

AmCham Germany · Postfach 10 01 62 · 60001 Frankfurt am Main

Via e-mail: [TFDE@oecd.org](mailto:TFDE@oecd.org)

Organisation for Economic Cooperation and Development  
Mr. David Bradbury  
Head of Division, Tax Policy and Statistics Division  
Centre for Tax Policy Administration  
2 rue André-Pascal  
75775, Paris, Cedex 16  
France

American Chamber of  
Commerce in Germany e.V.

---

Börsenplatz 13-15  
60313 Frankfurt am Main  
Postfach 10 01 62  
60001 Frankfurt am Main  
Charlottenstr. 42  
10117 Berlin  
[www.amcham.de](http://www.amcham.de)

---

T +49 30 2130056-28  
E [jreizig@amcham.de](mailto:jreizig@amcham.de)

March 5, 2019

## OECD Public Consultation Document Addressing The Tax Challenges Of The Digitalisation Of The Economy

Dear Mr. Bradbury,

We would like to thank the OECD for the opportunity to provide our comments in relation to the consultation document. We greatly appreciate the OECD's outstanding efforts to avoid uncoordinated unilateral action in this important area of taxation. The impact of the proposals will heavily depend on how robust a consensus can be achieved between countries as we lay out below.

### 1. General Remarks

#### 1.1. Businesses and tax administrations are already challenged

Since the OECD BEPS project kicked off, businesses and tax administrations have been confronted with a massive amount of change in relation to rules relevant for international taxation, be it on a unilateral or multilateral level. Some of the most meaningful revised nexus and allocation rules that resulted from these changes do not yet seem to be based on a comprehensive international consensus. This has created and still creates uncertainty and risk of double taxation, e. g. in relation to permanent establishments and transfer pricing.

Also, reporting obligations of businesses have been significantly expanded despite the fact businesses had to comply with quite comprehensive reporting obligations even before the BEPS project was initiated.

On the other hand, dispute resolution processes do not yet show material signs of improvement in practice that would ensure efficient coverage of the disputes arising from increased complexity and uncertainty.

Businesses as well as tax administrations are still digesting these changes and it will take more time to reinstate satisfactory levels of certainty. So, as an introductory remark, we would like to stress that further changes to international taxation rules and further reporting obligations need to be drafted with care as these may be hard

---

to administer for businesses and tax administrations alike, particularly if they do not simplify but complicate existing rules, further increase double taxation risks or further increase the administrative burden of complying with tax laws.

### **1.2. Importance of global consensus**

Achieving tax certainty and rules that can be administrated in practice while avoiding increased double taxation requires a comprehensive and sustainable global consensus and rules that are as harmonized as possible. Both, the interim report “Tax Challenges Arising from Digitalisation” issued in March 2018 as well as the consultation document reflect a situation that is characterized by a lack of consensus between countries in important areas.<sup>1</sup> This situation bears the risk of an outcome where different views are merged into an ambiguous compromise forming a basis for countries to deviate in different and incompatible ways from known principles at the cost of taxpayers, deteriorating an already difficult landscape further.

Such a development would be detrimental to a large number of businesses and must be avoided. While we understand that a comprehensive consensus will be extremely difficult to reach, we believe that any further reshaping of international nexus and allocation rules must be based on such a true consensus or business will have to face increased complexity, uncertainty and double taxation risks. New rules based which are indeed based on a real consensus, on the other hand, could instead lead to simpler, more certain rules that ensures that business profits are taxed (once, not twice) and expenses and losses are deductible exactly once (not twice or disregarded everywhere).

### **1.3. Need to assess what has been achieved**

As mentioned above, many material changes to the rules of international taxation and related reporting have already been implemented or are about to be implemented following the BEPS project. While it appears that BEPS measures implemented so far have already had a significant impact reducing BEPS issues, it will take some more time to assess the full impact of the measures taken, including not only on curbing BEPS but also on taxpayers and administrations more broadly.

Overwriting some of the outcomes of the BEPS project before giving oneself enough time to assess the impact of the anti-BEPS measures agreed, and acting again even before certain important measures are supposed to be implemented (such as the principal purpose test in the MLI) is unlikely to produce good policy outcomes. Questioning new principles agreed between countries only very recently as part of the BEPS project (such as the DEMPE principles) before the effects of these new principles have been fully understood and resolved would likely further increase uncertainty.

### **1.4. Certainty features**

It seems important to stress that symptomatic certainty features, such as traditional dispute resolution mechanisms or even “early certainty features” such as APAs are unlikely to be (per se) sufficient to resolve issues of double taxation. In addition, the primary rules of taxation, in relation to nexus, allocation and avoidance need to be made simpler and clearer. Neither taxpayers nor tax administrations will be able to

---

<sup>1</sup> See, for example, paras. 27, 26, 159, 346, 372, 407, 509, 514 of the interim report.

provide enough resources to work through the increasing number of bilateral and multilateral questions and disputes quickly enough if such simplification cannot be achieved as the number of cases and their complexities will simply be too high.

As indicated before, simplification will require consensus. Insofar, asking countries for a “consistent application of the proposals”<sup>2</sup> will be meaningful only if the application of these rules is made clear with enough “depth”, i. e. to an extent that allows to easily spot deviations from those proposals. A transaction-based approach where individual circumstances are taken into account will most likely leave enough room for discretion to make a review of the consistency of application difficult. Likely, enough clarity can only be achieved by applying simple mechanical rules.

## **2. Nexus and Allocation Rules**

### **2.1. Tax base**

The consultation document states that the “effective application of the proposals would also require a number of data points to be available to tax administrations (e.g. total profit, business line) which could be derived from tax accounting or financial accounting data. Any additional data needs could potentially be added to an already agreed filing and exchange of information mechanism ...”<sup>3</sup>. It also mentions that “the tax base could be determined by applying the global profit rate of the MNE group to the revenue (sales) generated in a particular jurisdiction”<sup>4</sup>. While we appreciate that details of how to calculate a profit (rate) as well as additional reporting requirements would yet have to be determined, the above raises concern in relation to further administrative burden, disputes and double taxation. If profit split elements or mechanical allocation rules were to be introduced then the profit to be allocated should ideally be derived from a harmonized tax base rather than profits derived from local, non-harmonized tax rules or even accounting rules.

### **2.2. User participation vs. marketing intangibles vs. significant economic presence**

For any of the suggestions made it will be key to achieve simplicity and avoid double taxation based on a true, sustainable and rather detailed consensus on future nexus and allocation rules. Any approach other than a fully harmonized mechanical one will likely increase complexity, uncertainty and double taxation risks to a level that may go beyond what taxpayers and administrations can digest. As the consultation document states, any non-mechanical “income allocation would be dependent entirely on the facts of each case and the economic contribution to profits provided by the marketing intangibles”<sup>5</sup>. Such an approach would create enormous uncertainty and complexity.

This is likely even true where the mechanical income allocation requires the upfront “determination of routine functions and their compensation, the deduction of routine profit from total profit and finally the division of the remaining or “residual” profit”<sup>6</sup>. Even this piece may cause disagreement within a new set of rules including

---

<sup>2</sup> See para. 84 of the consultation document.

<sup>3</sup> See para. 85 of the consultation document.

<sup>4</sup> See para. 53 of the consultation document.

<sup>5</sup> See para. 46 of the consultation document.

<sup>6</sup> See para. 47 of the consultation document.

previously irrelevant nexi. As the consultation document rightly states, “the more ... steps are based on detailed and factual determinations (e.g. conventional transfer pricing analysis), the greater is the risk of disputes and uncertainty in the outcome produced by the proposal”<sup>7</sup>. Practical experience with the residual profit split method shows that this is a resource intensive approach for taxpayers and tax administrations and not one that is likely to lead to consistent results as it typically relies upon an agreed set of individual assumptions for the allocation of value. In a world of constantly changing business models, this is a difficult exercise.

In case a comprehensive international consensus based on mechanics easing its application cannot be achieved, we believe all three proposals would heavily increase double taxation risk, uncertainty and administrative problems. User Participation is very difficult to define, value and track. The Significant Economic Presence would in effect wash away all traditional nexus concepts<sup>8</sup> and, in the absence of clear and agreed mechanics, extremely complicate international nexus and allocation rules. Also, we would expect the concept of Marketing Intangibles, while this proposal seems to be primarily focused on B2C cases of remote sales and limited risk distributors, to have the potential to drastically complicate profit allocation as well as “spill-over” into other fact patterns as the proposal seems to be built on a general notion for which it may be difficult to find a (comprehensive) international consensus. It seems inconceivable to control either of the concepts in practice without a full international harmonization of related nexus, tax base and allocation concepts and a degree of mechanical simplification.

The practically required simplification will, of course, not be able to do justice to the allocation of individual transaction profits for different business models, product lines, regions but, at best, only at an aggregated level. We appreciate that this will make it difficult for countries to agree to such harmonization and simplification and the related revenue impact. However, we believe it is absolutely essential that new rules incorporate an agreed way to simplify allocation that eases practical application and creates reasonable certainty to avoid creating another major source for international tax disputes and uncertainty.

Should a satisfactory degree of (mechanical) simplification not be agreeable, then it would appear important that new rules, if any, would

- be based on existing nexus and allocation principles,
- deviate from existing rules as little as possible with changes focused on outlier situations rather than taxpayers more broadly,
- be set up such that these lead to predictable results and make disputes the exception rather than the norm,
- be administrable by taxpayers and tax authorities (the OECD work to date on safe harbors could be useful component) including where disputes arise, supported by a mandatory and practical dispute resolution approach.

---

<sup>7</sup> See para. 75 of the consultation document.

<sup>8</sup> In particular, the concept of Significant Economic Presence appears to be completely at odds with any practicality requirements as a nexus would be assumed where there is evidence of “a purposeful and sustained interaction with the jurisdiction via digital technology and other automated means” such as (e. g.) the existence of a user base, billing and collection in local currency, the maintenance of a website in a local language or sustained marketing and sales promotion activities, either online or otherwise.

### 2.3. Losses

The consultation document states that “one possible approach would be to apply the proposals similarly to non-routine losses, in which case the portion of these negative amounts attributable to marketing intangibles or user contribution should also be re-allocated”<sup>9</sup>. We would like to stress that this would not be an option but would have to be a key ingredient for any profit-split based or mechanical allocation mechanism. Also, pre-existing losses need to be dealt with in a way that allows businesses to use these in any changed framework of rules.

### 2.4. Withholding taxes

The Significant Economic Presence proposal also “contemplates the possible imposition of a withholding tax as a collection mechanism and enforcement tool”<sup>10</sup>. Withholding taxes are gross basis taxes and, therefore, a potential driver of over taxation and double taxation. Applying them to a broad spectrum of payment categories will be very difficult to deal with in practice, as procedures for refunds are often complex and lengthy which exposes taxpayers, at a minimum, to significant adverse liquidity consequences. Accordingly, we would recommend not to incorporate withholding taxes into any new rules independent of which proposal these may be based on.

## 3. Global Anti-Base Erosion Proposal

The proposals made in this section of the consultation document effectively focus on linking rules that make the taxation of income or payments in one jurisdiction dependent on the taxation of the same in another country. A variety of similar rules exist already, and it may be advisable to review the impact these rules have had on fighting misuse as well as on the administrative burden of taxpayers, before taking further action. Independent of this remark, further linking rules raise serious concerns:

Practical experience shows that linking rules are very hard to administer, particularly where every piece of income or expense is to be tested individually in relation to its effective taxation (which we understand to be the likely direction the proposal is aiming at). Determining how each individual item of income or expense is effectively taxed in another country will be extremely difficult in practice because of (e. g.)

- overlapping rules addressing the same perceived “mismatch” or “under-taxation” from different angles (so far, despite certain BEPS recommendations called for it, no practical ordering rules have been observed),
- the interaction between existing misuse and matching rules, nexus and allocation rules as well as the anti-erosion proposals, for example when trying to calculate the effective taxation rate of a royalty payment for purposes of the anti-erosion proposals that may have to be reallocated to other countries under the nexus/allocation proposals,
- tax base differences arising from non-harmonized country tax rules,
- timing issues arising from non-harmonized country tax rules,
- the availability of losses carried forward,

---

<sup>9</sup> See para. 76 of the consultation document.

<sup>10</sup> See para. 55 of the consultation document.

- the fact that income inclusion rules may have to be applied at multiple levels as company group structures may have several tiers of ownership,
- effects of tax consolidations and group regimes,
- partnerships and other entities where income is not taxed at that level but at the (e. g.), partner level,
- post-audit, post-litigation or post-MAP adjustments impacting earlier years changing the treatment of an income or expense items,
- the application of safe harbor rules,
- the usage of tax credits,
- the uncertainty in relation to what the right treatment is under foreign law effectively leading to an import of doubtful technical questions into the other country.

So even if taxpayers were able to review every income or expense from multijurisdictional angles, the proposed rules would create a long list of extremely difficult practical problems. Based on this, it is quite obvious that an expansion of existing linking rules to apply such tests to virtually all income and expenses rather than just specific income or expense categories (such as passive income) will hardly be manageable in practice. More likely, it would create uneven and discretionary taxation.

It would also expose legal representatives of entities being signatories of tax returns to immense personal risk as tax return line items would increasingly have to be tested not just under the laws of the state of residence of the relevant entity but also in relation to rules in other countries and, for an internationally operating entity, the number of countries the rules of which may be relevant could be very high. This simply appears uncontrollable given the many transactions a multinational business may have and the many jurisdictions that may be involved.

All in all, it is hard to see how the proposed rules could be reasonably be dealt with in practice. If implemented, these proposals would create what we would view as an overreaction to BEPS issues that does not adequately weigh perceived benefits against adverse consequences it creates at a point in time when the relevance of BEPS is decreasing given previous actions (incl. US tax reform) that have been taken already or are in the process of being taken.

The main result of these proposals will therefore most likely be causing unnecessary adverse implications for a very broad group of taxpayers. Insofar, the statement that the Global Anti-Base Erosion Proposal addresses “the remaining BEPS challenges”<sup>11</sup> seems to ignore that, as mentioned above, a variety of similar or overlapping rules already exist and that the proposals create a massive risk of duplication and further complexity that does not seem to be grounded in a thorough assessment of the need for and the practical consequences of such proposals.

Finally, another rather obvious issue is that the proposals are at odds with existing international laws:

- While the consultation document mentions that the income inclusion rule “would be designed in such a way that Member States of the European

---

<sup>11</sup> See para. 91 of the consultation document.

Union could apply it”<sup>12</sup> it seems very doubtful whether any of the proposed rules (i. e. including the “Undertaxed Payments Rule” and the “Subject To Tax Rule”) would be compatible with EU freedoms and it also seems unlikely that a directive would be able to resolve that incompatibility. The aim to “not tolerate that a modest level of substance can result in an allocation of a substantial amount of intangible and risk related returns”<sup>13</sup> is hardly a good enough reason to justify the incompatibility, not least as the rules would apparently also impact low taxed income where the substance is not at all “modest”.

- Also, the denial of treaty benefits or deductions may be in conflict with non-discrimination or most favored nation clauses included in treaties.

#### 4. Conclusion

Concluding we would like to stress once more, that from a taxpayer perspective, the most important aspects of any new rules would be to what extent rules are clear, easy to administer and double taxation can be avoided. These policy goals can only be achieved based on a true and comprehensive consensus between the countries implementing these rules. Insofar, “comprehensive” means a consensus that drives a harmonized approach at a level detailed enough not to allow countries to come to significantly different views when taxing a transaction, payment or item of income or expense. Taxpayers need to know where taxes are to be paid.

Thank you for taking the time to review and evaluate our comments. We remain at your disposal for further discussion and consultation.

Yours sincerely,



Frank Sportolari  
President  
AmCham Germany



Felix Hierstetter  
Chair  
Tax Committee

About the American Chamber of Commerce in Germany (AmCham Germany)

Founded 116 years ago, AmCham Germany is the largest and oldest bilateral business association in Europe. Through our activities and our commitment to free and fair trade and a competitive and innovation-friendly business environment, we strive to enhance the transatlantic economic relationship, a cornerstone of the world economy. We represent the interests of American and German companies of all economic sectors and sizes. With more than 2,300 members, AmCham Germany is a powerful voice of transatlantic business in Germany.

For more information on AmCham Germany, our activities and our members, please visit [www.amcham.de](http://www.amcham.de).

---

<sup>12</sup> See para. 98 of the consultation document.

<sup>13</sup> See para. 91 of the consultation document.