COMPARATIVE ANALYSIS OF THE FRENCH AND CZECH REGULATION OF THE TAXATION OF DIGITAL COMPANIES

Zoltán NAGY[*]
Enikő KRAJNYÁK[**]

Abstract

The aim of this paper is to give a brief introduction to digital taxation, by referring to the supranational legislation and the problems arising from its loopholes, such as double taxation, tax erosion and tax avoidance. Due to the fact that it is difficult to create a binding, widely accepted legal instrument on a global and even on a European level, national legislations targeting digital companies are worth considering. Therefore, the paper aims to point out the most important aspects of such a regulation, focusing on the French and the Czech law. The importance of the French law on digital taxation is significant, as it is the first attempt at national level in Europe to offer a solution for the issue. The Czech law was chosen to represent a Central European perspective of digital services, as it could be an example for other states in Central and Eastern Europe in the future.

Keywords: *international tax law, digital servies tax, double taxation, European Union directive, tax harmonisation.*

1. Introduction

The technological innovations of the 20th century brought radical changes in economic life, which have challenged not only businesses but also legislators. The previous economic regulation that was based on the physical market presence, but the so-called "brick and mortar" economy no longer provides a sufficient basis to address the challenges posed by the globalization of the economy. These issues raise questions in a number of areas of law, such as data protection, the protection of interests, jurisdiction or supervision. The most important legal aspect for the present research paper is the examination of problems related to tax regulation, as differences in national regulations can cause several problems at international level.

The problems arise from the worldwide expansion of online companies that do not require presence production. Digital companies providing cross-border services take advantage of gaps and loopholes of inconsistent national regulations, which states seek to resolve between themselves through bilateral agreements. However, the expansion of digital companies is advancing at a faster pace than legislation, so the issues of double taxation, double non-taxation, tax evasion and tax avoidance could be more difficult to be solved by agreements that are binding for two states each. Even though the problem has been recognized at a higher level and there are comprehensive proposals (formulated by the OECD or the European Union), they do not have a coercive nature.The BEPS Action Plans issued by the

[*] University professor, Ph.D., Hungary, University of Miskolc, Faculty of Law, Institute of Public Law, Department of Financial Law; Ferenc Mádl Institute of Comparative Law (e-mail: jogdrnz@uni-miskolc.hu).
[**] Law student, 5th grade, Hungary, University of Miskolc, Faculty of Law (e-mail: kraen98@gmail.com).

OECD primarily offer a solution strategy to eliminate harmful tax practices, such as double taxation, double non-taxation, tax evasion and tax avoidance.

We believe that national regulations targeting specifically digital companies and offering modern solutions for digitalization could be a great example for a consistent and harmonized multilateral regulation. These national examples, however, could sparsely be found. Among these, the French and Czech regulation should be highlighted: through the comparison of these two tax policies and the examination of their compliance with the draft directive of the European Union, we aim to point out the possible directions for future digital taxation.

Although several states – such as the United Kingdom, Italy or Spain – are drafting legislation to introduce a digital services tax, along with the French legislation, that was the first to be adopted in Europe, we have chosen the tax regulation of the Czech Republic, a state that represents well the countries of the Central European region. The presentation of the draft directive of the European Union is inevitable, since, as we have pointed out above, this is primarily the source of law which, although it has not entered into force, is taken into account by the legislators when drafting national regulations.

The focus of the paper is on the comparison of national legislations. The national laws are going to be compared regarding taxpayers, tax subject, tax base, tax rate and the system of tax benefits and exemptions. Besides the motivations for lawmaking, we also list the international responses to them (from third countries), pointing out the complexity of the problem. After examining the regulations, we try to find an answer to the question of whether it is necessary or possible to create a harmonized supranational legislation, or whether it is possible that the solution rather resides in the adoption of unilateral national laws.

2. The phenomenon of the digital economy and related tax issues

Economic activities based on the use of digital technologies are collectively referred to as the digital economy,[1] which results in day-to-day online connections between billions of people, businesses, devices, data, and processes. This interconnection is mainly made possible by the Internet and other (“smart”) digital technologies. The digital economy is constantly evolving and is essentially undermining traditional frameworks for building businesses, collaborating with each other and acquiring services.[2]

Certain researches distinguish three areas of the digital economy,[3] which can be summarized as follows. The first component is the infrastructure of the e-business through which the various economic processes are executed. These include

[1] It shall be noted, however, that digital economy does not have a clarified, generally accepted definition. The notion itself appeared in the liternature in the 1960s, and certians use it as a synonym for ’internet economy’ or ’web economy’. The notion gained real meaning from the 1990s, when the use of internet spread rapidly. See: IMLAH, Bill: The Concept of a ‘Digital Economy’, Oxford Digital Economy Collaboration Group, 2 September 2013. Available: https://web.archive.org/web/20131022003036/http://odec.org.uk/the-concept-of-a-digital-economy/ (2020.05.10.)

[2] What is digital economy? Unicorns, transformation and the internet of things. *Deloitte*, 2020. Available: https://www2.deloitte.com/mt/en/pages/technology/articles/mt-what-is-digital-economy.html (2020.05.10.)

[3] Mesenbourg, T.L.: Measuring the Digital Economy, U.S. Bureau of the Census, Suitland, Maryland (USA), 2001, pp. 3-5.

various telecommunication networks and devices, as well as human resources. The second component is the e-business itself, which includes all the processes that an organization conducts on telecommunication devices, such as sales, advertising, or logistics. Thirdly, e-commerce shall be mentioned, which means the sale of goods and services through computer network. Computer networks are connected and communicate with each other in an interactive way.

The economic processes carried out through Internet have brought elements to the economy that the formerly operating, so-called traditional economic model did not make possible: platforms like Amazon, Uber, Airbnb are able to connect between economic operators in different parts of the world – there had not been the mere possibility of this before the spread of the Internet. Moreover, it has created a "virtual reality" that does not require ~~neither~~ either physical presence ~~n~~or cash payment. In addition, fewer tangible assets, existence and expansion in more and more countries are needed.[4]

The digital economy brought changes not only for economic actors – the analysis of which goes beyond the scope of this paper – but also poses new challenges for legislators. As digitalisation is a cross-border phenomenon,[5] restructuring international regulation and financial law (taking into account the nature of services, consider~~at~~ing consumer interests first) is essential.[6]

Key issues related to the taxation of digital companies include double taxation, double non-taxation, tax evasion and tax avoidance.

The opportunity to enter the market has increased significantly, given that it has a relatively low cost compared to the previous traditional market model, allowing a wider range of participants to engage in the digital economy.The previous regulation was based on the so-called "brick and mortar" economy,[7] which is physically present on the market with production units, shops and warehouses. However, technological development and digitalisation, have radically transformed the economy, which raises the following problems. First, a foreign seller or service provider does not pay the tax of its profits in the country where the customers are located, but in the service provider"s country of residence or another "source country" where the service activity is performed by the company. Secondly as a consequence, not only the taxpayer"s domicile, but any country where the taxpayer maintains production sites in a broad sense, including data centers or R&D departments, may claim tax under its own legislation.[8] Thirdly, due to the extremely rapid growth of the digital sector, an increasing share of Internet companies" business income from cross-border sales or services may not be taxed eventually.

[4] Armstrong, Brian: The digital economy is becoming ordinary. Best we understand it, *The Conversation*, 24 January 2020. Available: https://theconversation.com/the-digital-economy-is-becoming-ordinary-best-we-understand-it-130398 (2020.05.10.).

[5] Chohan, Usman W.: Some Precepts of the Digital Economy, Critical Blockchain Research Initiative (CBRI) Working Papers, 2020. pp. 4-6.

[6] Nagy Zoltán: A digitalizáció hatása a pénzügyi piac szabályozására, *Miskolci Jogi Szemle*, Vol. 15., No. 1., 2020, pp. 24-25.

[7] The term referrs to the fact that the production of these companies are carried out in a physical form.

[8] OECD: Tax Challenges of Digitalisation: Comments Received on the Request for Input, PWC – Comment, Part II, 25 October 2015., p. 2, 195 para. 1.5.

The presence of digital companies thus poses unprecedented challenges to both the economy and law, envisioning a reconsideration of tax law rules. Such a category is, for instance, the principle of "place of value creation", which seeks to justify the validity of the right to tax based on where and in which country the digital company provides the service. The core activities of value creation are mostly user-generated content and data collection, which can be strongly linked to intangible assets.[9] Since it is a rather new concept, its notions are not completely developed, and neither the value created nor the the place of its production can be clearly defined, therefore, the states do not consider taxation based on this principle mandatory.[10]

Businesses, which include digital companies, are subject to corporate tax. Corporate tax shall be paid not only by companies governed by domestic law or operating from domestic sources, but also by any company, possibly foreign, which has a permanent establishment in the country and manufactures the product there. According to the literature, companies under domestic law have legal personality, although which entities (associations, foundations, churches) are considered as such by the state varies from country to country.[11] However, a common element of all regulations is the definition of the tax object to which the taxation itself is directed: this is the business activity that the company carries out. This is problematic to define ~~it~~ in the case of a digital company, since it is difficult to clarify what kind of activity they do, what kind of product they produce, and where they carry out their activity. Due to online connection, a digital company can operate in all continents of the world, but this does not necessarily require an actual physical presence.[12] In this case, in which country shall corporate tax be paid? Is it where the place of business is located, or is it where business is done or where they are digitally present?

The problem is further shaded by the fact that local tax rules do not offer a sufficient solution for the cross-border activities of digital companies. The determination of tax policy is a significant component of state sovereignty, however, cooperation between regulations at national level is essential in order to avoid certain loopholes or inconsistencies. Nevertheless, legislators are trying to find a solution that does not undermine this sovereignty at all, while it takes into account factors such as economic growth, employment rates, competitive neutrality and non-discrimination.[13] Accordingly, bilateral agreements seek to resolve disputes by sharing regulatory competences (even though these conventions do not set out specific rules for digital activities). In most cases, however, digital companies are not present in just two states, so a higher level of

[9] Stevanato, Dario: Are Turnover-Based Taxes a Suitable Way to Target Business Profits?, *European Taxation*, November 2019, pp. 544-545.

[10] Schön, Wolfgang: Ten Questions about Why and How to Tax the Digitalized Economy, *Bulletin for International Taxation*, April-May 2018, pp. 278-280.

[11] Harris, Peter: Corporate Tax Law: Structure, Policy and Practice, Cambridge University Press, 2013, pp. 22-31, 35-37.

[12] It shall be noted as an example that certain companies, such as Google or Facebook, are present in more than fifty countires all over the world. Source: https://about.google/locations/?region=north-america&office=mountain-view; https://www.theguardian.com/technology/blog/2010/jul/22/facebook-countries-population-use (2020.09.12.).

[13] Marján Attila: Az Európai Unió gazdasága, HVG Kiadó Rt., Budapest, 2005, p. 335.

supranational regulation is needed.[14] The Organization for Economic Co-operation and Development (hereinafter referred to as: OECD) and the European Union are trying to addressthis issue.

As it had been pointed out above, digital companies operate in two or more countries, so a supranational level of regulation could provide a proper solution to their tax problems. While the OECD tends to issue proposals, model conventions and guidelines,[15] the European Union has the means to set binding rules, although rulemaking is rather slow due to the tax sovereignty of the Member States.

The right to tax is a key issue for digital companies because – even though the Union delegates corporate tax regulation to national level – the problems they raise cannot be linked to one or two states and cannot be resolved by national laws. The issue of double taxation, that is presented below, typically involves two states, since in this case, two states equally claim the corporate tax. Similarly, action by several states is required to resolve tax evasion, as a result of which no tax is paid to any states. Currently, there is no regulation at international nor EU level that would clearly define how these regulatory competences shall be shared between Member States, as the Union seeks to respect the sovereignty of taxation. However, insistence ~~to~~ on sovereignty would make it more difficult to create uniform regulations and it also blocks legal harmonization and, in the long run, integration. It should be noted that the issue of national sovereignty versus integration is also a political and economic dilemma that arises not only in relation to taxation.[16]

3. Attempts to solve the problem of digital taxation

3.1. European Union

The initiative of the European Union is worth mentioning: it does not address problems of digital taxation (double taxation, tax evasion or tax avoidance) one by one but – similarly to BEPS – digital services as a whole. In 2018, a proposal for a common system of digital service taxes was drafted, but it has not yet entered into force.[17] The most important objectives and provisions could be summarized as follows.

The subject matter of the draft directive extends to digital companies, for which user participation is a basic input that generates revenue, that is to say, these companies would not be able to exist in their current form without user consent. Such services include, for instance, the placement of advertisements, the provision of broadcasting services, the collection and transmission of data, which are carried out for remuneration. The proposal specifically targets large companies with worldwide revenues of more than €750 million and € 50 million in the EU. Since the proposal considers user participation as value

[14] OECD, Action Plan on Base Erosion and Profit Shifting, OECD Publishing, 2013. pp. 9-11. Available: http://dx.doi.org/10.1787/9789264202719-en (2020.09.12.).

[15] OECD: Who we are. Available: https://www.oecd.org/about/ (2020.09.13.).

[16] Faulhaber, Lilian V.: Sovereignty, Integration and Tax Avoidance in the European Union: Sovereignty, Integration and Tax Avoidance in the European Union: Striking the Proper Balance, *Columbia Journal of Transnational Law*, 2009-2010, pp.221-224.

[17] It should be noted that the European Union also envisaged the introduction of digital services tax in its forthcoming draft recovery budget, but refers back to the provisions of the 2018 draft directive for the details, so the 2018 proposal will be discussed in the paper and not the 2020 budget plan. See: EUROPEAN COMMISSION: The EU budget powering the recovery plan for Europe Communication from the Commission, Brussels, 27.5.2020., COM(2020) 442 final.

creation, it indicates the location of users as the place of taxation.[18]

According to the literature, this draft directive raises several concerns.Firstly, it does not address the issue of tax competences – although the EU would only have the right to regulate indirect taxation, this draft cannot be considered as a means of indirect taxation, as it would not collect the tax from final consumers but clearly from the company. Consumers could not be considered as a stable base for taxation, as one of the basic principles of taxation is activity based taxation.[19]

Secondly, the idea of determining the tax base on the basis of the financial capacity of the company, instead of the company"s income or profits, might bring up issues of discrimination . This taxation method does not take into account capital assets invested as means of targeting surplus profits but focuses exclusively on turnover, which in itself does not necessarily constitute a reliable solvency indicator. It is possible that the costs of the business exceed the income, generate a loss, or the profit is not sufficient to meet the tax obligations. In such cases, the financial capacity of the company is not a relevant category, as the tax can only be paid to the detriment of the capital.[20] The provisions of the draft also raise the issue of discrimination, as it clearly distinguishes between companies: not only by targeting digital companies, so that those carrying out the same or a similar activity offline (in other words, not by digital means) would not be taxable, but also by taxing the highest-income companies, which puts them at a disadvantage compared to companies that are present on the market but do not reach a certain income threshold.[21] In order to avoid discrimination, it would be important for decision-makers to justify the need for setting an income threshold criteria, especially because the tax would mainly affect American companies rather than European ones.[22]

Thirdly, the proposal does not include a specific action plan for the elimination of double taxation and tax evasion.It mostly seeks to coordinate the proposal with existing instruments, that are bilateral and multilateral agreements.

Fourthly, the adoption of the proposal for a directive is also hampered by the need for unanimous support from the Member States. Some points harm the interest of certain Member States: some, such as France, Italy or Spain, seek to introduce their own digital services tax, while in other countries these kind of aspirations are rather put into the shade.[23] Member States also fear

[18] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM/2018/0148 final, 2018/073 (CNS), Brussels, 2018, Article 3 (1), 4 (1)-(4), 5 (1).

[19] The OECD-BEPS directive is based on the principle of value creation: it essentially indicates the place where the economic activity is carried out. In our opinion, consumer participation should not be considered an economic activity, as Google or Facebook users use the services of these interfaces for their own benefit, there is usually no movement of assets between the digital company and users, so using services is not an economic activity for users. Source: Becker, Johannes – Englisch, Joachim: Taxing Where Value is Created: What's 'User Involvement' Got to Do With It?, *Intertax*, Vol.47/2. 2019, pp.161-171.

[20] Stevanato, Dario: ibid., pp.538-540.

[21] Károlyi Balázs – Szudoczky Rita: 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?, *European State Aid Law Quarterly*, 2020/3, pp.253-255.

[22] Károlyi Balázs – Szudoczky Rita: The Troubled Story of the Hungarian Advertisement Tax: How (Not) to Design a Progressive Turnover Tax, *Intertax*, Vol. 48/1. 2020., p.54.

[23] Gough, Simon – Polacco, Giuliana –Dorin, Sophie – Turrado, Montserrat – Bongaerts, Willem – Sikora, Bartlomiej: Digital Services Tax: Overview of the progress of implementation by EU Member States, *Bird&Bird*,

that their fiscal sovereignty would be threatened, therefore they argue against the proposal that it would interfere strongly with market conditions, which are not allowed by the EU Treaties. It has been argued that the EU can only monitor the functioning of the market but it certainly cannot shape it.[24] Although the EU proposal has not yet been adopted, in any case, the fact that there is a recognition at Community level of the need for a regulation on the taxation of digital companies is extremely forward-leaning.

3.2. The French model: the GAFA regulation

On 11 July 2019, for the first time in Europe, the French Parliament adopted a law on the taxation of digital companies. The so-called GAFA tax primarily targets the four largest dot.com (digital) companies – Google, Apple, Facebook and Amazon.[25]

The French state, exercising its sovereignty, aims to decide on its own tax matters. However, it was pointed out during the parliamentary debate that the law serves as a kind of C-plan, behind international and European Union regulations, which, as previously presented, have not entered into force yet. Therefore, the French Government does not wish to take away the competences of the higher-level legislators but seeks to temporarily fill the legal gap.[26] Consequently, if there were international or EU rules, they would take precedence over the French rules.[27]

Although the bill has already been adopted, negotiations are still ongoing with the OECD, but the United States (which participated in the negotiations through its Trade Representative (USTR)) suspended negotiations with France on 17 June 2020, due to the disadvantage that the regulation would bring to American companies; moreover, they also envisioned drastic taxation of French import products. The case also provoked resistance from Google and Amazon: the companies called the French provisions a brutal break with the previous, long-standing rules, which, according to them, result in a discriminatory tax.[28] It should be noted, however, that the tax is not limited only to American companies: about 50% of the 120-150 companies involved are American, 30% European, and 20% Asian. According to some French experts, the introduction of a tax targeting large US companies would severely affect emerging European and even French companies, as it

July, 2020. Available: https://www.twobirds.com/en/news/articles/2019/global/digital-services-tax-overview-of-the-progress-of-implementation-by-eu-member-states (2020.09.16.).

[24] Greggi, Marco: La tassazione dell'economia digitale nel contesto europeo: la proposta di direttiva sulla Digital Services Tax, in: Persiani, Alessio: La tassazione dell'economia digitale tra sviluppi recenti e prospettive future, Neu-Nuova Editrice Universitaria, Rome, 2019, p.103.

[25] Le Parlement adopte définitivement la « taxe Gafa », contestée par les Etats-Unis. Available: https://www.lemonde.fr/economie/article/2019/07/11/le-parlement-francais-adopte-definitivement-la-taxe-gafa-contestee-par-les-etats-unis_5488135_3234.html (2020.09.21.)

[26] Sadowsky, Marlyne: French perspectives on the Digital Services Tax (DST), *Tijdschrift voor Fiscaal Recht*, May 2020, p.427.

[27] Rapport de la commission mixte paritaire chargée de proposer un texte sur les dispositions restant en discussion du projet de loi portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés, n° 2080, 26 June 2019. Available: http://www.assemblee-nationale.fr/dyn/15/rapports/1737/l15b2080_rapport-fond# (2020.09.21.)

[28] La taxe numérique française « discriminatoire » selon Google, Facebook, Amazon. Available: https://www.lemonde.fr/international/article/2019/08/20/la-taxe-numerique-francaise-discriminatoire-selon-google-facebook-amazon_5500850_3210.html (2020.09.21.).

could retard their development – thereby damaging the state"s own economy.[29]

3.3. The Czech proposal

On 18 November 2019, the Czech government submitted a draft bill to the Parliament on the taxation of digital companies. This move seems ambitious, not only because the French law could be the only precedent but also because the proposal is expected to provoke fierce protests and sanctions by the United States. The need for national regulation in this case also emerges from the lack of regulation at EU level. The Czech government emphasized that the bill would fill a gap and it was designed specifically to take into account Central European economic conditions.[30] The Czech Ministry of Finance justified the introduction of the digital tax on the grounds that it would be compatible with the regulation of the taxation of companies operating in different ways, whether digitally or in presence, therefore, the company"s way of operating would not favor or disadvantage certain market participants. However, finding the right balance is not easy, as digital companies would be at a disadvantage compared to other offline companies as long as all states where these companies operate on a digital platform do not introduce a similar tax at the same tax rate.[31] It can be concluded that the digital services tax, although its primary purpose is to compensate for a market-distorting phenomena, is in fact market-distorting itself due to global activity, as long as states act unilaterally with their national regulations instead of setting up a common multilateral approach.

It should be noted that, according to the United States, it is not national regulation that is needed, but collective action, while temporary digital taxes, which vary from country to country, only complicate market conditions. The US, as in the case of France, has warned the Czech Republic that if a tax targeting US companies is introduced, it will also tighten import regulations on Czech products in response. From the American part, it has been argued that the tax threatens the competitive business environment: not only is it discriminatory, as it targets only large companies, but it also has a market-distorting effect as it imposes a disproportionate burden on foreign companies.[32] As a result, for both France and the Czech Republic, the question of how much it is worth introducing this tax arises: the amount the states would gain from it may be significant, but they could also lose at least as much in the future as a result of strict US trade regulations.[33]

3.4. The French and the Czech (draft) regulation in the light of the draft directive of the European Union

The two national regulations presented above are going to be compared and their

[29] Marques, Nicolas: La taxation française des services numériques un constat erroné, des effets pervers, Institut Économique Molinari, Paris-Brussels, 2019, p.29.

[30] Žurovec, Michal: Návrh zákona o digitální dani míří do Sněmovny, Ministerstvo financí České republiky,18 November 2019. Available: https://www.mfcr.cz/cs/aktualne/tiskove-zpravy/2019/navrh-zakona-o-digitalni-dani-miri-do-sn-36638 (2020.10.07.).

[31] Hrabčák, Ladislav – Popovič, Adrián: On certain issues of digital services taxes, *Financial Law Review*, No. 17 (1)/2020., pp.63-64.

[32] Wágner Tamás Zoltán: A digitális adók kérdése, különös tekintettel a cseh szabályozásra, *Külügyi Műhely*, 2020/1., pp.112-116.

[33] Česko plánuje digitální daň, Američané se zlobí, Svět průmyslu, 11 April 2020. Available: https://svetprumyslu.cz/2020/04/01/cesko-planuje-digitalni-dan-americane-se-zlobi/ (2020.10.07.).

compliance with the draft directive of the European Union will be examined on the basis of the following comparative criteria: taxpayers, tax subject, tax base, tax rate, tax benefits and tax exemption system.

Taxable persons are natural persons, legal persons or unincorporated partnerships and other organizations which, due to the pursuit of a taxable activity, realize the facts of the tax liability by themselves. A taxable activity is an economic activity carried out on a regular basis in order to get remuneration.[34]

In accordance with the above-mentioned, the scope of the EU draft directive extends to certain categories of digital service companies (higher income companies).[35] By setting the threshold, the Union seeks, on the one hand, to create legal certainty by forcing undertakings to keep separate records of their income from the activities covered by the tax in question. On the other hand,it excludes start-ups and small businesses whose income is clearly below a certain threshold, as they would be disproportionately burdened by the payment of such a tax. The tax liability applies regardless of whether the company is established in a Member State or in a third country.[36]

The issue of the taxable person is closely related to the place of taxation, which – as we have pointed it out above – would be the place of residence of the consumers. The definition of residence depends on the activity: in the case of advertising companies, it is the Member State in which the consumer is present at the time the advertisement is viewed; in the case of consumer interconnection companies, it is the Member State where the consumer concludes the transaction; in the case of the transmission of collected data, it is the Member State of residence shall be the Member State where the consumer was present when the data were collected.[37]

The French law also sets out the conditions for a company"s income: it deals with companies whose income exceeds € 750 million at an international level and €25 million in France. We can see that the threshold for global action is the same as that set out in the draft directive of the EU, and the threshold for a country is half that of the EU. This is essentially compatible with the EU draft. Businesses, regardless of their form or location, can be subject to the tax if they are established in accordance with French commercial law. The link between the company and taxation is also established by the user: the company is considered to be subject to the law if the user communicates with it via a terminal that is located in France.

The law, like the EU directive, which generally targets digital, non-physical companies, defines the activities that can be used to identify which entities become subject to the digital tax. These activities are the following:

- providing a digital interface[38] through electronic communication that allows users to communicate with other users, in particular for the delivery of goods or the supply of services. However, this activity is not taxable if the interface is

[34] Herich György: Adótan, Penta Unió, Budapest, 2019, p.28.

[35] Of which the annual income exceeds €750 million worldwide and €50 million in the European Union, as it had been pointed out previously.

[36] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM/2018/0148 final, 2018/073 (CNS), Brussels, 2018, Article 4.

[37] Kofler, Georg – Sinnig, Julia: Equalization Taxes and the EU's 'Digital Services Tax', *Intertax*, Vol.47., No.2., 2019, pp.191-192.

[38] Connection surface between two systems. Source: Gál Tibor: Interfésztechnikák, Szak Kiadó, 2010, p.3.

available to users only for the use of digital content, communication services or payment services.

– services provided to advertisers or their agents for the purpose of placing advertising messages on a digital interface based on data collected from users using such interfaces. Such services include, but are not limited to, services required for the storage and distribution of advertising messages, the monitoring of advertising activity, and the management and transmission of user data.[39]

Similarly to the French and the EU regulation, the Czech draft bill also links the payment of digital tax to the company"s revenue: revenue from global operations shall exceed €75 million and revenue from operations in the Czech Republic shall exceed CZK 100 million (~ €3.7 million), unless the revenue from the operation in the Czech Republic does not reach 10% of the whole European revenue in Europe.[40]

Regarding taxpayers, we can conclude that both national regulations are in conformity with the conditions of the Union: the maximum global revenue is set at €750 million, while national revenue understandably varies from country to country. It should also be emphasized that in none of the cases does the economic form matter in the selection of taxable persons; what is important is the nature of the activity; the directive outlines the scope of the service, thus, it sets the scope to those operating solely on the digital platform. National regulations specify in detail the services to which the digital tax is intended to apply: these are mostly advertising or data collection activities.

The object of the tax is the element or activity that gives rise to the obligation to pay the tax.. Corporate tax is an income type tax, which means that the income-generating activity carried out by enterprises will be subject to the taxation.[41]

According to the EU proposal, taxable income includes revenues from the supply of certain digital services, which can be summarized as follow. First,, this includes the placement of an advertisement on the digital interface that targets the users of the interface. In this case, the tax liability also applies if the digital interface is not owned by the entity that is responsible for placing the advertisement. (Thus, it is not the owner of the interface, but the person placing the advertisement, who is considered a taxable person.) Secondly,, the supply of multilateral digital interfaces to users, which enable users to find and contact others and which may facilitate the direct sale or supply of related products and services between users, is a taxable activity. The tax liability does not include investment services.[42] Thirdly, the transfer of data collected from the activities of users of digital interfaces, with the exception of the transfer of data by a trading venue, a regular internaliser[43] and a financial service provider regulated under

[39] Loi No. 2019-759, Article 1, II-III.

[40] Vládní návrh ZÁKON o dani z digitálních služeb, (Draft bill for digital services tax), Article 15-16.

[41] Herich György: ibid., p. 28.

[42] Receiving and transmitting orders related to one or more financial instruments; execution of orders on behalf of clients; trading with own accounts; portfolio management; investment advice; placement of financial instruments with a commitment to purchase the instrument; placement of financial assets without a commitment to purchase the asset; operation of multilateral trading facilities; operation of organized trading facilities. Source: 2014/65/EU directive on markets in financial instruments, Annex I., point A (1)-(9).

[43] An investment firm that executes its orders on its own account in an organized, regular and significant order, outside of a regulated market and a multilateral trading facility. Source: 2014/65/EU directive, Article 4 (1), point 20.

Community law, should be treated as a tax object.[44]

As for the French law, the activities covered by the digital tax have already been mentioned above, since it designates taxable persons on the basis of the activity. These activities are essentially related to the provision of digital interfaces, the advertisements placed on them and the collection of data. Digital taxes do not cover activities that are subject to EU legislation.

The Czech proposal considers the following activities to be taxable: the use of a multilateral digital platform with 200,000 users; targeted advertising on a digital platform amounting to CZK 5 million; and the sale of data collected from users of digital services with a revenue of CZK 5 million. The date of the taxable activity is the day on which the identities of all the users involved in the transaction are revealed.[45] This provision is interesting because it takes the subject of digital taxation from a different perspective than the EU directive or French law: although it makes almost the same activities taxable as the other two regulations – targeting advertising and data collection – it defines the minimum amount of income generated by the activity. Revenue was determined under EU and French provisions only in relation with the taxable person when setting the minimum amount of annual revenue for digital companies at international and EU/national level. As the scope of taxable activities is essentially the same in both the French and the Czech legislation, it can be concluded that they are also in conformity with the draft directive concerning the subject matter of the tax.

The tax base is the basis for the tax liability in value or quantity, after which the amount of tax can be calculated using a tax rate. The tax base is calculated taking into account all taxable income and profits.[46]

The harmonization of the corporate tax base at EU level[47] is not a new idea: a Common Consolidated Corporate Tax Base (CCCTB) has been drafted, but Member States have ultimately failed to reach a consensus, mainly because of insisting on tax sovereignty. Applying the tax base would have originally been optional,[48] which indicates how difficult it would be to introduce such a rule, due to the different interests of Member States. It would be less beneficial for countries with smaller industries, such as Luxemburg and Malta, while countries with a stronger manufacturing industry, like Germany and France, would be more favourable.[49]

Other issues are double taxation and erosion of the tax base. The EU draft directive mentions that the EU has already taken steps to harmonize the regulation of tax bases, but these are still difficult to outline properly. In any case, the preamble mentions that, in order to avoid double

[44] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM/2018/0148 final, 2018/073 (CNS), Brussels, 2018, Article 1 and 3 (1), (3), (4).

[45] Vládní návrh Zákon o dani z digitálních služeb, (Draft bill for digital services tax), Article 34-36.

[46] Définition Assiette Fiscale ou assiette de l'impôt. *ERECApluriel,* 2020. Available: https://www.erecapluriel.fr/definition-assiette-fiscale-ou-assiette-de-limpot/ (2020.10.10.)

[47] It shall be emphasized that the digital services tax is different from corporate tax, however, regulation on corporate tax might be a reference point for the regulation of digital services tax.

[48] Galántainé Máté Zsuzsanna: Problémák és újabb törekvések az Európai Unió társasági adózásában, Ph.D. dissertation, Győr, 2008, pp. 143-145.

[49] Kocsis Gabriella: EU: napirenden a közös konszolidált társaságiadó-alap, *Deloitte*, 2020. Available: https://www2.deloitte.com/hu/hu/pages/ado/articles/kozos-konszolidalt-tarsasagiado-alap.html (2020.10.10.)

taxation, for companies whose income is subject to both corporation tax and digital tax, Member States should be allowed to deduct digital tax from the corporate tax base, regardless of whether both taxes are payable in the same country or in other Member States.[50] The draft also highlights that one of its key objectives is to eliminate the erosion of national tax bases. The phenomenon of tax base erosion is particularly prevalent in the case of multinational companies, as states where the profits are made do not obtain the tax base, since it is transferred to tax havens which offer more favorable conditions for taxation.[51]

The French law provides that the amount of income obtained by the taxpayer during the year (excluding VAT) constitutes the tax base. This does not include the amount that the company receives in exchange for providing the digital interface.[52] This provision could be paralleled with the part of the legislation that lists the activities under which a digital company is subject to the law when defining taxable persons. A company that makes the interface available to users for the purposes of digital content, communication services or payment services is not considered a subject of a digital tax. As we pointed out earlier, these activities are not taxable, therefore, they cannot be included in the tax base either. The impact study of the law also shows that only that part of global turnover which was carried out in France is included in the tax base.[53]

The Czech bill is based on similar principles: the Explanatory Memorandum emphasizes that a proportionate share of the activity carried out in the Czech Republic should be considered as the tax base.[54] We can conclude that both regulations are compatible with EU objectives. By considering only profits made in the given country as a tax base, they seek to prevent tax base erosion and to tax locally collected income.

The amount of payable tax is determined by using the tax rate, which is usually the percentage of the tax base.[55] The draft directive of the EU set the uniform tax rate at 3%.[56] A uniform tax rate is needed at EU level in order to avoid distortions in the single market, and the 3% percentage is justified by the Commission because it strikes the right balance between tax revenues and the different effects on businesses of different profit margins following the introduction of digital services taxes.[57]

The French law operates with the 3% tax rate as well.[58] As it is known from the parliamentary reports, it was France who

[50] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM/2018/0148 final, 2018/073 (CNS), Brussels, 2018, Explanatory Memorandum, 1 (27).

[51] Peng, Wei: Multinational Tax Base Erosion Problem of the Digital Economy, *Modern Economy*, March 2016., pp.347-348.

[52] Loi No. 2019-759, Article 1, I-II.

[53] Étude d'impact de la loi No.2019-759, March 2019., p.20.

[54] Vládní návrh Zákon o dani z digitálních služeb, (Draft bill for digital services tax), Explanatory Memorandum, 2.4.

[55] Taux d'imposition, *Moneyland*. Elérhető: https://www.moneyland.ch/fr/taux-imposition-definition (2020.10.17.).

[56] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM/2018/0148 final, 2018/073 (CNS), Brussels, 2018, Article 8.

[57] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM/2018/0148 final, 2018/073 (CNS), Brussels, 2018, (35).

[58] Loi No. 2019-759, Article 1, II.

proposed to the European Commission not only a common, long-term rule requiring the taxation of digital services at Community level, but also a rate of 3% of the tax base. Therefore, it is reasonable that, in absence of a directive, the French law introduces the same tax rate.[59]

According to the original Czech draft, the tax rate on digital services was 7%, but this was extremely high compared to the EU directive and has provoked strong protests in the Czech parliament. As the bill has not yet been adopted, its content is subject to change;in June 2020, for example, the tax rate was reduced to 5%.[60] It should be emphasized that not every provision of the EU proposal or the French law was therefore taken over when the Czech law was drafted, but as the EU directive is not in force, the Czech bill does not conflict with any other supranational legal source. Nevertheless, the national rules that set different criteria make the regulation highly inconsistent, which is problematic because they target the same taxpayers and tax the same activity. In our opinion, the application of different tax rates could be dangerous because it could lead to a phenomenon similar to tax havens, and it is conceivable that large digital companies would reduce their activities in some countries due to unfavorable conditions for them.

The setting of tax rates is presumably related to the amount of tax revenue that the state needs. The two above-mentioned countries have different economic potentials: France aims to put some pressure on high-income digital companies by introducing the tax, and to prevent digital companies from operating in tax havens. The Czech Republic, on the other hand, is in great need of tax revenue; some research has shown that the introduction of a digital service tax would generate about 5 billion Czech korunas (~ 185 million euros) in revenue for the state, which would be one of the largest sources of tax revenue.[61] In France, tax revenue is expected to be €350 million per year, almost double of the Czech tax revenue.[62] It should be noted, however, that there are significant differences between the economies of the two countries: while France is one of the world"s leading economies,[63] the economy of the Czech Republic is far behind it. The potential revenue from the digital service tax is therefore disproportionate to the economic performance, so it can be concluded that it would be more advantageous for the Czech Republic to introduce this tax.[64]

Regarding the current regulations, we have mentioned certain "benefits", advantages caused by the inconsistency and non-harmonization of different national rules. These are the loopholes that, as we have seen above, can lead to some states acting as tax havens, and countries with less favorable regulations for companies that

[59] No. 496, Rapport fait au nom de la commission des finances sur le projet de loi, adopté par l'Assemblée Nationale après engagement de la procédure accélérée, portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés, 15 May 2019, p.38.

[60] Update 1-Czech coalition agrees 5% digital tax aimed at global internet giants, *Reuters*, 10 June 2020. Available: https://www.reuters.com/article/czech-internet-tax-idUSL8N2DN4MC (2020.10.17.)

[61] Hrabčák, Ladislav – Popovič, Adrián: ibid.., p.64.

[62] Assemblée nationale, Première séance du lundi 08 avril 2019, Compte rendu. Available: http://www.assemblee-nationale.fr/15/cri/2018-2019/20190208.asp#P1691407 (2020.10.22.).

[63] France is the 7th strongest economy in the world, based on the GDP. Source: The Top 20 Economies in the World, Investopedia, 18 March, 2020. Available: https://www.investopedia.com/insights/worlds-top-economies/#7-france (2020.11.01.).

[64] However, it shall also be considered that the Czech tax rate is higher than the French one.

lose significant revenue due to tax evasion. However, a clear distinction must be made between tax advantages under which the legislature allows certain taxable persons to pay only a certain proportion of the tax calculated. This can only be ordered for specific purposes, such as investment incentives, small business development, or catching up with lagging areas. The tax credit can be used in the form of a tax withholding, thus, the taxpayer must pay a certain percentage of the tax, as prescribed by law.[65] We can speak of a tax exemption if the taxable person would otherwise be liable to pay tax but the law completely exempts it from the obligation to pay for some reason.[66]

Concerning the digital services tax, we cannot really find a taxpayer receiving a tax benefit or tax exemption, as the purpose of this tax is precisely to tax large companies that operate worldwide and thus generate extraordinary income.

A distinction must be made between benefit and exemption, although they result in essentially the same situation, where a person is not obliged to pay tax.. Thus, for example, Czech law does not impose a tax liability on companies of which – even though they would meet the legal requirements based on their scope of activity and the amount of their income – the income from their activities in the Czech Republic does not reach 10% of their income in the European Union.[67] Also, companies with less than €750 million at international level and €50 million at EU level, €25 million in France and 100 million CZK in the Czech Republic will not be subject to the digital tax. In this case, we can consider these companies as not being covered by the legislation, as they would not have been originally liable to pay the tax, the fact that they are not taxed is not because the legislation exempts them for some reason, but because the legislation does not even target them. We think that it is reasonable why the regulations do not set a category that would be subject of tax benefits, as they are large companies that do not require state support to generate revenue and do not require investment-increasing rules in the sector, given the extremely high income (EUR 750 million).

4. Concluding remarks

By analyzing the proposal for an EU directive and then comparing the French and Czech regulations presented in the study we aimed to answer the question of whether it is possible to create a harmonized legislation at international level and how to eliminate harmful tax practices of digital companies. Taxation of digital companies that provide services without physical presence is extremely difficult. The current national regulations are not prepared for this, the supranational – European Union or international – law is not harmonized, and the enforceability and questionable binding nature of these laws also cause problems. However,these companies often operate with harmful tax practices, due to the lack or inconsistency of regulation.

The comparison of the two national and EU legislations could lead to the following conclusions. First,we can highlight that the scope of the regulation covers roughly the same companies: each

[65] Simon István (ed.): Pénzügyi jog II., Osiris kiadó, Budapest, 2012, pp.260-263.

[66] Kagan, Julia: The Meaning of Tax Exempt, Investopedia, 9 July 2020. Available: https://www.investopedia.com/terms/t/tax_exempt.asp (2020.10.21.)

[67] Vládní návrh Zákon o dani z digitálních služeb, (Draft bill for digital services tax), Article 15 (1) c). It shall be noted that this provision might potentially be contrary to the prohibition of discrimination.

rule sets an annual minimum income that is high enough to be worth taxing, although this varies by country. What they have in common is that the worldwide income of a taxable company must reach €750 million a year. In our opinion, it is conceivable that the Union may refer to the competence of a State to determine how much of a company"s worldwide revenue should accrue in that State, due to the different economic situations of the Member States.

Secondly, a similar issue may arise regarding the tax rate, which may also vary in the different regulations. This is presumably due to the fact that some states need more tax revenue, so imposing a higher tax may result in the same activity being taxed more in one state than in another. As we have pointed out above, different rules may even lead some states to become tax havens for digital services, so we believe that setting a common tax rate would certainly be more advantageous and would also reduce the chances of tax evasion.

Thirdly, the argument that the United States has envisaged the introduction of new, stricter customs rules against states considering the introduction of a digital tax is in favor of a uniform regulation. If the European Union acts uniformly to tax digital companies, the US may reconsider these provisions as an extremely important economic and strategic partner of the Union.

Fourthly, we can summarize the responses to the problems of taxation of digital companies, namely, double taxation, double non-taxation, tax avoidance, and tax evasion.. Regarding double taxation, it can be said that not only a common rule at EU level could offer a solution, and also in this case the problem would be easier to solve. Rules at national level could offer an effective solution to the issue if they all made the same activity taxable – this, as we have seen, could easily be solved – as this would also divide the revenue among states and it would not be necessary that all states conclude a bilateral treaty with each other. Double non-taxation, which comes from loopholes of regulation, that is to say, from the fact that the gap between national laws is not filled by a supranational regulation could also be avoided if the same activities were consistently taxed in all countries. As mentioned earlier, the problem of tax evasion could easily be avoided by introducing a common, uniform tax rate. Lastly, a transparent tax return system would be a solution against illegal tax evasion.

In our opinion, in order to systematically tax digital companies, it is absolutely necessary to introduce a uniform legislation at a European Union level, or to create national rules that are also harmonized with each other, which also take into account the economic peculiarities and the taxation systems of each country. However, since it is extremely difficult to find a compromise in the issue, mostly because of the different economic situations of the states, it can be assumed that this will not happen in the near future. Therefore, we believe that in the future, national legislation will offer a solution to the problems arising from the taxation of digital companies. Harmonization of legislation, such as the definition of the same taxpayers and tax subjects, and the introduction of a common tax rate, then are crucial for effective and consistent action.

References

- Becker, Johannes – Englisch, Joachim: Taxing Where Value is Created: What"s "User Involvement" Got to Do With It?, *Intertax*, Vol.47/2. 2019;
- Chohan, Usman W.: Some Precepts of the Digital Economy, Critical Blockchain Research Initiative (CBRI) Working Papers, 2020;
- Faulhaber, Lilian V.: Sovereignty, Integration and Tax Avoidance in the European Union: Sovereignty, Integration and Tax Avoidance in the European Union: Striking the Proper Balance, *Columbia Journal of Transnational Law*, 2009-2010;
- Gál Tibor: Interfésztechnikák, Szak Kiadó, 2010;
- Galántainé Máté Zsuzsanna: Problémák és újabb törekvések az Európai Unió társasági adózásában, PhD dissertation, Győr, 2008;
- Greggi, Marco: La tassazione dell"economia digitale nel contesto europeo: la proposta di direttiva sulla Digital Services Tax, in: Persiani, Alessio: La tassazione dell"economia digitale tra sviluppi recenti e prospettive future, Neu-Nuova Editrice Universitaria, Rome, 2019;
- Harris, Peter: Corporate Tax Law: Structure, Policy and Practice, Cambridge University Press, 2013;
- Herich György: Adótan, Penta Unió, Budapest, 2019;
- Hrabčák, Ladislav – Popovič, Adrián: On certain issues of digital services taxes, *Financial Law Review*, No. 17 (1)/2020;
- Károlyi Balázs – Szudoczky Rita: 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?, *European State Aid Law Quarterly*, 2020/3;
- Károlyi Balázs – Szudoczky Rita: The Troubled Story of the Hungarian Advertisement Tax: How (Not) to Design a Progressive Turnover Tax, *Intertax*, Vol. 48/1. 2020;
- Kofler, Georg – Sinnig, Julia: Equalization Taxes and the EU"s "Digital Services Tax", *Intertax*, Vol.47., No.2., 2019;
- Marján Attila: Az Európai Unió gazdasága, HVG Kiadó Rt., Budapest, 2005;
- Marques, Nicolas: La taxation française des services numériques un constat erroné, des effets pervers, Institut Économique Molinari, Paris-Brussels, 2019;
- Mesenbourg, T.L.: Measuring the Digital Economy, U.S. Bureau of the Census, Suitland, Maryland (USA), 2001;
- Nagy Zoltán: A digitalizáció hatása a pénzügyi piac szabályozására, *Miskolci Jogi Szemle*, Vol. 15., No. 1., 2020;
- Peng, Wei: Multinational Tax Base Erosion Problem of the Digital Economy, *Modern Economy*, March 2016;
- Sadowsky, Marlyne: French perspectives on the Digital Services Tax (DST), *Tijdschrift voor Fiscaal Recht*, May 2020;
- Schön, Wolfgang: Ten Questions about Why and How to Tax the Digitalized Economy, *Bulletin for International Taxation*, April-May 2018;
- Simon István (ed.): Pénzügyi jog II., Osiris kiadó, Budapest, 2012;
- Stevanato, Dario: Are Turnover-Based Taxes a Suitable Way to Target Business Profits?, *European Taxation*, November 2019;
- Wágner Tamás Zoltán: A digitális adók kérdése, különös tekintettel a cseh szabályozásra, *Külügyi Műhely*, 2020/1.

Legal sources

- 2014/65/EU directive on markets in financial instruments;
- Étude d"impact de la loi No.2019-759, March 2019;

- European Commission: The EU budget powering the recovery plan for Europe Communication from the Commission, Brussels, 27.5.2020., COM(2020) 442 final;
- Loi No. 2019-759;
- No. 496, Rapport fait au nom de la commission des finances sur le projet de loi, adopté par l"Assemblée Nationale après engagement de la procédure accélérée, portant création d"une taxe sur les services numériques et modification de la trajectoire de baisse de l"impôt sur les sociétés, 15 May 2019;
- OECD, Action Plan on Base Erosion and Profit Shifting, OECD Publishing, 2013;
- OECD: Tax Challenges of Digitalisation: Comments Received on the Request for Input, PWC – Comment, Part II, 25 October 2015;
- Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM/2018/0148 final, 2018/073 (CNS), Brussels, 2018;
- Vládní návrh ZÁKON o dani z digitálních služeb, (Draft bill for digital services tax).

Online sources

- http://www.assemblee-nationale.fr/15/cri/2018-2019/20190208.asp#P1691407;
- http://www.assemblee-nationale.fr/dyn/15/rapports/1737/l15b2080_rapport-fond#;
- https://about.google/locations/?region=north-america&office=mountain-view;
- https://svetprumyslu.cz/2020/04/01/cesko-planuje-digitalni-dan-americane-se-zlobi/;
- https://web.archive.org/web/20131022003036/http://odec.org.uk/the-concept-of-a-digital-economy/;
- https://www.erecapluriel.fr/definition-assiette-fiscale-ou-assiette-de-limpot/;
- https://www.investopedia.com/insights/worlds-top-economies/#7-france;
- https://www.investopedia.com/terms/t/tax_exempt.asp;
- https://www.lemonde.fr/economie/article/2019/07/11/le-parlement-francais-adopte-definitivement-la-taxe-gafa-contestee-par-les-etats-unis_5488135_3234.html;
- https://www.mfcr.cz/cs/aktualne/tiskove-zpravy/2019/navrh-zakona-o-digitalni-dani-miri-do-sn-36638;
- https://www.moneyland.ch/fr/taux-imposition-definition;
- https://www.oecd.org/about/;
- https://www.reuters.com/article/czech-internet-tax-idUSL8N2DN4MC;
- https://www.theguardian.com/technology/blog/2010/jul/22/facebook-countries-population-use;
- https://www.twobirds.com/en/news/articles/2019/global/digital-services-tax-overview-of-the-progress-of-implementation-by-eu-member-states;
- https://www2.deloitte.com/hu/hu/pages/ado/articles/kozos-konszolidalt-tarsasagiado-alap.html;
- https://www2.deloitte.com/mt/en/pages/technology/articles/mt-what-is-digital-economy.html;
- https://theconversation.com/the-digital-economy-is-becoming-ordinary-best-we-understand-it-130398.