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OECD Launches Public Consultation on Taxation Challenges of Digitalisation

The OECD has published a public consultation document inviting comments on potential solutions to issues surrounding taxation of the digital economy, reflecting the high-level discussions held at Inclusive Framework meetings. This follows from a Policy Note released after the Inclusive Framework's meeting in late January, identifying that discussions to reach a solution will be based around two pillars.

The first pillar will focus on how the existing rules that divide the right to tax the income of multinational enterprises among jurisdictions could be modified to take into account the changes that digitalisation has brought to the world economy. The second pillar aims to resolve remaining BEPS issues and will explore two sets of interlocking rules designed to give jurisdictions a remedy in cases where income is subject to no or only very low taxation.

The consultation document invites input sought concerning a number of technical and policy matters concerning the two pillars, in order to assist the Inclusive Framework in its task of developing a solution for inclusion in its final report to the G20, due in 2020.

The consultation document sets out that the Inclusive Framework are considering three "solutions" to the question of how to tax the digital economy, namely:

1. **The "user participation" proposal** – this proposal concerns engagement and active participation of users resulting in profit generation, such as from social platforms, search engines and online marketplaces. The proposal seeks to *"revise profit allocation rules to accommodate the value creating activities of an active and engaged user base. In addition, the nexus rules would be revised so that the user jurisdictions would have the right to tax the additional profit allocable to them."* The proposal sets out that profit concerning user participation could be calculated through non-routine or a residual profit split approach.

2. **The "marketing intangibles" proposal –** this proposal is envisaged to change profit allocation and nexus rules, applying not only to user participation but also to businesses which are able to either remotely or through a limited local presence create a customer base. The proposal would accordingly *"modify current transfer pricing and treaty rules to require marketing intangibles and risks associated with such intangibles to be allocated to the market jurisdiction. The proposal considers that the market jurisdiction would be entitled to tax some or all of the non-*

routine income properly associated with such intangibles and their attendant risks, while all other income would be allocated among members of the group based on existing transfer pricing principles."

3. ***The "significant economic presence proposal" –*** *This proposal envisages that a taxable presence in a jurisdiction would be dependent on a company meeting certain criteria that would establish "purposeful and sustained interaction with a jurisdiction" sufficient to amount to a significant economic presence", including: "(1) the existence of a user base and the associated data input; (2) the volume of digital content derived from the jurisdiction; (3) billing and collection in local currency or with a local form of payment; (4) the maintenance of a website in a local language; (5) responsibility for the final delivery of goods to customers or the provision by the enterprise of other support services such as after-sales service or repairs and maintenance; or (6) sustained marketing and sales promotion activities, either online or otherwise, to attract customers". Allocation of profit under this proposal would be based on a fractional apportionment method.*

The public consultation will run until Friday, 1 March 2019. Thereafter, the Inclusive Framework will hold a public consultation on 13 and 14 March 2019 in Paris as part of the meeting of the Task Force on the Digital Economy. Comments should be addressed to the Tax Policy and Statistics Division, Centre for Tax Policy and Administration, and should be submitted in Word format via e-mail to TDFE@oecd.org. All comments submitted will be made publicly available by the OECD in due course.

European Commission Adopts List of High Risk Third Countries for Anti-Money Laundering Directive

The European Commission has adopted a Delegated Regulation identifying a list of high-risk third countries with deficiencies in their anti-money laundering and counter terrorist financing regimes, in compliance with obligations under the 4th and 5th Anti-Money Laundering Directives.

The list was prepared following an analysis of 54 jurisdictions publicly identified to be assessed as a matter of priority for the purposes of compiling the list, on the basis that they either had strong economic relevance or ties with the EU, had been reviewed by the IMF as offshore financial centres or had systemic impact on the integrity of the EU financial system.

The jurisdictions included on the Delegated Regulation are: Afghanistan, American Samoa, The Bahamas, Botswana, Democratic People's Republic of Korea, Ethiopia, Ghana, Guam, Iran, Iraq, Libya, Nigeria, Pakistan, Panama, Puerto Rico, Samoa, Saudi Arabia, Sri Lanka, Syria, Trinidad and Tobago, Tunisia, US Virgin Islands and Yemen.

The Commission will engage with the countries identified in the Delegated Regulation concerning delisting criteria and securing undertakings to remedy deficiencies identified, so that the jurisdictions can possibly be delisted. The Commission will follow up on those undertakings and update the list accordingly.

The Delegated Regulation will now be submitted to Parliament and Council for approval. Following approval, it will thereafter be published in the Official Journal and enter into force 20 days thereafter.

General Court Annuls Commission's State Aid Decision in Belgian 'Excess Profit' Scheme

The General Court annulled the Commission tax related State aid decision in the Belgian excess profit rulings cases (Cases T-131/16 and T-263/16 Kingdom of Belgium v European Commission). This was a highly anticipated decision considering that the Court for the first time had an opportunity to interpret the Commission's understanding of the arm's length principle under EU State aid law and the competence of the Commission to assess individual tax rulings. It transpires that the decision did not invalidate Commission's substantive interpretation of the State aid rules, but challenged the methodology of assessment and the classification of the aid as a "scheme". Further clarity on the matter will be offered on potential appeal and in highly anticipated rulings in the cases like Apple, Starbucks and Fiat.

The original Commission decision established that the Belgian "excess profit" tax scheme had allowed multiple European MNEs in Belgium to benefit from a corporate tax base reduction for the generated excess profits. Commission's State aid investigation found that Belgium had established an "aid scheme", derogating from Belgian tax law and the "arm's length principle" as interpreted by the European Commission. The "excess profit" scheme was marketed by the Belgian government under the strapline "Only in Belgium".

The alleged error in law brought up by the Belgian government and the beneficiaries amounted to competence issues and methodology- related arguments. Belgium challenged European Commission competence to assess the State aid compliance of administrative measures in the direct tax area (tax rulings), invoking national sovereignty prerogative and methodological arguments related to the assessment of the alleged aid as an "aid scheme". The General Court dismissed the first plea, reaffirming Commission's competence to assess the State aid compliance of national direct tax measures, including administrative decisions such as tax rulings. The Court noted that while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law, in particular primary EU law (fundamental freedoms and State aid rules). Accepting the second plea, the Court disagreed with the Commission's assessment that the tax rulings constituted an "aid scheme". Significantly, the Belgian tax authorities had influence over the essential elements of the tax rulings system, which precludes the existence of an aid scheme. Further, it was established that the Procedural Regulation (EU/2015/1589) defines aid beneficiaries "in a general and abstract manner" for an infinite period of time, which was not the case with the Belgian "excess profit" rulings.

Commenting, Ricardo Cardoso, European Commission DG COMP spokesperson, said: "The Commission took note of the ruling and will now carefully consider the decision and possible further steps. However, at the moment, I cannot speculate on whether there will be an appeal or not".

OECD Publishes Peer Review Reports On Tax Dispute Resolution and Treaty Shopping

The OECD has released Peer Review Reports on Action 6, concerning the prevention of granting treaty benefits in inappropriate circumstances, and Action 14, concerning making dispute resolution mechanisms more effective.

The report concerning Action 6 sets out that the majority of the Inclusive Framework jurisdictions are in the process of modifying treaties in order to comply with their commitments made concerning treaty shopping, demonstrating the effectiveness of the BEPS MLI.

Peer review reports concerning Action 14's tax dispute resolution in the jurisdictions of Estonia, Greece, Hungary, Iceland, Romania, Slovak Republic, Slovenia and Turkey set out more than 200 recommendations for improving tax dispute resolutions. Notwithstanding this, the OECD states *"these stage 1 peer review reports continue to demonstrate that countries remain dedicated to turning the political commitments made by members of the OECD/G20 Inclusive Framework on BEPS into measureable, tangible progress. Countries from previous batches are already working to address deficiencies identified in their respective peer review reports".*

EU Parliament Adopts Resolution on Technical Measures to Introduce Definitive VAT Regime

The European Parliament at its plenary session on 12 February voted and adopted a legislative resolution setting out its opinion on recommended amendments to the EU Commission proposal for a Council directive as regards the introduction of the detailed technical measures for the operation of the definitive VAT regime system for the taxation of trade between Member States.

Parliament calls on the Commission to establish strict harmonised criteria and guidelines through which enterprises can benefit from being categorised as a certified taxable person, with common rules and provisions concerning fines and penalties for non-compliance. Further, Parliament calls on the Commission to analyse whether the temporary application of the reverse charge mechanism ought to be repealed following implementation of the definitive VAT regime. As concerns SMEs, the Parliament recommends a web information portal be accessible for businesses providing up-to-date information about VAT rates for goods and services in different Member States, as well as a tailored procedure for SMEs. Parliament also calls on the Commission to guarantee the transparency of the definitive VAT regime system, and to publish annual reports concerning VAT fraud.

Discussions between Members States at the EU Council concerning the proposed Directive are ongoing.