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Position Paper

OECD Proposal on a Unified Approach Under Pillar One

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The bevh[1] welcomes the progress made at OECD level and the publication of the Pillar One proposal on a Unified Approach. We acknowledge the need to update the international tax framework to make it fit for the business models of the 21st century and we believe that these changes need to be agreed on at global level as all unilateral measures would inevitably risk creating an unlevel playing field and lead to retaliation and double taxation. Therefore, we are very supportive to the work done at OECD level and appreciate the opportunity to provide feedback to the Proposal for a Unified Approach.[2]

However, there are a couple of points that need further clarification and that need to be taken into consideration in order to make the proposal work in practice as intended and to avoid negative side effects for businesses.

1. Need for further definition of the scope and place of taxation

In order to ensure legal certainty for the businesses concerned and to avoid different interpretations in different countries, it is first of all necessary to clarify the scope of the proposed tax. This includes laying down an unambiguous definition of “highly digitalised companies”, “consumer-facing businesses” as well as “digital services (that have consumer-facing elements)”. It needs to be taken into consideration that business models keep evolving, which will make it very difficult to find a futureproof definition. Moreover, today’s business models get more and more interlinked and combine different channels, which will make it very difficult to clearly differentiate between them. In order to ensure legal certainty and a level-playing field between businesses, we

[1] The German E-Commerce and Distance Selling Association (bevh) represents a dynamically growing membership of large and small distance selling businesses using the internet, catalogues, direct sales and TV as sales channels. They include both, companies with a very narrow product range and others with more than 100,000 articles in their inventory. Statistically, there are more specialists than generalist retailers among them. The German aggregate turnover in distance selling (goods) amounted to 65,1 billion EUR in 2018.

[2] https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf

suggest broadening the scope to all businesses and, if needed, to introduce clearly definable exemptions.

As according to the proposal, digital services will be taxed in the jurisdiction where the customer is located, there is also a need to specify the rules based on which the customer location will be identified, which need to be compliant with the data protection requirements laid down in the GDPR. Therefore, the concept of the user also needs further clarification. We would like to point out that currently the location information is only collected for the first third party customer. This means that for example in the case of digital advertising the service should be taxed in the country where the advertiser is based and not in the country where an end-user views the ad. Collecting the data of the end-users' location would require extensive and very costly changes to the internal systems of companies. And even if this data was collected, it might be highly inaccurate as lots of users access the internet via VPN.

Moreover, in order to be able to unambiguously identify the activities of a company falling under Amount A, B and C, it is also essential to clarify how exactly the "baseline activity" of a company can be defined.

Finally, the proposal should keep internal transactions between parent companies and their subsidiaries out of scope of the revenue measurement e.g. when it comes to software licenses that are provided from the parent company to the subsidiary.

2. Need to limit administrative burden to a minimum

There is concern that the administrative burden and adaptation costs for businesses and for tax authorities alike could be disproportionally high in relation to the expectable tax revenues. But in order to ensure the compliance of businesses and the enforceability of tax measures the global solution must be as simple as possible.

First of all, it will be difficult and costly for companies to adapt their accounting systems in a way to segment their revenues and to produce separate financials as required to calculate Amount A - especially as the different channels and business lines become more and more interlinked in today's highly complex business models.

Moreover, in order to determine Amount A, businesses would need to perform a full value chain analysis which is highly complex, prone to disputes and entail complexity and uncertainty. For the purpose of practicality and simplicity, accounting profits should be considered as a reasonable proxy to taxable profit. If adjustments are needed, they should be limited to a minimum.

In order to reduce the administrative burden, a de minimis threshold could be considered. This would oblige companies to allocate profits only in countries where their revenues exceed a specific threshold - similar to the principles in place in VAT law.

Moreover, it should be possible that simplified returns can be filed in local markets and it needs to be ensured that detailed calculations only need to be provided by the parent company. Simplified tax filing and payment systems should be put in place that can be used if a company doesn't have a physical presence in a country. Filing Amount A profits in a country should also be possible without the business having a bank account there.

3. Need to ensure viability of low-margin business models

It is necessary to ensure that the fixed return for digital services under Amount B would not be damaging for loss-making companies or MNE groups with low-profit margin business models that are widely spread in the targeted sector. Therefore, the percentage of return under Amount B should be tied to overall group profitability based on audited financials.

4. Need to avoid double taxation

In order to avoid double taxation, it is necessary to clarify what kind of tax the OECD tax will be. This will be the only way to clearly identify the responsible taxpayer, to differentiate it from other taxes and to ensure that profits especially concerning Amount A are not taxed twice. This applies for example at national level to withholding tax mechanisms such as the German Income Tax Law (Einkommensteuergesetz, EStG) Article 50 A and D and Article 49 applying to revenues from patents and licenses etc. It must be made clear that revenues deriving from Amount A activities are exempt from such withholding tax mechanisms. Similarly, it must be clarified that Amount A revenues don't provide for a nexus for VAT purposes or other non-tax or regulatory processes. Moreover, as mentioned above the clear distinction between revenues under Amount A and B is also a prerequisite to reduce double taxation issues.

At the international level, the OECD rules need to be clear about which country has the right to tax the revenues under Amount A. It is essential that the countries agree on how to distribute the taxing rights between them.

To resolve potential disputes in a timely and clear manner, it is fundamental that strong and effective dispute resolution mechanisms are put in place, which should follow a mandatory binding arbitration approach.

Finally, it is of outmost importance to ensure that all unilaterally enacted digital taxes such as the ones in Austria and France are removed after there has been an agreement on global level and that no further national digital taxes will be adopted.

5. Final Remarks

The bevh looks forward to continuing its support to the work done at OECD level in order to ensure that a stable and enforceable agreement on a new taxation system will be reached at global level that ensures a level playing field between all businesses and avoids further fragmentation because of unilateral measures. In this sense, we also welcome that the OECD announced to conduct an impact assessment of the consequences of the measures proposed under the unified approach.