to reach a special sector of digital services.
For instance Frances DST has two threshold, similar to the Commission proposal. It did instal a first threshold on worldwide revenue of EUR 750 million and another threshold on French Revenue of EUR 25 million (two times less than the Commission threshold European revenue of EUR 50 millions). As mentioned, this has been a flourishing topic for debate in doctrine especially because it seems to be targeting only mnes and 'protecting' smes (as intended in France). These two points may raise issue of discriminatory statues, like violation of fundamental freedoms[76] as well as giving rise to State aid prohibition[77].
In regards to State Aid, firstly AG Kokott like the Court did not found the question admissible. However, in her opinion the Advocate General seems very favorable of turnover based tax. Understandably, its pointed out in the opinion that it is harder to profit shifting and aggressive tax planning turnover than profit. Resulting favorably in a more accurate representation of the financial capacity of undertakings, as well as easy to assess (simple administration)[78]. The Advocate Generals opinion could be at some points defined as a 'defensive' and approving of the DSTs. But yet no stand taken by the court on State aid questions. Fortunately, the state aid issue is resolved in recent cases regarding the Hungarian and Polish trade taxes[79].

Different Member States introduced DSTs based on the argument of public order defense/ « public burden sharing ». As a result, the threshold were incorporated to ensure that the burden be on those (multinationals) that have a higher ability to pay. The ability to pay principle is a fundamental base of these DSTs, since Member States claim that mne's have an higher ability to

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[76] Art. 49, 63 Treaty on the Functioning of the European Union (TFEU) and EU Treaty (as amended through 2007) OJ C 115 (2008), Primary Sources IBFD.

[77] Art. 107.1 Treaty on the Functioning of the European Union (TFEU) and EU Treaty (as amended through 2007), art. 107(1), OJ C 115 (2008), Primary Sources IBFD.

[78] AG Opinion in *Vodafone* (C-75/18), para. 95
Id., para. 101, referring to recital 23 of the DST Proposal, *supra* n. 11 and para 185-186.

[79] Commission v. Poland case C-596/19 P and joined case Commission v. Hungary case C-562/19 P

pay taxes. Additionally DSTs are turnover taxes because tax planning is harder be done when turnover cannot as easily as profit be shifted. But turnover taxes can be problematic especially in regards to State aid rules because they are specific taxes (sectorial taxes) as well as with their threshold they apply to only specific undertakings where higher turnover equals higher tax burden or for instance to be incorporated in the scope of the tax. Until the last relevant and very anticipated cases[80] , the Court did not bring any light on the state aid nature of progressive turnover taxes. Indeed, Vodafone[81] and Tesco[82] did open the path to the question, the Court however did not find it admissible as did not the Advocate General Kokott. Nonetheless, the AG did analyze the question on its merit.

Finally, the Court was in' front of the wall' and in cases Commission v Poland C-562/19 P and Commission v Hungary C-596/19 P joined, the Court answered the long awaited question of whether progressive turnover taxes were selective in nature insofar as they targeted large companies (more) and exempt small ones. The Commission in these cases underlined that the progressive nature of these turnover taxes did not and could not be a taxation justified by the ability to pay of the undertakings touched by these taxes. Turnover taxes are not a fair way to tax undertakings because in turnover the deduction of is not done and as such ie does not reflect probability or solvency of the undertakings. For the Commission these taxes were discriminatory and were likely to cause « disturbances in the market ». In Vodafone[83], even though the Court did not answer the State aid question, the fundamental freedoms were the main topic, the court did open a path to the state aid questions.The court did recall in the Polish and Hungarian cases[84] that in the current state of harmonization of the Union, Member State have the freedom to introduce taxes that seem fair and balance to them, as long as they do not discriminate and infringe Union Law. As such, the Court underlined that turnover taxes can be introduced by Member States. As such, Vodafone was the beginning of the path for the ruling in the

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[80] Commission v Poland case C-596/19 P para 40 and 42 and Commission v. Hungary C-562/19 P

[81] Vodafone C-75/18

[82] Tesco

[83] Vodafone C-75/18

[84] Commission v Poland case C-596/19 P para 40 and 42 and Commission v. Hungary C-562/19 P para 46 and 48

cases of Commission v Poland and Commission v Hungary[85]. The Court had to follow the ruling in Vodafone and transform it a State aid ruling[86]. In this spirit the Court rejected the Commission findings and ruled fairly and briefly that those turnover taxes are not discriminatory on the grounds of state aid rules.

The Court in its ruling mentioned the definition of « referencing system/ normal system » used in the selectivity test[87]. However, each taxes had a specific argument that the Court death with. Regarding the polish case, the Court found that the Commission did not just wrongly defined the reference system of the member state, but the Court did also annulled the decision to « inmate the formal investigation procedure » as it did regarding the Hungarian tax. Additionally, regarding the Hungarian tax, the Court dealt with the argument that the partial deductibility of losses carried forward (for a specific period only, (2014)) was a selective measure. The Court found that this feature was not a selective measure[88].

Important to mention that two of the relevant and important findings of the Court in these cases were, first that the progressive rate of taxation is indeed a characteristic of the tax and it is freely chosen by the Member States (following its recent case law, namely Vodafone) and as such it must be incorporated in the reference system[89]. For the Court, turnover is a neutral criterion of distention[90]. In the authors opinion, as well as some opinions

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[85] Commission v. Hungary case C-562/19 P

[86] see one of many, concurrence article, Bruno Stromsky n100553

[87] see for more detailed information on the definition of the reference system in the case Commission v.Poland C-562/19 P; article concurrence

[88] Hungarian case para 58 and 59

[89] « *Member States are free to establish the system of taxation which they consider most appropriate, so that the application of progressive taxation is a matter for the discretion of each Member state (…)* » para 37, « (…) *The determination of the constituent features of each tax is a matter for discretion of the Member States, with due regard for their fiscal autonomy, and that discretion must, in any event, be exercised in compliance with Union law. This applies, in particular, to the choice of the rate of tax, which may be proportional or progressive, but also to the determination of the tax base and taxable event* » para 38, Case C-562/19 P, Commission v.Poland.

[90] Vodafone C-75/18
Commission v Poland case C-596/19 P para 41

found in French academical doctrine[91], the Court did in this rulings in march 2021 in some sense admit that profit could be a more accurate indicator of the ability to pay (of taxpayers). Secondly, it could be understood in the Court findings that the Commission or that the 'selective test' could not be used to search for the 'best tax', this test is a limited and general discrimination analysis test (since the Member States still have the power to DETERMINE their tax system).

Even though the Court gave some space to the Member States to enact taxes needed at national levels, it is not to forget its previous settled case law, namely the Gibraltar case[92], where the Court found that progressive tax may in some cases[93] (reference system/normal system itself) be discriminatory[94]. It is a clear reminder from the Court to the Member States. Indeed, it ruled that progressive rates for turnover taxes are compatible with state aid rues however, as mentioned above, progressively could be incompatible with State aid rules, namely article 107(1) of the TFEU

As mentioned by authors[95] the most relevant aspect f these cases is the assessment of the selective advantage. Starting with the reference system, the Court agreed with the General court and ruled that indeed the progressive rates are a part of the reference tax system in which it was primordial to base the selectivity test on. It is of course the first step for the Commission to asses selectivity advantages, to first identify the normal tax

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91 compétition law review; Sélectivité: La Cour de justice de l'Union européenne confirme l'annulation des decisions de la Commission européenne qui affirmait que le taux de progressivité des taxes sur le chiffre d'affaire étaient selective et constituaient une aide d'Etat, Bruno Stromsky n100553, Commission Européenne service legal, Bruxelles Concurrence n2-2021 and article n99774, Taxes: La Cour de justice de l'Union européenne rejette les pourvois de la Commission européenne et confirme les arrêts du Tribunal à propos de la taxe polonaise dans le secteur de la vente au detail et de la taxe hongroise sur la publicité (Commission /Pologne, Hongrie) Alain Ronzano, l'Actu-concurrence Paris, Avril 2021.

92 Gibraltar case C-106/09 P and C-107/09 P

93 Gibraltar case as well as Commission v.Poland and Commission v.Hungary: `when the taxes are designed in such a way that they do intentionally discriminate between undertakings, « a manifestly discriminatory element » case C596/19P para 48 and case C-562/19 P para 42.

94 para 43 Gibraltar and para 44 of the Commission V.Poland case C-596/19 P

95 *and others*: Rita Szudoczky and Balàz Kàrolyi article on Progressive turnover taxes under the Prism of the State Aid rules: Effective Tools to Tax high financial capacity or inconsistent Tax design granting selective advantages? EStAL 3/2020; European State Aid Law Quarterly.

system of the state 'the benchmark'[96]. In the cases in study here, the Court ruled that the Commission did not identify « correctly » the normal tax system of the member states as well as the Commission missed to prove that the tax law in question were manifestly discriminatory[97].

Here the Court set an important and awaited precedent for the future. Firstly the scope the Gibraltar case is narrowed down by defining that the rules should be designed in a way as to be de facto (or manifestly and non accidentally) discriminatory between comparable undertakings. Then a new element was introduced as the consideration if the legislator had « (…) the time of circumventing the requirement of the EU law on State aid »[98]. This is an uncertain step forward[99].

However, it is yet to be seen how the intent of discriminating comparable undertakings would be proven in the future. It does point to the DSTs of the Member States that introduced them already[100]. We can clearly see similarities in these past cases and DSTs.

The Polish and Hungarian tax cases are indeed quite relevant for the purpose of analyzing the comparability EU State aid rules and Member States DSTs. The main objective of those taxes are to tax certain sectors of digital services (a sectorial tax as defined by Rita Szudoczky[101]) used by user located in their countries whether or not the provider have a physical presence in the jurisdiction of the Member State in question. For instance, this geo-localization element is at issue in some Member States like in Italy[102] where the introduced DST and actually payable tax in May 2021 for

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[96] id p 257

[97] Commission v.Poland case C596/19P para 50 and Commission v.Hungary case C-562/19 P para 44

[98] id

[99] Also analyzed by the AG in her opinion of Vodafone, as such, the Court did 'follow' (in the ruling of the Polish andHungarian cases) at some extended the AG opinion not only there but her opinion of the cases in question.

[100] Member states like France, Spain, Austria and Italy.

[101] *see* Rita Szudoczky and Balàz Kàrolyi article on Progressive turnover taxes under the Prism of the State Aid rules: Effective Tools to Tax high financial capacity or inconsistent Tax design granting selective advantages? EStAL 3/2020; European State Aid Law Quarterly.

[102] *see*, From use and enjoyment to Geolocation: A crossover fromVAT to DST? , Giorgio Beretta, April 20, 2021 Kluwer International Tax Blog,

the first time, uses unlike the Commissions proposal different system of geo-localization which could bring the Court to asses it earlier than other DSTs[103].

It results that before the joined cases of the Polish and Hungarian turnover based taxes, the chances for the DSTs, for instance the French DST and its thresholds, could have been easier qualified as giving selective advantages to 'French' (or EU) small undertakings as such having a more favorable tax treatment. In contrast, larger undertakings (mainly foreign) will suffer the total burden of the tax. Now the cases mentioned above[104] have changed the (CHANGER LA DONNE) and it appears harder if not unlikely to find them incompatible with State aid rules.

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[103] *for further analyses*, Member States DST must be analyzed on their main differences.

[104] Commission v.Poland case C-596/19 P and Commission v. Hungary Case C-562/19 P

4. Brief debrief on the VAT potential issue regarding DSTs.

The nature of the new tax is an issue that should be talked quite exhaustively in doctrine but will only be briefly mentioned here, as it is not in the scope of direct taxation and outside of the delimitation of this thesis. Nonetheless, worth to be mentioned. In regards to the violation of European Union law, the VAT Directive in its article 401[105] prohibits Member State to enact domestic taxes that can « be characterized as turnover taxes ». The Court in Vodafone did confirm that that national taxes are prohibited by article 401 OF THE VAT DIRECTIVE [106] tenant similar taxes as VAT[107]. It is enough to determine similar characteristics to qualify the tax as a VAT or jeopardizing the functioning of the harmonized VAT systemic the common market[108]. .

As such the French DST is not a turnover tax or it is not defined as such by the legislator. Following the study undertook in this thesis the following step is to show that the French DST is not a turnover tax. The Court in Poland v. Commission[109] dealt with the progressive based turnover tax and the legality of such a provision.

The main characteristic of VAT are four and they are as followed; the applicability of the tax to goods and services as well as its applicability at each stage of production and distribution, its proportionality between price of goods and the tax to be paid. Finally, the possibility of deduction of the amount already paid regarding a specific transaction in liaison with the company[110].

In Vodafone, the court focused one two of the conditions and did not found that they were met. Indeed, the Court found that the charging of the tax at each stage and that the deduction of the tax payed previously were not met in the case. As a result, in Vodafone the Court did not characterize the tax as a VAT and in consequence it was not subject to the prohibition of article 401

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[105] Vat Directive 2006/112/EC VAT DIRECTIVE

[106] to enact a provision or tax that has the essential characteristic of VAT, even fit not identical »

[107] Banca Popolare di Cremona v. Agenzia Entrate Ufficio Cremona para 26., C-475/03,

[108] Joined cases C-283/06 and C-312/06, KOGAZ and Others, para 34

[109] Comission v.Poland C-596/19 P

[110] Vodafone C-75/18 para 62
Banca Popolare di Cremona Soc. Copp a.r.l.v v. Agenzia Entrate Ufficio Cremona, C-475/03 para 26, ibfd case law.

of the VAT directive[111].

In regards to the applicability of article 401 of the VAT directive to the French DST it is 'fair' to follow the Court findings but also to study the Advocate generals opinion on the subject since she linked the challenges of the case to DST in Member States and the future possible challenges that will be brought up.

Advocate General Kokott in her opinion of Vodafone did come to the same conclusion as the Court regarding the qualification of the Hungarian tax and the applicability of article 401 of the VAT directive. However, the Advocate General did push further in her enquiry.

The Advocate General did indeed point that the tax in this case was not general but specific[112] and the fact that it is an annual tax and not a transactional tax it did not meet the fourth characteristic, to pass the burden of the tax to final consumer. The Advocate general came to qualify the tax as a « turnover-based special income tax » and not VAT alike tax, as such a direct tax and not an indirect taxation.

Assessing the French DST in light, of the case law and Advocate General opinion, would bring us to conclude that it is likewise not a VAT alike tax, because it does not meet the principle characteristic of VAT as it is not legally designed to be passed on to consumer, it is a specific tax on two type of digital services as such not a general tax. And it is not a tax due or paid at each stage of production and distribution.

In this aspect, the Court did follow it case law[113] in Vodafone, and did not qualify VAT a like tax if the essential characteristic were not met[114] as such we can conclude that if the French DST is challenged and end ups in front of the CJEU on argument that it is a VAT alike tax and as such prohibited by article 401 of the VAT directive then it is likely that the Court will once again follow its case law and deny the applicability of article 401[115] because the characteristics of VAT are not met by the French tax.

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[111] Vodafone C-75/18 para 65

[112] AG Kokott opinion in the Vodafone case.

[113] IRAP case C-475/03
Viking Motors and Others C-475/17
Kögaz C-283/06 and C-312/06 para 34

[114] id

[115] Vodafone C-75/18 case, para 65

5. General conclusion

How could the recent case law[116] of the Court impact the DSTs (and their compatibility test to EU laws) ?

Between the two they are quite similar points. Since DSTs are now being implemented individually by Member States, the case law is quite small substantive, Vodafone did bring some light that is most useful in the 'examination of admissibility' of these specific (digital services) turnover based taxes[117].

Firstly, we take from Vodafone that as such they are, turnover based tax do not create issues in regards of fundamental freedoms, even if the rate is proportional like in the French DST (3%) or progressive like in Vodafone. (Inter alia, the findings of the Court in Vodafone).

In regards, to discrimination based on the nationality or based state of origin of the undertaking. It is found inter alia by the Court, that taxes shifting their burden to foreign-owned undertakings does not create discrimination, unless it is inherent. But this could not be drown from the only fact that the majority of the undertakings are foreign-owned.

To conclude, it is of course yet to be seen how the Court will react to such provisions in light of fundamental freedoms such as freedom of establishment but also in light of State Aid. Since it is arguably the most relatable prohibition on which challenges could be brought up and be admissible.
In regards, of DST the thresholds will probably be the main issue challenged. Even if we can take from the Advocate Generals opinion, the Court in Vodafone as well as the Courts findings in Hungary v. Commission

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[116] Case C-323/18 , Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága
HU: ECJ, 3 Mar. 2020,
Case C-323/18 , Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága
PL: ECJ, 16 Mar. 2021, Case C-562/19 P, European Commission v. Republic of Poland, Hungary , Case Law IBFD.
HU: ECJ, 3 Mar. 2020, Case C-482/18 , Google Ireland Limited v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága , Case Law IBFD. (see R. Szudoczky & B. Károlyi, Google Ireland: System of Penalties Relating to the Hungarian Tax on Advertisement is not Compatible with EU Law , Highlights & Insights Eur. Taxn., p. 169 et seq. (2020)).

[117] In Advocate General Kokott opinion on Vodafone case C-75/18, digital services taxes were mentioned many times and she made a clear connection between *Vodafone* and the digital tax debate :AG Opinion in *Vodafone* para 1, 4, 71, 96, 101, 119, 123 and 184

that threshold are quite acceptable because they do reflect the aim and purpose of the measure by wishing to tax undertakings only when they do fell into a high degree revenue[118]. Yet again, it is unpredictable to define the Courts approach on such cases. Especially, when in DST like the French DST, threshold could possibly be deliberately discriminatory.

Nonetheless, it is clear from Advocate General Kokott opinion on Vodafone, and the Grand Chamber of the Court that they do validate DSTs especially and explicitly Advocate General Kokott.
Worth mentioning the fact that Member States that have already introduced DST would have been in a much agreeable position if the DST would have been a result of a EU directive. In such matter for instance DST issued from a directive could never be challenged on grounds of State Aid.

DST will probably be subject to challenges soon enough in the future and it will remain to be seen how the Court will deal with such provisions. Even if we could assume from the recent relevant case-law that fundamental freedoms could arguable not be found violated and probably State Aid will equally not be found violated in the DST.
however, it is yet to be seen and challenge the DSt in light of international law. The international law and trade law that will be potentially violated by those DSTs is not the least important .

6. A compliance of the French DST with EU law to be proven in the future.

To conclude the investigation, it is quite difficult to actually determine if there is a true compliance of the DST with European Union law, this because it is quite a difficult subject. There is no relevant law that could be use to determine if this DST is contrary to EU law. there is barely any case law that could potentially qualify or not the DST. Digital economy has been a difficult topic to delimited by taxations. This is why there is still no Union wide or International digital tax. But in regards to this paper, the main difficulty as been to asses if there is a compliance of the French DST with

[118] AG Opinion in *Vodafone* (C-75/18), para. 185, referring to the exemption for small undertakings under EU VAT law
Hungary v. Commission T-20/17, 2019, para. 104

the European Union law, because the case law with similar factual circumstances was missing. There have been relevant new cases on the topic of State aid rules, the Commission v.Poland and joined by Hungary. And in the fundamental freedoms aspect, Tesco, Vodafone which have been the backbones of this study.

Nonetheless, it is likely that the French DST or even the Member States DST (Italy, Spain, Austria) will be challenged on the grounds of the fundamental freedoms. Even if we have seen in this paper that to challenge those DST is one thing but to prove violation of fundamental freedoms or incompatibility with EU State Aid rule will be quite difficult in practice.

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