



Council of the
European Union

**Brussels, 5 December 2017
(OR. en)**

15445/17

**FISC 346
ECOFIN 1092**

OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	15175/17
Subject:	Responding to the challenges of taxation of profits of the digital economy – Council conclusions (5 December 2017)

Delegations will find in the annex the Council conclusions on "Responding to the challenges of taxation of profits of the digital economy", adopted by the Council at its 3582nd meeting held on 5 December 2017.

Council conclusions on

'Responding to the Challenges of Taxation of Profits of the Digital Economy'

The Council:

1. RECALLS the European Council conclusions of 22 and 23 June 2017, which highlighted the necessity of a 'holistic' approach to face up to the challenges of digitalisation and use the opportunities flowing from the 4th industrial revolution;
2. WELCOMES recent discussions on this matter at the September 2017 informal ECOFIN and Digital Summit, as well as the Commission communication of 21 September 2017 on a 'Fair and Efficient Tax System in the European Union for the Digital Single Market' (doc. 12429/17), which builds inter alia upon the report of its expert group on Taxation of the Digital Economy from May 2014;
3. RECALLS the European Council conclusions of 19 October 2017 (doc. EUCO 14/17), which:
 - a) underlined the need for an effective and fair taxation system fit for the digital era;
 - b) highlighted the importance to ensure that all companies pay their fair share of taxes and to ensure a global level-playing field in line with the work currently underway at the OECD; and
 - c) invited the Council to pursue its examination of the Commission communication on this issue and looked forward to appropriate Commission proposals by early 2018;
4. NOTES that it is expected that the implementation of the OECD BEPS action items should substantially address the BEPS issues exacerbated by the digital economy and ENCOURAGES their continued implementation across all countries and, where appropriate, at EU level;

5. UNDERLINES the need to address the remaining challenge to ensure that international tax rules are suitable for both the digital and more traditional sectors of the economy, which goes beyond tax avoidance and evasion, and STRESSES the urgency to safeguard the level playing field as well as to ensure that digital economy businesses pay their fair share of taxes in the right jurisdiction, so that all businesses have equal conditions for growing and developing in the Internal Market;
6. REITERATES the tax policy objective to ensure that companies operating in the EU pay taxes where the value is created in line with the arm's length principle and its commitment to principles of international taxation, and UNDERLINES the importance of the examination of value creation and profit generation processes by the digital economy, currently being carried out by the OECD, with the aim to design adequate policy responses;
7. REAFFIRMS the importance to respect the competences of Member States with regard to the conclusion of conventions for the avoidance of double taxation;

Opportunities and challenges of digitalisation

8. HIGHLIGHTS the positive economic impact of the innovation connected to the digitalisation of the economy and the necessity not to undermine this extraordinary growth potential;
9. CONCURS that digitalisation has acted as a facilitator and accelerator of cross-border trade and affects to varying degrees the whole economy through advanced technological solutions such as cloud computing, big data, robotics, or high speed broadband;
10. NOTES that the concept of permanent establishment, together with transfer pricing and profit allocation rules, remains one of the essential principles for the global allocation of taxing rights on profits;
11. OBSERVES however that this concept, focusing on the physical presence, has been challenged by the rise of the digital economy, which relies on the digital presence, leading in certain situations to a misalignment between where profits are taxable and where value is created;

12. CONSIDERS that, where a business is performing significant activities in a jurisdiction, its absence of physical presence should not per se prevent it from being subject to tax on its profits generated in that jurisdiction, provided an appropriate nexus reflecting value creation is used, taking into account the arm's length principle;

Revising international tax rules

13. HIGHLIGHTS in this context the urgency to agree on a tax policy response to the direct taxation challenges of the digital economy at the international level;
14. UNDERLINES that a globally accepted definition of permanent establishment and the related transfer pricing and profit attribution rules should also remain pivotal when addressing the challenges of taxation of profits of the digital economy;
15. HIGHLIGHTS the principle of tax neutrality according to which tax policy choices and tax rules should foresee similar treatment for comparable situations;
16. TAKES THE VIEW that the challenges posed by the sharing economy in the corporate tax area will be covered by the general policy options envisaged in the present conclusions;
17. TAKES THE VIEW that an appropriate nexus in the form of a virtual permanent establishment, together with any necessary corresponding amendments to the rules of transfer pricing and profit attribution, which would take into account where value is created in the different business models of the digital economy, should be explored;
18. CONSIDERS that the relevance and feasibility of possible elements of this appropriate nexus, such as those referred to in the OECD BEPS report on Action 1 (revenue-based, user-based and digital factors), could be further explored;
19. HIGHLIGHTS the importance of various data, including user data, for value creation by the digital economy in generating profits and REITERATES the need to consider and assess the role of data in the context of the transfer pricing and profit attribution rules;

20. ENCOURAGES the reporting of the relevant information by the digital platforms and marketplaces to appropriate tax authorities, as well as the exchange of this information between jurisdictions in accordance with international tax law, and INVITES the Commission and the OECD to further explore the barriers related to and possibilities created by such a co-operation on tax compliance, including within the sharing economy;

Call for global action

21. STRESSES the importance of ensuring that all companies pay their fair share of taxes and ensuring a global level playing field and ENCOURAGES in this respect close cooperation between the EU, the OECD and other international partners in responding to the challenges of taxation of profits of the digital economy;
22. URGES the OECD to find appropriate solutions for upgrading the global network of double tax conventions, modify its Model Tax Convention and accompanying commentaries, as well as its Transfer Pricing Guidelines and Guidance on Attribution of Profits to Permanent Establishments, in order to address these global challenges, taking into account paragraphs 13 to 19 of the present conclusions;

Action at EU level

23. OBSERVES that the speed at which the economy is digitalising and the absence of international consensus on the modernisation of the rules of distribution of taxing rights gives rise to unilateral actions, leading to an increase of double taxation disputes between Member States and thereby undermining the Internal Market;
24. INVITES the Commission in responding to the challenges of taxation of profits of the digital economy to take into account paragraphs 13 to 20 of the present conclusions, and however, TAKING NOTE of the interest of many Member States for temporary measures, such as for example an equalisation levy based on revenues from digital activities in the EU that would remain outside the scope of double tax conventions concluded by Member States, CONSIDERS that these measures could also be assessed by the Commission;

25. Whilst stressing its preference for a global solution, LOOKS FORWARD to appropriate Commission proposals by early 2018, taking into account relevant developments in ongoing OECD work and following an assessment of the legal and technical feasibility as well as economic impact of the possible responses to the challenges of taxation of profits of the digital economy;
 26. ENDEAVOURS to closely monitor future international developments and consider appropriate responses.
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