



Brussels, 25 September 2017

## 1. Fair taxation of the Digital Economy – European Commission publishes communication to the European parliament and Council

Days after taxing the digital economy took centre stage at the informal ECOFIN meeting in Estonia, the European Commission published its communication to the European Parliament and Council entitled, '[A fair and Efficient tax System in the European Union for the Digital Single Market](#)'.

The Communication provides detailed analysis of the digitalisation, its growing impact on the economy, and new business models emerging in the digital economy. It highlights the effective average tax rates paid by traditional business models versus the newer digital business model.

The Communication identifies two main policy challenges when seeking to tax the digital economy, nexus and value creation, i.e. where to tax and how best to tax.

The [Commission Press Release](#) focuses attention on the CCCTB framework as the optimal means by which to address the tax challenges that arise from the digital economy in the context of the revised permanent establishment rules and the use of formulary apportionment for allocating the profit of large multinational groups. In addition, the Communication states that "*There is scope within the current CCCTB proposal to examine further enhancements to ensure that it effectively captures digital activities*".

The Communication outlines 3 options which should be considered as short-term solutions.

### 1. ***Equalisation tax on turnover of digitalised companies***

This is envisaged to be a tax on all untaxed or insufficiently taxed income generated from all internet-based business activities, including business – to - business and business-to-consumer, creditable against the corporate income tax or as a separate tax.

### 2. ***Withholding tax on digital transaction***

The communication states that this would constitute a standalone gross-basis final withholding tax on certain payments made to non-resident providers of goods and services ordered alone.

### 3. ***Levy on revenues generated from the provision of digital services or advertising activity***

The possibility of applying a separate levy to all transactions concluded remotely with in-country customers where a non-resident entity has a significant economic presence.

The Estonian Presidency is pursuing an ambitious timeline for conclusion, with the Finance Minister stating that they are aiming for agreement to be reached by the December ECOFIN meeting.

## **2. OECD announces public consultation on taxation of the digital economy**

On 22 September the OECD announced a public consultation to obtain input on the tax challenges of digitalisation and the potential options to address these challenges.

The input will inform the work of the OECD for the interim report on the implications for taxation of digitalisation to be published in April 2018 with a final report due in 2020.

The request for input outlines the outcomes of the OECD BEPS Action 1 Final Report which concluded that the digital economy could not be 'ring-fenced' and that BEPS Action 3, 6, 7, and 8-10 would substantially address the BEPS issues exacerbated by digitalisation. The Request for input reiterated that the Final Report acknowledged that specific problems still arise in the context of digitalisation namely, nexus, debate, and characterisation for direct tax purposes and outlines the possible solutions (not recommendations) listed in the Final Report, namely, a new tax nexus concept of "significant economic presence", the use of a withholding tax on certain types of digital transactions, and a "digital equalisation levy".

The request for input comes at a time where an increasing number of countries are taking or considering taking unilateral action in this regard.

The request for input relates to

- ? Digitalisation, business models and value creation
- ? Challenges and opportunities of tax systems
- ? Implementation of the BEPS package
- ? Options to address the broader direct tax policy challenges; and
- ? Other comments not raised in the request.

The closing date for submissions is 13 October 2017.

The consultation is available here:

[OECD Request for input on work regarding the tax challenges of the digitalised economy](#)

## **3. VAT & Cost Sharing Exemption – European Court of Justice issues decision**

The European Court of Justice issued its eagerly awaited judgment in the joint cases of *DNB Banka* (Case C-326/15), *Aviva* (Case C-605 /15) and *Commission v Germany* (Case C- 616/15).

The cases concerned the cost-sharing VAT exemption ("CSE") contained in Article 132(1) (f) of the Council Directive 2006/112/EC (the VAT Directive"). The cases concern various aspects of the exemption and its applicability to the financial and insurance sectors.

The Court ruled that it was implicit that the VAT exemption for cost sharing groups did not apply to bodies making supplies of insurance and financial services. The decision eliminates the use of the cost-sharing VAT Exemption in the financial services industry. This is counter to the prevailing practice

in many Member States. It is important to note that the Court has clearly indicated that the decision should not be applied retrospectively by Member States.

A detailed case summary and analysis will be included in the next *CFE EU & Tax Policy Report*

[Judgment of the Court \(Fourth Chamber\) 21 September 2017 Case C-605/15](#)

#### **4. CJEU upholds its jurisdiction to rule in a dispute regarding terms of the double tax treaty between Austria & Germany**

The decision of the European Court of Justice in *Republic of Austria v Federal Republic of Germany* (Case C-648/15) was issued on 12 September 2017. The case concerned the interpretation of a clause in the double tax convention between Germany and Austria regarding the taxation of financial instruments and more precisely the interpretation of the phrase contained Article 11(2) of the Convention '*income from debt-claims with participation in profits*'.

Having accepted jurisdiction to hear the dispute the CJEU held that the particular criterion in the certificate which makes the payment of interest in a given year dependent on the existence of profit does not render those certificates as granting a right to share in the profits.

##### ***Detailed Summary***

The facts of the case involve an Austrian company purchasing registered certificates from a German bank. These certificates confer an entitlement to an annual payment at a fixed percentage of their nominal value, however, if the payment is likely to result in an accounting loss the amount of the payment is reduced or suspended to the degree necessary to avoid this loss. This suspended payment becomes payable in subsequent years when the debtor realises sufficient profit.

Whilst both Member States agreed on the legal classification of the income under the Convention, and that the taxing rights should be allocated to the state of residence of the beneficial owner – in this case Austria, a dispute arose in relation to an exception. The exception allows for '*income from rights or debt-claims with participation in profits*' to be taxed also in the state in which the income arises. Austria argued that the exemption must be interpreted narrowly.

On a procedural point the ECJ ruled that it had jurisdiction to rule on this case pursuant to Article 273 TFEU which grants jurisdiction to the CJEU in disputes between Member States which relate to the subject matter of the Treaties and are submitted by special agreement of the parties concerned. The Court held that the conditions were satisfied on the basis that:

- ? there was clearly a dispute between the parties,
- ? the dispute "related to" (interpreted by the Court as 'linked to') the subject matter of the Treaty,
- ? the referral was not based on the arbitration clause relating to this dispute specifically but rather under the general terms of Article 25 (5) of the Convention. The Court therefore accepted jurisdiction.

On the substantive issue before the Court, it was held that the phrase must be interpreted in line with international law and the terms of the Vienna Convention which requires phrases be given their

everyday meaning where possible. The Court observed that it is clear the instrument may be regarded as a particular class of debt but it need to be ascertained whether the form of remuneration of those certificates may be regarded as characteristic of *'participation in profit'*.

The Court held that the particular criterion in the certificate which makes the payment of interest in a given year dependent on the existence of profit does not render those certificates as granting a right to share in the profits.

[Judgment of the Court \(Grand Chamber\) 12 September Case C-648/15](#)

## **5. OECD publishes Report on the three dimensions of business taxation**

The Taxation Paper, entitled *'Legal tax liability, legal remittance responsibility and tax incidence'* examines the role of business in the tax system, in particular the role of business in the capacity of a withholding tax agent and remitters of tax on behalf of others. The paper demonstrates that businesses play an important role in the tax system not only as a tax payer but also as a remitter of tax. The paper seeks to demonstrate that the economic incidence, or burden of a tax is not necessarily borne by the person on whom the tax is imposed but in many instances is passed onto be borne by other economic actors.

[OECD Taxation Working papers No. 32](#)

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