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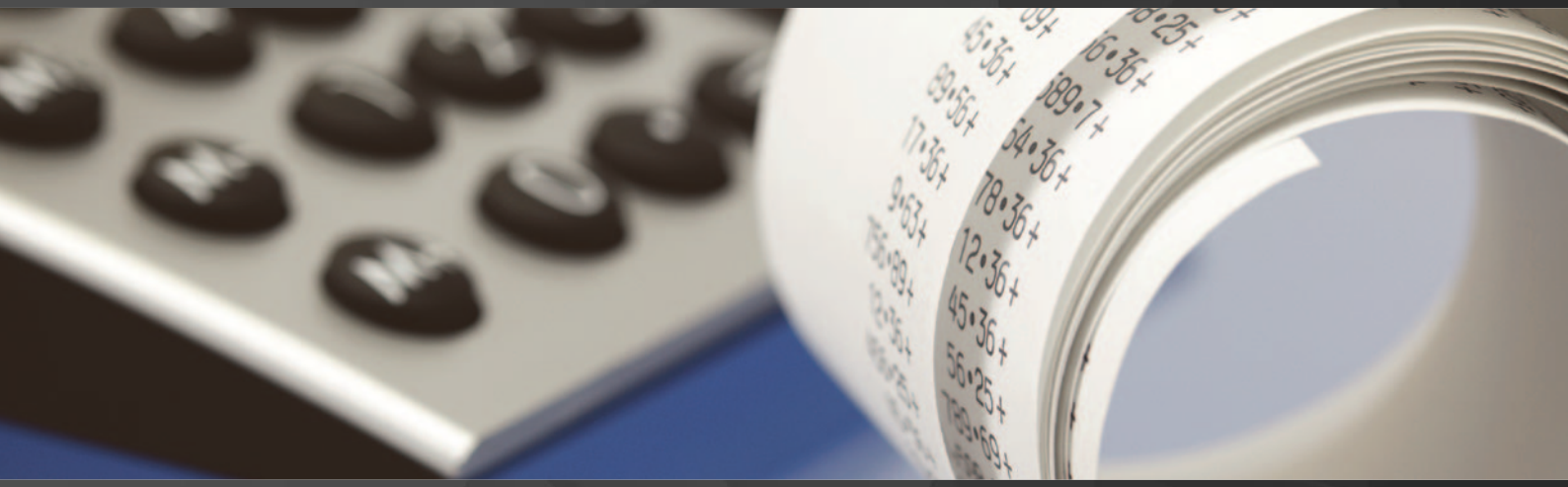

Corporate Tax 2020

A practical cross-border insight to corporate tax law

16th Edition

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Corporate Tax 2020

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Taxing the Digital Economy


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Introduction

As part of the OECD/G20 BEPS project, and in the context of Action 1, the Task Force on the Digital Economy considered the tax challenges raised by the digital economy. The 2015 Action 1 BEPS final report (the "**2015 Report**") and the 2018 Action 1 BEPS interim report (together, with the 2015 Report, the "**Action 1 BEPS Reports**") noted that highly digitalised business models are characterised by an unparalleled reliance on intangibles, along with the importance of data, user participation and their synergies with intangible assets.

Following the publication of the Action 1 BEPS reports, the potential tax challenges were debated – particularly in relation to the remaining BEPS risks and the question of how taxing rights on income generated from cross-border activities in the digital age should be allocated among jurisdictions. No consensus was reached regarding how to address these issues but there was a commitment to deliver a final report in 2020, aimed at providing a consensus-based, long-term solution.

Further to the analysis included in the Action 1 BEPS Reports, members of the OECD/G20 Inclusive Framework on BEPS (the "**Inclusive Framework**") suggested that a consensus-based solution to the taxation of the digital economy should be focused on the: (i) allocation of taxing rights by modifying the rules on profit allocation and nexus; and (ii) unresolved BEPS issues. On 31 May 2019, the OECD published a consensus document entitled "*Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*" (the "**Programme Report**"). The Programme Report emphasises that the way multinational corporations are taxed will need to be reshaped in order to effectively deal with the tax challenges arising from digitalisation. The aim is still that a global, consensus-based solution will be agreed by the end of 2020. The proposals outlined in the Programme Report are summarised below.

Aside from the proposals in the Programme Report, the other BEPS Actions also have a significant impact on the taxation of a digitalised economy. The most relevant BEPS direct tax measures for digitalised businesses include amendments to the permanent establishment definition in Article 5 of the OECD Model Tax Convention (Action 7), revisions to the OECD Transfer Pricing Guidelines related to Article 9 of the OECD Model Tax Convention (Actions 8–10), and guidance based on best practices for jurisdictions intending to limit BEPS through controlled foreign company rules (Action 3). These topics are also explored in more detail below.

The EU has also made efforts to find a solution to the tax challenges arising from digitalisation. In March 2018, the European Commission published two proposals to address such challenges. The first was based on a long-term solution that proposed to tax a digital permanent establishment, while the second was a short-term proposal that would apply to revenues created from specific digital activities. However, the EU Economic and Financial Affairs Council failed to reach consensus on a way forward on an EU digital services tax. It is unlikely that there will be an agreed approach in the EU until at least 2020, but the new European Commission President, Ursula von der Leyen, published a manifesto which stated that taxation of big technology companies is a priority, and that the EU should act alone if no global solution is reached by 2020.

Various jurisdictions have also been implementing unilateral national measures relating to the tax challenges arising from the digitalisation of the economy. As examples, French senators have recently approved a temporary digital services tax, and the UK digital services tax will take effect from April 2020. These measures are outlined below.

The Programme Report – Digitalisation of the Economy, not the Digital Economy

One of the findings of the Action 1 BEPS Reports was that the whole economy was digitalising and, as a result, it would be difficult, if not impossible, to ring-fence the digital economy. The Programme Report may therefore impact multinational organisations which would not be immediately categorised as "digital businesses".

The Programme Report focuses on two pillars, namely:

1. *Pillar One – Allocation of taxing rights*: This pillar details the different technical issues that need to be resolved to undertake a coherent and concurrent revision of the profit allocation, and nexus rules are detailed.
2. *Pillar Two – Remaining BEPS issues:* This pillar describes the work to be undertaken in the development of a global anti-base erosion ("**GloBE**") proposal that would, through changes to domestic law and tax treaties, provide jurisdictions with a right to "tax back" where other jurisdictions have not exercised their primary taxing rights or the payment is otherwise subject to low levels of effective taxation.

The Programme Report also discusses the work to be undertaken in connection with an impact assessment and economic analysis of the above proposals.

Pillar One – Allocation of Taxing Rights

The Programme Report considers the objective and scope of the reallocation of taxing rights across jurisdictions – i.e. the "new taxing right". The technical issues identified in relation to the new taxing right are as follows:

a) different approaches to determine the amount of profits subject to the new taxing right and the allocation of those profits among the relevant jurisdictions;
b) the design of a new nexus rule that would capture a novel concept of business presence in a market jurisdiction reflecting the transformation of the economy, and not constrained by a physical presence requirement; and

c) different instruments to ensure full implementation and efficient administration of the new taxing right, including the effective elimination of double taxation and resolution of tax disputes.

Pillar Two – Remaining BEPS issues

The Programme Report recognises that the measures set out in the BEPS package (explored in further detail below) have sought to align taxation with value creation. However, it was also noted that certain members of the Inclusive Framework consider that such measures do not yet provide a comprehensive solution to the risk that continues to arise from structures that shift profit to entities subject to no or very low taxation.

The proposal outlined in Pillar Two seeks to address these remaining BEPS challenges through the development of two inter-related rules:

a) an income inclusion rule that would tax the income of a foreign branch or a controlled entity if that income was subject to tax at an effective rate that is below a minimum rate; and
b) a tax on base eroding payments that would operate by way of a denial of a deduction or imposition of source-based taxation (including withholding tax), together with any necessary changes to double tax treaties, for certain payments unless that payment was subject to tax at or above a minimum rate.

Relevant Measures of the BEPS Package

Permanent Establishments (Action 7)

The possibility to reach and interact with customers remotely through the internet, together with the automation of some business functions, have significantly reduced the need for local infrastructure and personnel to perform sales and other activities in a specific jurisdiction. The same factors potentially create an incentive for multinationals to remotely serve customers in multiple market jurisdictions from a single, centralised hub.

These structures can present some BEPS concerns. This is the case when the functions allocated to the staff of the local subsidiary under contractual arrangements (e.g. technical support, marketing and promotion) do not correspond to the substantive functions performed. For example, the staff of the local subsidiary may carry out substantial negotiation with customers effectively leading to the conclusion of sales. Provided the local subsidiary is not formally involved in the sales of the particular products or services of the multinational group, these trade structures can avoid the constitution of a dependent-agent permanent establishment in the market jurisdiction.

In response to these BEPS risks, Action 7 resulted in the amendment of key provisions of Article 5 of the OECD Model Tax Convention and its Commentary. The changes aim to prevent the artificial avoidance of permanent establishment status – which is the main treaty threshold below which the market jurisdiction is not entitled to tax the business income of a non-resident. In addition, the 2015 Report noted that these changes could help mitigate some aspects of the broader direct tax challenges regarding nexus, if widely implemented. These expectations were primarily relevant for situations where businesses have some degree of physical presence in a market (e.g. to ensure that core resources are placed as close as possible to customers) but would otherwise avoid the permanent establishment threshold.

More specifically, Action 7 provided for the amendment of the dependent agent permanent establishment definition through changes to Articles 5(5) and 5(6) of the OECD Model Tax Convention. The amendments address the artificial use of commissionaire structures and offshore rubber-stamping arrangements. Some structures common to all sectors of the economy involved replacing local subsidiaries traditionally acting as distributors with commissionaire arrangements. The result was a shift of profits out of a certain jurisdiction but without a substantive change in the functions performed there. Other structures more specific to highly digitalised businesses, such as the online provision of advertising services, involved contracts substantially negotiated in a market jurisdiction through a local subsidiary, but not formally concluded in that jurisdiction. Instead, an automated system managed overseas by the parent company could be responsible for the finalisation of these contracts. Such arrangements allowed a business to avoid a dependent agent permanent establishment under Article 5(5).

Where the recommendations of Action 7 are implemented, these structures and arrangements would result in a permanent establishment for the foreign parent company if the local sales force habitually plays the principal role leading to the conclusion of contracts in the name of the parent company (or for the transfer of property or provision of services by the parent company), and these contracts are routinely concluded without material modification by the parent company.

Action 7 also recommended an update of the specific activity exemptions found in Article 5(4) of the OECD Model, according to which a permanent establishment is deemed not to exist where a place of business is used solely for activities that are listed in that paragraph (e.g. the use of facilities solely for the purpose of storage, display or delivery of goods, or for collecting information). The proposed amendment prevents the automatic application of these exemptions by restricting their application to activities of a "preparatory or auxiliary" character. This change is particularly relevant for some digitalised activities, such as those involved in business-to-consumer online transactions and where certain local warehousing activities, previously considered to be merely preparatory or auxiliary in nature, may in fact be core business activities. Under the revised language of Article 5(4), these types of local warehousing activities carried out by a non-resident no longer benefit from the specific activity exemptions usually found in the permanent establishment definition if they are not preparatory and auxiliary in nature.

Transfer Pricing (Actions 8–10)

Business models where intangible assets are central to the firm's profitability, such as those of highly digitalised businesses, have in some cases involved the transfer of intangible assets or their associated rights to entities in low-tax jurisdictions that may have lacked the capacity to control the assets or the associated risks. To benefit from a lower effective tax rate at the group level, affiliates in low-tax jurisdictions have an incentive to undervalue the intangibles (or other hard-to-value income-producing assets) transferred to them. At the same time, they could claim to be entitled to a large share of the multinational group's income on the basis of their legal ownership of the intangibles, as well as on the basis of the risks assumed and the financing provided (i.e., cash boxes). In contrast, affiliates operating in high-tax jurisdictions could be contractually stripped of risk, and avoid claiming ownership of other valuable assets.

Actions 8–10 of the BEPS Action Plan developed guidance to minimise the instances in which BEPS would occur as a result of these structures. In particular, the guidance seeks to address the prevention of BEPS by moving intangibles among group members (Action 8), the allocation of risks or excessive capital among members of a multinational group (Action 9) and transactions which would not occur between third parties (Action 10).

The guidance developed under BEPS Actions 8–10 was incorporated into the OECD Transfer Pricing Guidelines in 2016 to ensure that transfer pricing outcomes are aligned with value creation. While the Transfer Pricing Guidelines play a major role in shaping the transfer pricing systems of OECD and many non-OECD jurisdictions, the effective implementation of these changes depends on the domestic legislation and/or published administrative practices of the relevant countries.

Controlled Foreign Company Rules (Action 3)

The 2015 BEPS Report on Action 3 provided recommendations in the form of six building blocks, including a definition of Controlled Foreign Company ("**CFC**") income which sets out a non-exhaustive list of approaches or combination of approaches on which CFC rules could be based. Specific consideration is given to a number of measures that would target income typically earned in the digital economy, such as income from intangible property and income earned from the remote sale of digital goods and services to which the CFC has added little or no value. These approaches include categorical, substance and excess profits analyses that could be applied on their own or in combination with each other. With these approaches to CFC rules, mobile income typically earned by highly digitalised businesses would be subject to taxes in the jurisdiction of the ultimate parent company. This would counter offshore structures that result in exemption from taxation, or indefinite deferral of taxation in the residence jurisdiction.

Domestic Responses

UK Digital Services Tax

The UK will introduce a digital services tax ("**DST**") from 1 April 2020 as a temporary response to the tax challenges arising from digitalisation, with a proposed 2% tax on UK revenues (not profits) on specific digital businesses. Draft legislation of the DST has been included in the Finance Bill 2019–2020. It has been suggested that the DST will be repealed when a universal consensual approach is reached. There is no specific legislative obligation mandating such repeal, but the UK Government has committed to review the DST before the end of 2025.

The DST will be levied on "in-scope activities", namely: (a) social media platforms, i.e. targeting revenues from businesses that monetise users' engagement with the platform; (b) search engines, i.e. targeting platforms that generate revenue by monetising users' engagement with the platform and with other closely integrated functions; and (c) online marketplaces, i.e. targeting businesses which generate revenue by using an online marketplace platform to allow users to advertise, list or sell goods and services on such platform. Certain businesses are specifically excluded from the definition of in-scope activities, including the provision of financial or payment services, the sale of own goods online and the provision of online content.

The DST focuses on the participation and engagement of users as an important aspect of value creation for digital business models. A key issue of the proposed approach will be how to determine user-created value and attribute profits to user participation. The attribution of profits will be difficult to calculate and further guidance will be required on the mechanical rules of apportionment. In addition, it will be challenging to allocate profits between the UK and different jurisdictions, particularly as international rules develop in relation to the taxation *of digital services.*

The DST is designed to ensure digital businesses pay tax reflecting the value they derive from the participation of UK users. User participation refers to the process by which users create value for certain types of digital businesses through their engagement and participation. The definition of "UK user" in the draft legislation is broad and provides that a UK user means "*any person who it is reasonable to assume – (a) in the case of an individual, is normally in the United Kingdom, (b) in any other case, is established in the United Kingdom*". As digital business models develop, it is expected that the range of businesses affected by the user participation concept will expand.

High financial thresholds are proposed for the DST. The DST will only be payable by businesses whose global revenues from the in-scope activities are at least £500 million. Tax will not be levied on the first £25 million of revenue from in-scope business activities linked to the participation of UK users.

Additionally, there is a safe harbour provision for low-margin and loss-making businesses, which allows for a reduced rate of tax to be paid. The thresholds are based on an expectation that the value derived from users will be more material for large digital businesses, which have established a significant UK user base, and generate substantial revenues from that user base. In addition, the thresholds are intended to ensure that the DST does not place unreasonable burdens on small businesses.

An important factor in the implementation of the DST is the associated EU state aid implications. Whilst the UK is preparing to leave the EU, it is reasonable to assume that EU state aid rules will form part of any agreement between the UK and the EU on their future relationship. The settled case-law of the Court of Justice of the European Union provides that, for a national measure to be classified as state aid, the measure must confer an economic advantage on companies which is: (i) not received under normal market conditions; (ii) selective; (iii) granted by the State or through State resources; and (iv) liable to distort competition and affect trade between Member States.

The main question arising in respect of EU state aid tax cases is the existence of selectivity. The DST would be selective on the basis that there may be a derogation from the "reference framework" which the DST is targeting (i.e. the group of entities which carry out in-scope business activities). The high financial thresholds anticipated for the DST (of £500 million of global annual revenues from in-scope business activities, of which at least £25 million is generated in the UK) may constitute a derogation. Any derogation from the "reference framework" must be justified by the nature and logic of the national tax system. Based on the Commission's decision-making practice to date, this is usually only the case if the tax paid is somehow paid to the authorities in a different context.

However, a recent legal opinion by Advocat General Kokott in case C–75/18 (*Vodafone Magyarország Mobil Távközlési Zrt*) concluded that a special progressive telecommunications tax imposed between 2010 and 2012 in Hungary did not discriminate against foreign-owned telecoms companies, nor did it amount to illegal state aid under EU rules. Advocat General Kokott reiterated that the European Court of Justice has consistently held that "state aid" within the meaning of Article 107(1) of the Treaty on the Functioning of the EU requires that a selective advantage must be conferred upon the recipient. The opinion concluded that in relation to the special telecommunications tax, the different taxation arising from a progressive rate did not constitute a selective advantage for lower-turnover undertakings (and therefore did not constitute state aid); nor can a higher-turnover undertaking rely on it in order to evade its own tax liability.

In relation to the UK DST, it is unlikely that the beneficiaries (i.e. the businesses that do not meet the DST thresholds) will pay an amount corresponding to DST in some other way to the UK tax authorities. It would follow that this derogation cannot be justified, but the opinion in *Vodafone Magyarország Mobil Távközlési Zrt* demonstrates that the EU state aid implications of taxes such as the DST are still evolving.

UK Diverted Profits Tax and Offshore Receipts in Respect of Intangible Property

The UK has also introduced other unilateral legislative tax measures to address the tax and BEPS challenges arising from the digital economy, namely the Diverted Profits Tax and the Offshore Receipts in respect of Intangible Property rules.

The diverted profits tax ("**DPT**") was introduced under the Finance Act 2015 in response to the BEPS project to prevent the erosion of the UK tax base. It is intended to counter aggressive tax planning by international companies that were diverting profits from the United Kingdom to reduce their UK corporation tax liability. The DPT rate is a punitive 25% in most cases, although higher rates can apply to specific industries.

The recent "offshore receipts in respect of intangible property" ("**ORIP**") rules took effect from 6 April 2019. A charge to tax applies to "UK-derived amounts" if, at any time in the tax year, a person is not resident in the UK or a full treaty territory, and such UK-derived amounts arise to them. Subject to some exemptions, income tax is chargeable on the full quantum of the UK-derived amounts arising in the tax year. The person liable for the tax charge is the person receiving, or entitled to receive, the UK-derived amounts. The new rules are designed so that a charge to UK income tax will arise to a foreign entity where UK sales supported by intangible property (or rights over that property) are held by an entity in a no- or low-tax jurisdiction.

French Digital Services Tax

France has also progressed with the implementation of unilateral measures to address the challenges of taxing the digital economy. French senators have approved a temporary digital services tax. The French bill sets out a 3% levy on turnover of companies with digital business models and revenues of more than €750 million globally and €25 million in France. The charge to tax will broadly be imposed on revenues which include turnover from online advertising, the sale of data for advertising, and fees drawn from linking users on online sales platforms. The new tax is to be retrospectively applied from early 2019, and it is expected to raise about €400 million this year.

Many other European countries, including Italy and Spain, are in the process of enacting unilateral measures to tax the digital economy. It remains to be seen whether such measures will be repealed if an international consensual position based on the OECD's Programme Report is reached. However, the USA has been vocal in its disapproval of national digital tax measures. In response to the French digital services tax, the USA trade representative, Robert Lighthizer, said that "Washington" would conduct an investigation into France's digital services tax, as it "unfairly targets American companies". The investigation as to whether the French measures are discriminatory and unreasonable to an extent where it will cause harm to US companies was launched in July. On 26 August, a compromise was reportedly reached between the US and France, where France undertook to issue a tax credit accounting for the difference between the French DST and the eventual OECD framework. Further details should come in due course.

It is not known whether the USA will raise similar investigations with other EU countries implementing national digital tax measures. However, it is clear that the political response to the taxation of the digital economy will be as relevant as the details of any technical implementation.

US Tax Reform

The US has been consistently sceptical in relation to the digital economy project. The reaction to the French digital services tax emphasised the concern that the USA has in relation to whether such national measures will negatively affect and restrict USA commerce. The Trump administration has also repeatedly warned of the potential dangers of inhibiting growth in this area, and are clearly not afraid to enact unilateral measures to deal with what they perceive as deliberate targeting of USA businesses.

Following the various amendments made to USA federal tax laws in December 2017 under the Tax Cuts and Jobs Act, the USA also maintains that US multinationals do not erode tax unfairly, because the companies in question pay tax where the "value" is created. A comprehensive summary of the changes is beyond the scope of this chapter, but the following changes should be highlighted:

- The base erosion anti-abuse tax ("**BEAT**"), which is essentially a corporate minimum tax arising from so-called "base erosion" payments.
- The global intangible low-taxed income ("**GILTI**") regime, whereby a 10% or more US corporate shareholder of a CFC must include the relevant share of net income of that foreign company in its gross income. Such net income is an amount above a deemed fixed return to that foreign company on its tangible assets (subject to certain exceptions).
- The foreign-derived intangible income ("**FDII**") regime, which provides for corporate tax deductions against such income which is earned directly by a US corporate. This is intended to provide an incentive against the transfer of intangibles outside the US to low-tax jurisdictions.

Closing Remarks

There are considerable legal and technical complexities which multinational corporations will have to take into account with the advent of national and international legislative measures to address the tax challenges arising from the digitalisation of the economy. Significantly, it should be noted that there is a recognition that the "digital economy" cannot be ring-fenced and as such, the various measures will impact multinational corporations from all sectors and industries.

All these changes are taking place in the context of an uncertain political climate. Some jurisdictions have consistently noted opposition to tax measures designed to address the digitalisation of the economy, and this may negatively impact international trade. In addition, the outcome of Brexit negotiations are unclear and this will continue to impact industry on a UK-wide and global level.

An interesting aspect of the GloBE proposal is the income inclusion rule, which would impose a charge to tax for multinationals on their global income at a minimum rate, with the aim of reducing incentives to shift profits to low-tax jurisdictions. The concept of a minimum tax is not new in the international tax sphere – the US GILTI regime aims to protect the US tax base by the creation of an income inclusion based on a broad class of CFC income. Similarly, domestic diverted profit tax rules, for example, as implemented in the UK and Australia, also have the effect of imposing a tax on profits that are transferred offshore to a no- or low-tax jurisdiction. The broad principle of such measures is to ensure that income derived from one jurisdiction and subject to tax in a foreign jurisdiction is taxed at least at a minimum level of tax. Whilst the rate is intended to be punitive (in the case of the UK), both are effectively a cost of doing business in the respective jurisdiction where it is not possible to tax profits domestically under primary legislation.

It is difficult to envisage how multiple domestic minimum tax rules would interact on a global level. Issues relating to sovereignty over tax affairs are likely to arise, as well as the matter of how to determine tax allocation rights. A move towards a global minimum tax, as suggested in pillar two of the GloBE proposal, may unify the various domestic rules. However, it would be highly complicated to achieve this from a technical and administrative perspective.

One of the greatest challenges facing tax authorities around the world will be aligning the gap between political rhetoric and legal reality in order to create enforceable frameworks which offer the clarity, certainty and coherence essential to long-term economic growth and stability. The Programme Report is the next step in reaching a consensual global solution to the tax challenges arising from the digitalisation of the economy. However, the development of unilateral national digital tax measures, together with strong opposition from some jurisdictions to any taxation of the digital economy, will result in a long and complex road to 2020.

NB: This article reflects the law as of August 2019.

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