Bundesverband E-Commerce und
Versandhandel Deutschland e.V.
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- Bundesverband E-Commerce und Versandhandel Deutschland e.V. (bevh) -

Contribution to the OECD Public Consultation on the Reports on the Pillar One and Pillar Two Blueprints

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1. Introduction

bevh, the German association of e-commerce and distance sellers[1], welcomes the progress made at OECD level and the publication of the technical blueprints for Pillar One and Pillar Two. bevh acknowledges the need to update the international tax framework to make it fit for the business models of the 21st century and believes that these changes need to be agreed on a 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 of the work done at OECD level and appreciate the opportunity to provide feedback on the technical blueprints.[2] However, there are a couple of points that raise our concern and need to be further clarified in order to make the proposal work in practice as intended and to avoid negative side effects for businesses, particularly for small and medium sized online sellers.

2. General remarks

Before commenting on the technical blueprints for Pillar One and Pillar Two, we would like to emphasize the following principles that we deem to be crucial for a future-proof global tax reform:

a) Taxes should be based on profits, not on revenues

Any change to the international tax framework should be based on profits/losses and not on revenues. VAT/GST is the tax that applies to revenues based on the location of the customer. Taxes based on revenues have a regressive effect on start-ups and scale-ups companies, which invest and often operate at a loss in their growth phase, as well as on companies that operate with low profit margins such as in online retail. Moreover, taxes on revenues generally function as consumption taxes and are likely passed on in the form of higher costs to sellers and/or higher prices to consumers. This tends to depress consumption or divert it to other products and services that might be of lower quality or less efficient. These effects are well-known. Consequently,

[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. The members of bevh represent more than 75% of the total industry turnover in Germany. In addition, more than 130 service providers from the e-commerce sector are affiliated to the association. A list of our members can be found here: https://www.bevh.org/mitglieder.html

[2] http://www.oecd.org/tax/beps/public-consultation-document-reports-on-pillar-one-and-pillar-two-blueprints-october-2020.pdf

revenue-based taxes – in addition to VAT/GST - are typically reserved for products that have well-defined health or environmental consequences, including petrol/diesel, tobacco and alcohol.

b) The digital economy should not be "ring-fenced"

Any new tax rules should not "ring-fence" the digital economy. The economy is rapidly becoming more and more digital, which includes the widespread use of data analysis, customer feedback, automated data feeds, computer-mediated transactions, customized products and services, targeted offers, and more. Thus, any future-proof taxation approach must be channel-neutral and apply to all businesses equally regardless of their business model, distribution channel or way of interaction with their customers as it gets more and more impossible to separate the digital economy from globalization and the digitalization of the broader economy.

c) Need for simplicity and legal certainty

Any future digital tax solution must be easy to calculate and implement by the authorities but also by taxpayers, which will promote certainty and prevent intercountry disputes and/ or multilayer taxation as much as possible. This will also avoid higher compliance costs for businesses that are already paying their fair share of taxes. The distribution of taxing rights among countries should be clearly defined and not subject to a range of interpretations or assessments. This is needed to avoid costly disputes and excessive compliance costs for taxpayers. The goal of international tax policy should be a predictable tax regime that allows companies operating across borders to make long-term investments. To achieve this certainty for tax authorities and companies alike, we would recommend that any solution that may be adopted includes mandatory binding arbitration as a minimum standard with peer review.

d) Need to ensure global enforceability

New tax rules should be easily enforceable at global level, in order to avoid putting non-EU companies in a competitive and unfair advantage vis-à-vis EU businesses. All players should face real consequences for non-compliance or fraud.

e) Need to remove unilateral digital taxation measures

As all unilateral measures would inevitably risk creating an unlevel playing field and lead to retaliation and double taxation, we call on all participating countries to commit to the removal of all unilateral digital taxation measures as soon as a global solution has been reached or to swiftly update them so that they are consistent with the framework agreed at OECD level. Moreover, it will be essential to allow for sufficient time after the agreement at global levels for the implementation by national administrations to avoid disputes or multilayer taxation.

3. Pillar One

bevh is broadly supportive of the Pillar 1 Blueprint. However, there are still a couple of points that from our point of view need further clarification.

The scope proposed in the Blueprint appears reasonable as it is broad and catches a wide range of Automated Digital Services (ADS) and Consumer Facing Businesses (CFB). However, we do

not necessarily see a strong justification to differentiate between ADS and CFB businesses in the design and we would recommend that the definitions are as comprehensive as possible to ensure a level playing field between competitors. For example, if cloud services are an ADS then this should apply to all cloud providers, not just a subset. Moreover, as regards cloud computing services, it remains unclear if 'Software as a Service Applications' (SAAS) will be exempt from the definition. It is questionable why the use of a software in a cloud should be digitally taxed while the use of the same software on an own server infrastructure is exempt from digital taxation as in both cases license fees must be paid and only the way of the user location or access to the software is different.

In terms of channel-neutrality, we welcome that the online sale of physical goods is excluded from the scope as it only constitutes another form of retail and another channel. Concerning online intermediation platforms, there is a necessity to clearly differentiate between pure platforms and marketplace providers. However, we would also recommend exempting the mere provision of an online shop infrastructure from the proposed tax as this infrastructure provides a low-barrier market access opportunity especially for SMEs. Therefore, a DST which would likely be passed on to the company users would be detrimental for SMEs. This principle could be compared to the rent of a stationary shop in a shopping mall and would need to be equally applied to service providers who offer the building structure for an online shop such e.g., Shopify. Obviously, data flows which allow for the extended evaluation by shop operators or platform providers would have to be looked at separately and would be covered by the scope of the DST.

We welcome that the OECD is drawing some attention to the elimination of double taxation and the withdrawal of unilateral measures once a global solution is agreed upon. This is a key issue for businesses and should figure more prominently in the debate. However, the blueprint is lacking a mechanism moving income from paying jurisdiction to market jurisdictions.

bevh is supportive of the marketing and distribution profits safe harbor to cap the allocation of profits to a market country under Amount A. In principle, we consider this should be an effective way to ensure that profits allocated to a market country are not excessive and do not allocate profits where sufficient profits are already allocated to that market under existing transfer pricing.

Furthermore, the global revenue threshold for the scope should be high enough to ensure that companies that are doing business outside their home country but are not very global are exempt from the scope.

3.1 Segmentation

It is difficult for companies to differentiate in their fee structure the parts falling within and outside the scope of the digital tax. Thus, for the preparation of new, bespoke separate financials based on hallmarks a full value chain analysis would be necessary in order to carve out a country-only or business-only P&L where this is not already in place. This constitutes a highly complex exercise which is challenging for companies and will likely lead to disputes. For example, central technology and R&D costs are generally not tracked by business or country and attempting any

sort of allocation of these costs would be complex and likely contentious. We would be concerned that this may take up a significant amount of time for both taxpayers and tax authorities through the review panel process, and countries within the panel may themselves not agree on how the hallmarks should be applied to a complex integrated business.
If there is a requirement for segmentation not contained in a MNE's financial statements, the methodology for preparing such segments should be formulaic and/or prescriptive (i.e., not subjective), such that there are not prolonged disputes. However, we believe devising and agreeing to such a methodology is likely to be time consuming. As such, we would strongly advocate that, in order to have an implementable solution in quick order, no bespoke segmentation be required.

3.2 Sourcing

The proposed approach on sourcing to consider the place of end consumption as the country location for revenue allocation purposes wherever possible is generally reasonable for B2C sales. However, for many B2B business models this creates significant challenges (e.g., cloud, sales of products to third party distributors, advertising, etc.). A clear and unambiguous set of rules is necessary to identify the consumer location with a clear hierarchy of how these rules should be applied. Businesses should be provided with a level of flexibility based on information they have available. It would make sense to look at rules that are already applied by several countries, such as the EU ESS VAT rules. For VAT (ESS) purposes, local law typically requires the seller to look to find two non-contradictory indicators of customer location. This normally involves looking at the customer's bill-to address and/or country of residence, as well as the default ship-to address, payment method issuer country and IP address country.
The purchaser must be defined as the first third party customer paying for goods or services, and not the end users/ consumers in the chain following any onward sales. The proposal to seek to collect information on the onward use of such goods or services, does not constitute a proportionate requirement, and many customers would not be prepared to provide this information for good commercial reasons.
There is also concern if the concept of "user" or IP location is used to allocate revenues, e.g., for advertising. We would suggest that a simpler approach would be to allocate sales to the country of the advertiser (who is the customer), which is information used for VAT purposes in most cases. It is true that the IP location information could be inaccurate, as a large proportion of internet access is through VPN (including corporate networks) and so this will not reflect the actual location of users. Therefore, we would suggest combining the IP of the e-mail address to the IP of the account in order to determine the user location. It should be clear that related party transactions are out of scope of the revenue measurement.
Finally, there will be challenges for businesses to collate this information on a group wide basis as this information is typically only collated on an entity level basis for VAT purposes today and consolidating across different businesses/systems will be challenging.

Moreover, it remains unclear if the designated tax will be considered as an expense. This means that in case of the taxation of the income this tax would not be profit-reducing which would lead to multiple taxation of all income at national level comparable to the German business tax. This

tax ceased to be considered an allowable operating expenditure but does not constitute a uniformly regulated taxation at national level, which leads in the taxation of corporations on the one hand to different taxation due to local presence and regarding corporate income tax already to multiple taxation of the same income. Against this background, the DST should be counted among the creditable types of tax as a business expense and thus reduce the total income.

3.3 Dispute resolution

bevh supports the proposed panel arrangement and staged approach to dispute prevention/resolution to simplify the audit and review process. We consider this is an effective way to manage the time and resources of both taxpayer and tax authority, and have any audits focus on key topics in an efficient manner.

4. Pillar Two

The form of the Pillar Two system outlined in the Blueprint is highly complex. It contains several areas that would create a significant amount of additional work for MNE companies as well as challenges for tax authorities. It is highly likely that it will be challenging for many countries to interpret and apply these rules in practice. Thus, we encourage the OECD to consider ways in which these rules can be simplified.

- For example, the requirement for jurisdictional blending creates a burden on groups to effectively create mini consolidations for every country in which they operate and maintain multiple sets of books. Considering safe harbors based on global financial segment effective tax rates (ETRs), or even allowing groups to apply the rules at an entity level (by taxpayer choice) may create a simpler approach. The rules should leverage existing financial information that groups already have available and should provide appropriate flexibility in this area.
- The approach to income inclusion rule (IIR) credits and timing differences appears to be very complex to apply for MNE groups. Ecommerce Europe recommends that using deferred tax balances would be a more straightforward approach since those numbers are largely already available and achieve a similar outcome.
- Considering the various applicable accounting standards, it would be advisable to set up two calculation templates to determine the amount of tax to be paid under Pillar Two in order to ensure compliance with the IFRS and GAAP standards. This would help to reduce the burden for taxpayers and tax administrations alike and avoid that deviation from accounting standards would lead to shifts in tax calculation.
- Adjustments based on different local tax laws may create ambiguity, complexity and distortive effects (for example, on share-based compensation). The approach should be simple to administer and uniform across all countries, otherwise it will lead to inevitable disputes.

Pillar Two does not yet provide how GloBE will co-exist with Global Intangible Low-Taxed Income (GILTI). GILTI has a policy objective consistent with Pillar Two: to tax foreign earnings that are otherwise subject to little or no tax. We believe that securing GILTI grandfathering would be

helpful in leveraging wider US support to an overall agreement. This should be designed in such a way that any future amendments to GILTI are respected providing they do not alter the overall policy design of the rules.

According to the proposal, the digital service tax is not considered to fall within the meaning of "covered taxes" under the Pillar Two Blueprint. If Pillar One is not fully adopted/ or national DSTs repealed, MNEs will be faced with an inequitable tax burden (subject to DSTs with no relief for any amounts paid under Pillar Two). Thus, the digital service tax should be declared as a covered tax and credited to the tax burden or be considered as an allowable operating expenditure as already described in the comments on Pillar One.

5. Final remarks

bevh looks forward to continuing its support to the work done at OECD level in order to ensure that a timely, 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 digital tax measures.