

Advertising, Media and Brands Global Compliance Challenges

# Global Data, Technology and Tax

Strategic Global Legal and Regulatory Issues Facing the Advertising, Media and Brands Industry



# Introduction

2021 has provided unique challenges for businesses operating across the advertising, media and brands industry. Aside from the impact of the pandemic, we are seeing a changing and challenging landscape due to increasing economic, consumer, regulatory and compliance pressures.

With increased exposure as a result of these pressures, we have partnered with BDO on this Global Compliance Challenge to bring you a series of webinars, podcasts and articles to help your business navigate this new complex compliance landscape.

**Our legal experts summarise the regulatory landscape at present for global data, technology and tax, as well as presenting upcoming challenges and important considerations for businesses. You can watch the full webinar [here](#).**

## Data Privacy and Technology

### US

The California Consumer Privacy Act (CCPA) is now in effect with the exception of HR and B2B data subjects, which will come into effect on 1 January 2023. On this date, we will also see the introduction of new consumer rights and obligations under an amended CCPA as a result of the California Privacy Rights Act ballot initiative. In turn, there will be changes to behavioural advertising and third-party cookies, as well as more complex contracting requirements and operational requirements on processors.

As for inter space advertising and cookies, under the current do not sell regime of the CCPA, the California attorney general has been very active in bringing enforcement actions against publishers that are not providing an opt-out of inter space advertising cookies using this do not sell mechanism.

In 2023, there will be opt-outs for things known as cross-contextual behavioural advertising in California and targeted advertising in Colorado and Virginia. The latter will look very much like the current Networking Advertising Initiative (NAI) and Digital Advertising Alliance (DAA) sub-regulatory programmes, but the California regime will be much more broad. Both are not necessarily restricted to cookies, which is important as we move into a cookie-less advertising ecosystem.

Closely related are restrictions on service providers and processors. Moving forward, any obligations and restrictions will be required to be set out in contracts, meaning data protection agreements (DPAs) will need to be re-worked next year. The bigger issue, however, is that many marketing vendors will not qualify as service providers or processors given their own use of personal data.

### Europe and the UK

Beginning with recent guidance from the French government, cookie banners must now provide three options: (i) agree, (ii) reject and (iii) make choices. This change has arisen as a result of rising complaints from citizens and non-government organisations about the function of cookies in capturing consumer data. In turn, authorities are encouraging businesses to make this change, and many businesses are following suit.

Data transfers have become a staple of everyday business operations, and five years since the introduction of GDPR guidelines, businesses are aware of the restrictions that have been put in place. One way that businesses try to overcome data transfer restrictions is to implement standard contractual clauses (SCCs).

In June, the EU Commission adopted a new SCC and established a transition period for companies to move from the old to the new clause by the end of 2022. There is an increased demand for businesses to update their master service agreements (MSA) as a result.

An SCC should be accompanied by a data impact assessment (DIA). This document, drafted by the data importer, explains that there is no national law, local law or law enforcement that will prevent the importer from abiding by the contractual obligations that have been undertaken by the SCCs, in addition to explaining what technological and technical measures have been implemented to make privacy stronger.

### Competition

In response to rising government and regulator concerns about the power of big tech companies and the weakening of digital market competition, a number of studies have been conducted by the EU Commission and the UK Competition and Markets Authority (CMA). The conclusion of these studies is that:

- Digital markets are now dominated by a few large companies. Authorities have become concerned that these companies have built and entrenched their market power on the back of powerful network effects, which make them extremely difficult to challenge. This makes new entry to market extremely difficult.
- With specific regard to the UK, the CMA found that in the online platforms and digital market study, big tech firms can gather and make use of vast quantities of data and use this data to target their products and services in a way that their competitors cannot.
- Authorities are concerned about the ability of big tech firms to leverage their power in adjacent markets, and to acquire competitors through “killer acquisitions”; where competitor businesses are acquired with the intent to suppress challengers.

These are just some examples of the concerns being raised about the use of data for big tech platforms in digital markets, and will influence future market regulations.

## Tax

### The Big Picture

International tax policy has become headline news in recent months. This has arisen from a collision between the traditional international tax framework, based on the physical presence of a business within a sovereign border, with an increasingly globalised and digital economy. As a result, the traditional tax policy that was established in the 1920s is deemed no longer fit for purpose, and the development of a new more appropriate tax policy is underway with the G20 and the OECD.

The need for a new tax policy is exacerbated by the growing power of big tech companies, sovereign nations seeking increased revenue in order to recover from the pandemic, and changing consumer behaviours.

At present, governments are trying to redesign taxes in a way that fall outside the constraints of the existing framework. One possible solution is to tax based on revenue rather than profit, but this creates a challenging environment for businesses, as it creates a high risk for double or multiple taxation. Furthermore, this method can be distortive where it does not take into account the maturity of a business or whether the business is profitable. Hence, such measures will put tension on existing business models.

There are questions as to whether the framework will be effective in terms of who bears the tax. There is a view that foreign businesses are being taxed in an environment where there is a recognised need for revenue, with these taxes often badged as the “google-tax” or “taxes on big tech”. These taxes prove extremely popular from a political perspective and we have seen them being implemented or in the advanced stages of consideration in more than 40 countries.

Unfortunately, the US has not responded well, as it believes it is being targeted by the developing tax policy. There is some truth to this, where policies have been modelled on large US businesses. It has responded with the threat of potential impositions and tariffs, which, in turn, has put pressure on international trade.

### Where Are We Now?

In early October 2021, 136 countries announced that they had agreed on a high-level set of proposals for each country to implement in their domestic laws over the next couple of years. The G20 leadership signed off and approved its two-pillared plan:

**Pillar 1** deals with the physical presence issue by allowing countries to impose corporate income tax on non-resident multinationals that are selling to consumers in their jurisdiction without any physical presence, if their sales exceed a certain threshold. It would have a new formulary approach to allocating a certain amount of the global profits of the company to each of those markets. These are radical departures from existing tax law and will require significant changes in the country's existing domestic tax laws.

**Pillar 2** says that the global minimum tax (not directly related to digital business) of these 136 countries will be an effective 15% corporate income tax rate. The unilateral rate prevents any country offering tax holidays for extended periods of tax. This is an attempt to level the playing field for corporate income tax for large multinational businesses.

Part of this deal is that the unilateral digital services taxes will be repealed and the plans to create new ones will be put on hold in an attempt to escape the chaos of different countries having different taxes.

At present, there has been a preliminary deal between the US, the UK, France, Spain, Italy and Austria about the timing of the repeal of the digital services act and about how payments under pillar 1 will be managed, but uncertainty remains about the other countries with digital services taxes in place that are not part of this deal.

Questions remain about the practicalities of all these countries simultaneously making tax changes in the next 12 to 18 months, as this will likely incur big challenges in the months ahead.

## Potential Challenges

- Previously, taxation of companies has been on a company-by-company basis. This new approach under pillar 1 requires group-based taxation. There is a formulary allocation of profits, but there is not yet any clarity about which countries and entities will be yielding up profits that can be shifted to other countries.
- There is still no clarity about which tax base will be used to compute the 15% effective rate on minimum tax globally. There is a need for a multilateral tax treaty.
- There are serious questions as to whether the US Congress can pass the changes into US law. The US has been a leader in this process, so if it is unable to lead these changes, it poses doubt on the ability for the rest of the world.

For now, companies need to wait and see what will happen, as we do not have enough information to model the implications of new tax policies. The corporate world should keep a close eye on how this develops for the next year onwards.

## Key Issues Currently Facing Businesses

The coordinated tax policy approach is preferable for businesses, as it will help to simplify a currently complex compliance landscape. However, if or when the new policy is passed into law, it is unclear as to how the policy will evolve over time. At present, it is pitched at the largest multinationals, but undoubtedly, overtime, we will see this filter down to smaller businesses. Thus, businesses should be anticipating their strategic response to the implementation of the new framework.

In parallel to the evolution of the new tax framework, we are seeing the evolution of new types of business models, which, in part, are driven by the pandemic. Changes such as hybrid working present new tax and legal challenges for businesses to grapple with.

We are seeing more changes to business model structures as a result of changes in the way that businesses go to market. This has been accelerated by the pandemic. We will see businesses restructuring to react to the changes in the international tax framework, including thinking differently about transfer pricing, what their holding structure looks like, and how entities within a group interact with each other.



# Additional Considerations

## What have been the hot issues for regulators over the last year, and what do you see as the hot issues for the data protection authorities going into 2022?

GDPR has successfully been in place for five years, but moving forward we can expect to see an increasingly robust enforcement of the regulatory framework in the EU/the UK regardless of sector. To date, the authorities have the ability to enforce a fine of up to 4% of a company's global turnover for failure to comply, but have not done so, yet. This more stringent approach is driven by increasing consumer and NGO complaints relating to the use of consumer data.

From a US perspective, data security and data breaches are receiving increasing scrutiny. The new private right of action for data subjects to bring claims relating to data security issues are increasing, where individuals are now able to bring these claims without proving actual harm, and there is an availability of statutory damages to support their case. This trend is fuelled by entrepreneurial lawyers who file actions on behalf of all affected data subjects any time a significant data breach is reported.

## What has your experience been in the EU with data breaches now that GDPR brings a security mandate and a breach notification that was not present under the initial directive?

If there is a breach, you are required to notify the authorities immediately. To lessen the repercussions of such a breach, it is important that businesses can demonstrate the security measures in place, that the security measures are recently renewed or up to date and that the workforce is sufficiently trained, as well as demonstrating due diligence. If businesses are able to demonstrate they have not been negligent, the authorities are more understanding.

## The EU has been more robust in its enforcement of antitrust laws than the US. What is the state of this in relation to the advertising, media and brands industry? Do you see the US moving to a more aggressive enforcement of antitrust under the Biden administration?

It is fair to say that the EU was perceived as leading the way in using competition rules to curb the perceived market power and abuses of such market power by big tech companies. In fact, a number of such cases have been lost by the European Commission. These cases indicate the difficulty of applying competition rules to digital markets and to practices that may well have an economic justification and, in some instances, be required by other statutes including privacy and security regulations. Hence, there is potential tension and perceived difficulty in enforcing competition rules on digital markets. It will take time, the outcome is uncertain, and any decision is likely to be challenged.

It is for this reason that the European Commission proposes to impose *ex ante* rules that complement general competition laws, hence the development of the Digital Markets Act. This is a proposal that, if adopted, would black list a number of practices that have been the subject of competition law investigations in Europe by big tech companies. The act is still going through the legislative process – hence, we do not know what the outcome will be, and there are a number of proposed amendments from member states and EU Parliament for consideration. Nevertheless, the trajectory is set and we will have the EU Digital Markets Act (in some form), if not this year then next year.

The US is rising to the challenge, like other jurisdictions; there are proposals to implement legislation that would complement competition rules through *ex ante* regulations. It is a changing world and we are monitoring all of the changes being made by jurisdictions around the world (not just the UK, the EU and the US). All of these initiatives are available on our website, where you will find a dedicated page for [global digital markets regulation](#), where we are monitoring this evolving framework with which big tech companies and the users of digital platforms will have to grapple with.

## With the consideration of state taxation, federal taxation and recent Supreme Court decisions, how is tax evolving in the US in relation to the advertising, media and brands industry? What do you predict for the future?

Here, we see a scaled down version of the global picture, but reflected across state borders rather than sovereign borders. In the same way that sovereign nations want control over their tax policy, individual states want control over taxation in their states. There is a movement to push back against state tax laws, especially in light of the global agreement the US Treasury has entered into. Hence, we expect to see ongoing court battles and political battles at state level.



# Key Takeaways for the Audience

## Global Data

- (i) It is very easy for authorities to see if your cookie banner is correct, so try to define it in line with current requirements.
- (ii) Prepare for data breaches, have an incident response plan and prepare your due diligence.
- (iii) Make sure all your contractual agreements have moved to the new SCCs.
- (iv) The time has come to start thinking globally about your information governance programme.

## Competition

We are seeing an increasingly complex regulatory framework. Therefore, when advising clients as to whether they are complying with competition rules, we will also advise on additional regulation that we see coming down the pipeline. This requires a joined-up approach, not only in terms of different subject matters that need to be reconciled (data privacy, sector-specific regulation in competition law and a global approach), and this is where a global law firm that can leverage experience in multiple jurisdictions can be very valuable.

## Tax

- (i) Stay up to date on evolving tax policy in order to best prepare over the next 12 to 18 months.
- (ii) Make sure you are aware of how your own operating model will adapt to the tax landscape as it stands today and as it evolves.
- (iii) Have robust procedures in place to stay compliant but also start thinking about what the future might look like and what your strategy might look like.

# Panellists



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