

### **The French supreme Court cancels some guidelines about the digital services tax (“DST”) regime**

Following an appeal filed by **Amazon Online France** in September 2021 against the French tax authorities' guidelines relating to DST, the French supreme Court in a decision dated of April 1<sup>st</sup>, 2022, specified several points of the DST regime and cancelled some paragraphs of these guidelines.

It first clarified the conditions under which video games are subject to the tax: the provision of a digital interface enabling users to contact and interact with other users is, in principle, one of the services included in the basis of assessment for the tax on digital services. However, Article 299 of the French tax code (“FTC”) provides for an exception by specifying that this is not the case when the person making the provision uses the digital interface mainly to provide users with digital content. The French tax authorities use the words "mainly" to distinguish between different types of services: the provision of content directly usable by the user and the provision of content considered as a mere support for another service. It then indicates that the exclusion does not concern the supply of software that is itself a digital interface allowing users to interact with each other, such as multi-player online games. The Court then cancelled the paragraphs of the French tax authorities' guidelines that denied the benefit of this exception to the supply of digital content to multi-player online games since it had exceeded the scope of the law and, thus, invalidated this provision.

Regarding the exclusion of services carried out between related companies, Article 299 of the FTC provides that services performed between companies belonging to the same group are excluded from taxable services. However, the French tax authorities' guidelines only authorized this exclusion on the condition that the services be rendered exclusively to companies belonging to the same group, i.e., the provision of identical services to third-party customers prevented a company from applying this exception to all of its income. The supreme Court has restored the scope of this exclusion, which had been essentially emptied of its substance by the French tax authorities and has cancelled this paragraph.

Finally, as regards the tax basis, the French tax authorities' comments are based on the principles established by the ECJ for VAT on complex transactions in order to apply them to DST. Thus, the French tax authorities state that payments made in consideration of the supply of a taxable service include all sums paid by the users of this interface, with the exception of those paid in consideration of the supply of goods or services, which constitute independent transactions of the access or use of the digital interface, within the meaning of Article 257 ter of the FTC.

Two types of transactions are challenged by Amazon request:

- Logistics services:
  - o concerning the logistics services that oblige buyers to use the transport offers for the goods it proposes: the appeal criticizes the French tax authorities' guidelines for stating that transport offers for goods purchased by users on a marketplace

and proposed by the operator of the latter are not independent of the access or use of the digital interface. The supreme Court confirmed Amazon's position and considered that this mandatory transport service cannot be considered independent of access to the digital interface itself. The sums collected for this transport service are therefore included in the calculation of the DST basis;

- concerning the logistics services provided to sellers by the operator of a marketplace: Amazon contests the French tax authorities' guidelines according to which services whose acquisition makes it possible to benefit from additional or improved functionalities or more advantageous pricing conditions in the use of this marketplace cannot be considered as independent of access or use of the interface. The supreme Court ruled that these services, if they are optional and in competition with other companies, cannot be considered as related or essential services. The sums collected for this optional service are therefore not included in the calculation of the tax basis.
- Commercial offers composed of several elements for a fixed price, "bundled offering". The French tax authorities seem to deduce from the bundled price of the offer that it cannot be artificially split up and that the taxable sums are made up of the price of the commercial offer. However, the existence of a bundled price may be an indication but is not in itself decisive.

The supreme Court also cancelled paragraphs of the French tax authorities' guidance that define the conditions for considering the income derived from logistics services and bundled offerings.

With its decision, the supreme Court gave the French tax authorities two months to amend the provisions deemed illegal.

**For more information, please do not hesitate to contact us.**



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