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From:	General Secretariat of the Council
To:	Council
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Subject:	Council conclusions on 'Responding to the challenges of taxation of profits of the digital economy' <ul style="list-style-type: none">• Adoption

1. The Presidency took the initiative to launch a discussion on the challenges of the taxation of profits of the digital economy at the Council High Level Working Party on tax issues (hereafter “HLWP”) meeting of 4 July 2017.
2. Following the support by delegations, the Presidency launched follow-up technical discussions at the level of the Working Party on Tax Questions (hereafter “WPTQ”) on the concept of virtual permanent establishment, the specifics of the sharing economy and the valuation of data for tax purposes. These issues were furthermore discussed at the informal ECOFIN Council meeting on 16 September 2017 in Tallinn.
3. This initiative prompted a number of parallel developments:
 - a) President Juncker sent a letter of intent to President Tajani and Estonian Prime Minister Ratas on 13 September 2017 in the context of his State of the Union 2017 speech, announcing for Spring 2018 a legislative proposal establishing rules at EU level allowing taxation of profits generated by multinationals through the digital economy;

- b) 10 EU finance ministers co-signed a political statement ('Joint initiative on the taxation of companies operating in the digital economy') that supported EU law compatible and effective solutions "*based on the concept of establishing a so-called 'equalisation tax' on the turnover generated in Europe by the digital companies*".
 - c) The Commission issued a communication on a 'Fair and Efficient Tax System in the European Union for the Digital Single Market' (doc. 12429/17) on 21 September 2017;
- 4. The Presidency and the Commission informed ministers about the above developments at the ECOFIN Council meeting of 10 October 2017.
 - 5. Finally, following the Digital Summit in Tallinn on 29 September 2017, the European Council adopted on 19 October 2017 conclusions (doc. EUCO 14/17) that underlined the "*need for an effective and fair taxation system fit for the digital era*".
 - 6. Against this background, the Presidency presented at the HLWP meeting of 27 October 2017 a first draft of Council conclusions on 'Responding to the Challenges of Taxation of Profits of the Digital Economy', with a three-fold objective:
 - a) input into parallel OECD discussions on their forthcoming interim report to G20 finance ministers (April 2018);
 - b) follow-up to the above-mentioned European Council conclusions; and
 - c) guidance to the Commission in advance of its legislative proposal (expected early 2018).
 - 7. These draft Council conclusions were subsequently discussed at the WPTQ meeting of 8 November, Fiscal Attachés meetings of 13 and 20 November, as well as at the HLWP meeting of 23 November 2017.
 - 8. At the COREPER meeting of 29 November 2017, delegations confirmed agreement on the latest draft of Council conclusions (doc. 14769/17).

II. NEXT STEPS

9. The ECOFIN Council in December is therefore suggested to adopt the draft conclusions as set out in annex to the present note.
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(Draft) 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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