



Centre for Tax Policy and Administration
OECD
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[Via e-mail CTP.BEPS@oecd.org](mailto:CTP.BEPS@oecd.org)

Dear Sirs,

On 24 March 2014, the OECD Center for Tax Policy released a **Discussion Draft on Action 1 (Tax Challenges of the Digital Economy) of the BEPS Action Plan**, for interested parties to provide written comments.

A3F is pleased to respond to the OECD's request for comments on this discussion draft.

A3F background

A3F (French Women Tax Experts Association - Association Française des Femmes Fiscalistes) was founded in 2005. **A3F** is a French-based network of professional women from diverse horizons representing most players of the French and international tax system (experienced tax executives and expert tax advisors from a wide range of French and foreign companies and law firms, University professors, etc). The ever changing and rapidly evolving corporate and individual tax policies in France and around the world are a major concern for businesses. **A3F** provides its members with opportunities to exchange ideas and best practices, and to contribute to the shaping of tax policy through participation in public debates. **A3F** currently counts 115 members (of which two thirds are business representatives), all with a recognized work experience.

The president of **A3F** is Ms Eva Memran, Tax Director for a large French MNC. Ms Memran can be reached at +33 6 77 76 90 76 or evamemran@gmail.com.

Conclusion

A3F appreciates this opportunity to provide its views on OECD Discussion Draft on Action 1 Tax Challenges of the Digital Economy of the BEPS Action Plan, (outlined in the following pages). These comments were prepared by an ad-hoc **A3F** working group chaired by Ms Odile Courjon (Tax Lawyer, VAT specialist) and Ms Laurence Delorme (Tax Lawyer, Transfer Pricing specialist). We will welcome an opportunity to participate in the subsequent public consultations and related discussions.

Respectfully submitted,

For Association Française des Femmes Fiscalistes

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OECD DISCUSSION DRAFT ("DD") 24 MARCH 2014
ON ACTION 1 (TAX CHALLENGES OF THE DIGITAL ECONOMY) OF THE BEPS ACTION PLAN

1. KEY MESSAGES

- **A3F** fully supports the work done by OECD to address the tax challenges of the digital economy under Action 1 of the OECD. **A3F** main concern is that the evolution of Information and Communication Technology, although contributing to the rapid development of digital economy, may also cause some unfair competition between key players of the digital economy and others (be it with regard to collection of VAT from end-consumer or with regard to payment of corporate income tax on business profits).
- **Definition of the digital economy:** it could be necessary to have a broad definition of the digital economy in the DD: lots of businesses do confuse e-commerce and digital economy, and the digital economy itself also has evolved.

Although this is mentioned here and there in the DD report, we believe, it is of critical importance that concepts be defined. As an example:

- Under OECD definitions, e-commerce covers *"the sale and purchase of goods and services, conducted over computer networks [...]"* (cf Para 61 of the DD).
- Under EU standards for VAT/customs purposes, the e-commerce rules only cover B to C supplies of telecom, broadcasting and electronic services (from non-EU vendors, and also from EU vendors as from January 1, 2015). But B to C sales of goods remain regulated by the distance selling rules when made within the EU or by the low value import scheme, which are all rules resulting from the single market of 1993.

We understand that the DD report covers both goods and services, potentially both in B to B and B to C transactions (and also eventually C to C transactions), but always in a dematerialized order processing and through an internet transaction.

For the sake of clarity and understanding, we believe this is should be outlined in a clearer way because we see lots of confusion around those concepts.

- Work on corporate tax aspects of the digital economy cannot be treated in isolation of work on CFC rules. BEPS Action 3 "Strengthen CFC rules" aims at providing some *"recommendations regarding the design of domestic [CFC] rules"* which are due by September 2015. **Fixing well-known holes in specific country's local CFC regulations would resolve the perceived issue with international tax and digital economy much better than adding new measures specific to the digital economy, at the risk of increasing uncertainty and risk of double taxation for businesses.**

- We are not in favor of introducing new characterization of income specific to digital economy for the purpose of withholding income tax in the source country. Independently of the difficulty in setting a proper and precise definition of such income, it would in practice translate into tax being withheld by the source country on a basis equal to consumer sales by a foreign MNE in such source country - such basis would have no bearing with that share of business profits possibly attributable under Treaty to the source country (contrary to interest or royalties). The corresponding tax withheld at source (irrespective of total business profits generated by MNE) would therefore most likely be hard to credit in the residence country, leading to double taxation for businesses. Article 5 of OECD Model Convention (and related commentaries) could be reviewed and updated in order to take into account the evolution of the economy and business models of MNEs, especially (but not only) with regard to the impact of the digital economy, as analysed in the DD. We also recommend reviewing the list of exceptions to Permanent Establishment in particular, so as to avoid/limit cases where a substantial share of an MNE's activity is carried out in a foreign country through direct (internet) sales to customers, but with no reported tax presence (e.g. no subsidiary or branch) in the said foreign country. The PE definition could possibly be reviewed by introducing some materiality threshold based on the level of business of an MNE in a foreign country in which it has no reported corporate tax presence (subsidiary or branch). As an example, if more than x% of consolidated sales of an MNE headquartered in country A is realized in a foreign country B, and subject to meeting other criteria as per (revised) Article 5 of the OECD Model Convention, the MNE headquartered in country A could be deemed to have a permanent establishment in country B. This would form the starting point of the analysis, based on facts (e.g. actual substance of functions, assets and risks located in country B), as to whether such MNE effectively operates a PE subject to corporate tax in country B (based on Article 5 of OECD MC), and if so, which amount of business profits should be attributed to such PE.
- As to VAT, the n°1 issue lies with the location of a non-resident vendor (or supplier) in a B to C transaction. Failure for the non-resident vendors to VAT register creates harmful unintended competition to bona fide taxpayers. We believe that the OECD should have a firm political commitment for a "civic tax attitude" by all digital players: this is a quest in favor of a fair tax concept.

2 - COMMENTS ON SPECIFIC ISSUES AND QUESTIONS HIGHLIGHTED IN DD

Whether it is possible to ring-fence the digital economy from the rest of the economy, and if not, whether specific types of digital transactions could be identified and addressed through specific rules;

- We believe that it is not appropriate trying to ring-fence the digital economy from the rest of the economy for the purpose of defining specific corporate income tax rules, nor should specific types of digital transactions be identified and addressed through specific corporate tax rules. It is however necessary to review and update Article 5 (and related commentaries) of the OECD Model Convention.
The initial digital players, which are all mainly US multinationals with a very specific business model (made extremely effective through favorable US CFC rules allowing them to retain untaxed foreign profits in low-tax jurisdictions without being subject to US tax) now share the digital model with the traditional economy which is now converting itself to digital processing and offerings.
- Specific types of digital transactions (or forms of payment by the end-consumer) could possibly be identified and addressed through specific rules when they create specific issues with collection of indirect tax from the end-consumer and offer possibilities of unfair competition for non-resident Vendors (see below).

The key features of the digital economy identified by the Task Force and whether there are other key features that should be taken into account;

We believe the identification of opportunities for BEPS in the digital economy (para 119 et sq) has mainly focused on the traditional GAFA scenarios. For other players, it has relied on a simplistic scenario of a non-resident company interacting with customers in a remote country (cf Para 123). Although this direct B to C transaction is a given, it is far from true to represent the actual digital world.

In practice, the digital economy entails complex structures with **many intermediaries**: very often, a content owner, a data provider, an integrator, and App-store, a mobile operator, a bank collecting the cash, a web-portal operator, just to name a few.

The DD **report currently addresses none of these scenarios where intermediaries are involved**. We believe the DD report should address the case of these intermediaries and should determine to what extent they are deemed to intervene in the digital transaction. Because failing to do that, any non-resident vendor could easily “hide behind” one of those intermediaries which would hold the BEPS actions ineffective but also which would cause harmful and unfair competition to other bona fide players in the local market.

The EU has set forth presumptions to help operators determine which entity is deemed engaged in the digital transaction vis-à-vis the end-customer (B to C) or not. This piece of work has not been reflected in

the OECD DD report. We believe it should be taken into consideration. Indeed, this is a matter of **legal security for the businesses** to understand what entity is deemed engaged in the B to C digital transaction and thus becomes liable to all the BEPS consequences (direct and indirect tax).

The examples of new business models in the digital economy and whether (and if so which) other business models should be considered;

We wish to draw your attention on the fact that it is quite urgent to deal with non-resident Vendors (suppliers) which fail to register (for VAT purposes) in the country of their customers' residence. Particularly, we believe that this results from:

- (i) yet legal but unfair practices which create harmful competition to bona fide traders;
- (ii) the increase of fraud schemes, both on import VAT and customs duties : indeed, many operators create an activity, develop sales and then disappear after a few months and then recreate the same activity under a new name or brand. This raises the issue of registration thresholds, should they be very high or instead very low

The ability of the measures developed in the course of the BEPS Project and the current work on VAT/GST to address BEPS concerns in the digital economy;

In our view, the main opportunity for BEPS with respect to VAT lies with the location of a non-resident Vendor (or supplier) in a B to C transaction: as a particular illustration in the EU, which has implemented a declaring platform for B to C transactions for non-EU vendors, it appears that only very few of the existing non-EU suppliers have effectively registered on this platform and declared their VAT accordingly on sales to EU consumers (less than 1000 non-EU companies in the world have spontaneously registered on the EU portal). **This is "THE" major concern of BEPS in a VAT environment.**

Of course, the main ones (GAFA and others) have registered further to previous OECD reports, the political pressure and their marketing image. But many others, less big, less equipped, less organized, but also less diligent fail to register. These small ones of today may be the big players of tomorrow!

Failure to register by the non-resident suppliers invalidates the VAT collection mechanism and creates harmful and unintended VAT competition.

Only the OECD can address that issue because of its eminence and its International role. Regional platforms (like the EU one) can only provide technical rules and business friendly tools. But they have no impediment to force non-resident vendors to register otherwise than voluntarily.

Therefore, we strongly believe that the OECD should voice out very loud this political commitment: it is a matter of "civic tax attitude": we could call it as participating to a "fair tax concept". We believe only OECD can and should take this on-board.

In our view, this issue should be presented as the N°1 source of Digital BEPS with respect to VAT, which should be addressed under the BEPs action plan as it creates unfair competition in addition to loss of tax revenues for governments.

Paragraphs 136 and 170 address BEPS VAT issues for the exempt sector: but this is a sectorial business issue. In our view, this is NOT the N°1 issue for the Digital economy in a BEPS environment: this is rather an “abuse of law” scheme on some B to B practices implemented by some banks. This is already dealt with by the OECD B to B VAT/GST Guidelines. Moreover, the described scheme is quite old, has circulated a lot in a non-digital business transactions environment: it is not specific to digital business although it can be accelerated in a digital business context. Therefore, this should not come as the first opportunity for Digital BEPS in the VAT area.

Most of the MNEs tend to be 100 % VAT payers so that VAT is not their major tax concern: rather, transfer pricing and corporate tax basis and liability are their concern with regard to their international operations. VAT is due along the recharged invoices: VAT cascades down the value chain of services, with no final impact for businesses (other than cash). This issue, although important comes after the non-resident vendor issue described above.

Whether other measures should be developed during the course of the work on other aspects of the BEPS Action Plan to address BEPS concerns in the digital economy and if so which ones;

VAT measures

Distance selling should be included in paragraphs 220 and 221 pretty much as the low value imports scheme (just like also in sub paragraph 189); indeed, it may happen that some countries have set a customs Union or have no customs due because of free trade agreements in place where goods are basically no longer subject to customs duties. Still the VAT/GST scenarios need be addressed as a result of the “on-line shopping” habits from consumers in a cross-border transaction. Most of the import value scheme addresses the customers as being the importer of records, rather than the supplier. Thus, it is important that the distance selling is also mentioned together with the import of low value goods.

Any facilitation set up for the import of low value goods should also apply to distance selling with the same VAT territory.

The existence of VAT number, the access to centralized electronic clearances, or access to electronic platforms (for direct or indirect tax) should not create Virtual Permanent establishment issues.

Corporate Income Tax

Regarding corporate income tax, the key issue is effectiveness of CFC rules preventing accumulation by MNEs of foreign business profits never subject to tax. This is not specific to digital economy, although the major players (GAFAM - which are all US corporations) have focused the debate on digital economy over the recent years. But as the whole traditional economy is now converting itself to digital processing and offerings, the BEPS issue with regard to corporate income tax is more global.

Setting-up a special corporate income tax for digital economy only is not a good option, since it would generate the risk of double taxation for business.

The broader tax challenges raised by the digital economy which have been identified by the Task Force and how these challenges should be addressed, taking into account both direct and indirect taxation;

On paragraph 224, OECD should propose specific enforcement agreements **and dispute resolution mechanisms (bilateral or multilateral) to cover also VAT**. Those could be clauses to be included in existing tax treaties or in newly negotiated ones. Businesses often suffer from the double taxation on VAT, resulting from mismatches of qualification by the authorities or from diverging interpretations by the authorities. Indeed the likelihood that "Virtual PE" (if retained further to BEPS actions, or if assessed by tax authorities) will end up with VAT collection reassessments is quite high.

The options to address these broader tax challenges discussed by the Task Force and summarized in the discussion draft;

The draft report suggests various options to fight against the VAT and customs harmful competition from non-resident vendors/suppliers. We believe this is a good ultimate goal.

But amongst the various options proposed, the creation of a digital withholding tax (VAT) by intermediaries in charge of digital payments (para 218, Creation of a withholding tax on digital transactions), seems the most suitable solution, due to its simplicity.

Please note however that the EU has not chosen that route as banks are explicitly considered NOT as an intermediary engaged in a digital transaction (and therefore never liable for VAT on it).

The potential cost of compliance arising from the options proposed to address the tax challenges of the digital economy and suggestions for more cost efficient alternatives;

It is quite critical that any proposed compliance tool be on electronic format, secured and business friendly, including for small and medium sized business organizations.

Whether the Ottawa taxation framework principles identified above are an appropriate framework for analysing options to address the tax challenges, and whether and how they should be supplemented

Yes.