

## Consultation on the digital levy

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### **I. Introduction**

The Federation of European Data and Marketing (FEDMA) welcomes the opportunity to provide feedback to the European Commission's Consultation on the digital levy. The European Data and Marketing industry plays a crucial role in helping marketers to effectively communicate reliable information and services to individuals. Reaching the right audience is particularly important for European small and medium sized enterprises (SMEs) which are trying to survive in a highly competitive environment. Data-driven marketing contributes to a vibrant European business community, by enabling businesses to offer products and services to consumers, both directly and through large commonly known online platforms.

In light of the increasingly digitalized and cross-border nature of the data-driven marketing sector, we believe that any reform of the tax regime for the digital economy should lead to a uniform set of clear, predictable and proportionate tax rules which do not hamper growth, innovation and cross-border investment. As such, we believe that the EU should first privilege efforts towards a common solution in the framework of the Organisation for Economic Co-operation and Development (OECD) before taking actions at EU level.

Revising the taxation of the digital economy raises indeed significant challenges which should not lead to fragmented responses across different jurisdictions. In this context, any new legislative initiative for the tax system should have a clear and well-defined scope, taking into account the progressive digitalisation of traditional businesses; avoiding a knock-on effect on consumers and companies using digital services; and clarifying the interplay with the data protection legislation when relying on users' value creation for tax allocation purposes.

### **II. Recommendations**

#### **A. Focus on multilateral solutions at OECD level**

FEDMA is concerned that the national stand-alone measures of an increasingly number of EU Member States risk fragmenting the EU Digital Single Market, potentially leading to a fiscal race to the bottom among EU countries, an uneven playing field, as well as unnecessary fiscal and administrative burdens for cross-border service providers to comply with their tax obligations. As such, while an EU level initiative may become necessary to address the growing risk of regulatory fragmentation among Member States, we call on the Commission to maintain the focus on the ongoing work by the OECD Inclusive Framework towards a multilateral consensus on the taxation of the digital economy. As the complementary character of the Commission's initiative with the OECD's work remains unclear at this stage, any new EU tax rules could lead to increased legal uncertainty, double taxation, or protracted tax disputes. We therefore recommend the Commission to wait for the outcome of the ongoing multilateral negotiations at OECD level ahead of any EU proposal. Should there be a political consensus for further consideration of EU-level measures, FEDMA calls for the introduction of a sunset clause whereby the new EU tax rules would be repealed once an agreement on the taxation of the digital economy is reached at OECD level.

#### **B. Consider the progressive digitalisation of the broader economy**

FEDMA believes that the scope of any new legislative initiative for the tax system should not refer to any "artificial" distinction between digital and traditional businesses. Accelerated by the current pandemic, digitalisation is indeed becoming an essential element of most offline businesses, thus

making it more and more difficult to separate the digital economy from the traditional one. This is also the case for the data and marketing industry which increasingly relies on data and other digital tools to deliver relevant messages and enhance the customer's experience in both the offline and online worlds by means of advertising mail, mobile, email, social media, online and telemarketing. As such, we concur with the [OECD's BEPS Action 1 Report](#) ("the Action 1 Report") which stresses that the digital economy cannot be "ring-fenced" for the purposes of taxation. Against this background, any new tax rules for the digital economy should not result in a general tax applying to most companies which would counter the initial intention to support the EU's economic recovery and tackle global base erosion.

### **C. Target only activities conducted by digital gatekeepers**

FEDMA calls on the Commission to carefully assess the in-scope activities to ensure any new tax reform will fulfil its stated objectives and avoid unintended consequences that risk stifling competition in the digital sector. As part of this assessment, the Commission should clearly identify the industry and individual companies set to be impacted by the introduction of an EU-wide levy. Against this background, we would like to encourage the Commission to consider a digital tax system where only the flagship activities performed by digital gatekeepers (under the forthcoming Digital Markets Act) would be taxed – as per the digital services tax recently implemented by the UK tax authorities, which targets the following activities: (i) E-commerce activities related to a marketplace; (ii) Internet search engine activities; (iii) social network activities. If not focused on those three main activities performed by digital gatekeepers, any future digital tax would risk bringing the tax out of alignment with the EU policy objectives and established goal of encouraging competition in the digital field.

### **D. Assess the impact on consumers and platforms' business users**

FEDMA is concerned about the risk that the additional costs of any new digital levy would eventually be borne by consumers and companies using large digital platforms. As already observed by some of our members (e.g. advertisers), certain big digital players have already started passing the tax on their business users in some of the EU countries where the new digital tax has been implemented. Since there is usually no alternative for advertisers to switch to, there is no other choice than to pay the digital levy which is passed on by the platform. This raises the costs of advertising in a time when businesses already struggle to survive the current crisis. We want to warn for this scenario, as it would also undermine the goals of a digital levy. This outcome is thus likely to spur market distortion, pose indirect risks of double taxation to companies out of the scope, counter the objective of the tax to foster a fair contribution from digital companies and support the recovery of the economy.

### **E. Assess the impact on data protection legislation**

FEDMA recognises that the taxation of the digital economy may require a reliance on the concept of "value creation" based, among others, on the users' interaction with the relevant service provider in the online ecosystem. This will likely result in the collection of users' personal data, especially location data, for the purpose of allocating tax obligations in the jurisdiction where the said users are located. As such, we believe that any new tax rule applied to the digital economy should carefully assess and clarify its interplay with the body of EU law on data protection and user' privacy. Further clarifications on this point are necessary to avoid that companies are sanctioned for data protection infringements while trying to comply with their tax obligations.

### **F. Apply profit-based tax rules**

FEDMA believes that any digital taxation proposal should focus on taxing operating profits rather than turnover. A digital tax based on turnover will proportionately affect to a greater extent companies running losses or generating small profit margins than the more powerful digital



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gatekeepers. Additionally, companies in the growth phase or under turnaround would be harshly affected as they would be subject to an additional tax to the detriment of their capacity for development, thus harming those businesses that have been hit the hardest during the pandemic. In this context, we also urge the European Commission to consider safe harbor provisions, which would allow the digital levy rate to be calculated by reference to the operating margin of the in-scope activity. Such provision would provide a mechanism so that where the in-scope activity is loss making, no digital tax would need to be paid on revenues attributable to that activity.