Consultation response

AmCham EU's response to the Consultation on the Fair Taxation of the Digital Economy – Digital Levy

Introduction

AmCham EU welcomes the opportunity to provide feedback to the European Commission's Consultation on the Fair Taxation of the Digital economy – Digital Levy.

As noted in our comments dated 11 February 2021, in response to the consultation regarding the digital levy Inception Impact Assessment, the OECD Inclusive Framework is currently seeking consensus from 139 countries to reform the global corporate tax framework. This effort aims to address some countries' concerns regarding broad tax challenges arising from the digitalisation of the entire global economy, in a coherent and growth-focused manner. AmCham EU commends the Commission and Member States for their support to find a global solution which is crucial to achieve the long-term stability required for sustainable economic growth and job creation.

AmCham EU is concerned that proceeding with a separate digital levy at this point risks inflaming trade tensions – particularly between the EU and US – and may make it harder to reach a global consensus as it sets an unfortunate example of wilful unilateralism within the larger Inclusive Framework. As economies seek to recover from the COVID-19 pandemic, now is not the time to levy additional taxes – in response to public perception or political pressures – on an emerging sector that will be critical to drive growth and economic recovery now and into the future. We strongly encourage EU countries to focus all their efforts on reaching a globally agreed solution at the OECD to reform the international tax framework.

We strongly agree with the OECD's BEPS Action 1 Report[1] that the digital economy cannot be ring-fenced. These measures, targeted at highly digitalised business models, can result in double or multiple taxation, causing very high effective tax rates particularly on low margin businesses, hindering growth and investment.

If a digital levy is to be implemented, it must apply instead of, rather than in addition to, national Digital Services Taxes and other unilateral measures which should be revoked. In order to respect the principle of avoiding multiple taxation, companies subject to a reallocation of taxing rights under an OECD Pillar One agreement should be exempt from any digital levy and specific exclusions from the other digital measures should be similarly respected.

Fair taxation of the digital economy

AmCham EU supports the principle of ensuring that tax is levied where value is created and profit earned, but because digitalisation is being adopted by businesses of various sizes and sectors, consensus at the international level is critical to arriving at a sustainable, equitable solution.

The Inception Impact Assessment outlines the problem the digital levy seeks to address as one in which digital businesses 'pay less tax compared to more traditional businesses.' However, in recent years with the Anti-Tax Avoidance Directives (ATAD 1 and 2), the OECD Base Erosion & Profit Shifting (BEPS) measures, and US tax reform, the tax landscape has changed. Indeed, in May 2020 the International Monetary Fund (IMF)[2] compared effective tax rates of large digital companies to those of other sectors and concluded (page 71): '*What we see is that the tech sectors report implied average tax rates more or less in line with the average of other Fortune Global 500 firms. What is most striking is that the implied tax rates are certainly non-zero, and therefore we can reject the widely-held hypothesis that on average these companies pay zero or low corporate income taxes at the globally consolidated level.'*

The conclusion that digital companies do not in fact pay zero or low corporate income taxes is in line with academic studies published at the time of the Commission's 2018 digital tax proposals by both ECIPE[3] and Copenhagen Economics[4] which, based on analysis of empirical data on effective tax rates in the digital and other sectors, found that digital business did not in fact pay less tax than other sectors.

The features of digital businesses listed in the Inception Impact Assessment as indicators as to why intervention is required are not unique and do not justify special levies or taxes – ie, remote selling; user value creation; profit

[1] http://www.oecd.org/ctp/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report-9789264241046-en.htm

[2] *Working paper 20/76 - Tec(h)tonic Shifts: Taxing the "Digital Economy" – International Monetary Fund*

[3] *"Digital Companies and Their Fair Share of Taxes"* ECIPE (2/2018)

[4] *"The Proposed EU Digital Services Tax, Effects on Welfare, Growth and Revenue"* Copenhagen Economics (9/2018)

shifting through intangibles; scale without mass and network effects – as they apply in varying degrees to digital and non-digital businesses alike.

Since early 2020, Europe has been and remains in the grip of the Coronavirus Pandemic. The Commission's Winter 2021 European Economic forecast[5] (published 11 February 2021) indicated GDP across the EU was forecasted to fall by 6.3% in 2020. Innovation and digital evolution will be critical to drive recovery across the board in the EU. Digitalisation delivers smart, sustainable, and inclusive growth for private and public sectors alike and any final consensus should not inhibit continuing innovation from information and communications technologies. Tax policies should support, not hinder, the Commission's ambitious digital agenda and strategy.

Moving forward with the digital levy risks escalating, rather than calming, EU/ US trade tensions at a time when increased trade is needed for economic growth, job creation, and social stability. This is particularly true if a digital levy uses a narrow scope and thresholds to target a particular set of digital activities supplied predominantly by companies based in the US. At the time an EU-wide unilateral digital tax was first mooted it was in the context that it would be an alternative should the OECD talks fail to reach consensus. It is concerning therefore that the informal meeting of economic and finance ministers on 16 March[6] reported that the Commission proposal for a digital levy should be a separate instrument and not linked with the corporate tax rules that are being negotiated in the OECD. As seen with the response of the US Trade Representative to the national Digital Services Taxes, there is real risk that the measure will be viewed as discriminatory with the possibility of strong retaliatory measures.

To date, the Commission's formal documents regarding the possible outline of a digital levy lists three broad policy options (a corporate income tax top-up, a tax on revenues, and a tax on business-to-business digital transactions), and informal statements by officials indicate that lower thresholds (eg, €250 million) than the OECD's workplan could also be considered. The Commission has not been clear how a digital levy would be structured and in particular, whether it would be different to the earlier proposed 2018 DST Directive. Based on the general nature of imposing a tax on digital transactions, a number of potential problems can be assumed, such as the inherent difficulty in determining appropriate sourcing rules (such as IP addresses or geolocation measures), resolving administrative issues (such as registration of foreign entities and agents), etc. As such, it is hard to provide any detailed comments without more information as to what form any proposal will take. Nevertheless, we encourage the Commission to seek continuous input from stakeholders as these plans develop and to focus on ensuring any new tax measure is profit-based and avoids distortions.

As demonstrated by the national Digital Services Taxes, taxes on gross revenue are inconsistent with international norms, lead to double and multiple taxation, and adversely impact low margin or lossmaking companies. It is very important that a digital levy complies with Member States' existing obligations as set out in bi-lateral tax treaties and elsewhere and meets the requirements of EU law (eg, the Four Freedoms). In many instances such unilateral taxes are passed on and borne by EU businesses and consumers, hindering investment and competitiveness. Such taxes are also costly for tax authorities and taxpayers to comply with.

The adoption of a digital levy would represent a movement towards destination-based taxation. Such a development will encourage other market countries to adopt similar principles in order to impose additional taxes on EU-based businesses trading in their jurisdictions, thus harming all EU exporters.

Recommendations

- The Commission's Digital Strategy is clear that digitalisation can deliver smart, sustainable and inclusive growth and jobs across Europe. Tax policies of the EU should seek to encourage and support this objective, and not lead to distortions due to double or even multiple taxation.

- Because of the ongoing work by the OECD Inclusive Framework of 139 jurisdictions to consider changes affecting corporation taxing rights in the era of increasing digitalization, it is critical to maintain the focus on reaching a multilateral solution. While we recognise that the Commission has been mandated to provide a proposal in Q2, the work should strongly account for (and reflect the EU's public optimism for) a global consensus solution, so that any EU-level measure is anticipatory of and consistent with an international agreement. A proposal that either significantly departs from or expands on an OECD agreement will send a

[5] Winter 2021 Economic Forecast: A challenging winter, but light at the end of the tunnel | European Commission (europa.eu)

[6] *Informal video conference of economic and finance ministers -* Consilium (europa.eu)

message that is counterproductive to the current negotiations. Ensuring sufficient time is given to evaluate the new proposals advanced by the US administration and to seek their input into the process will also help to avoid potential tensions with a critical trade partner. We believe the EU should only proceed with the work on a digital levy in the event the OECD process breaks down.

- The EU should ensure that any tax proposals do not create new barriers to economic recovery by inadvertently inhibiting cross border trade, investment, and economic growth. The EU should also refrain from any initiative that could exacerbate existing trade tensions. To increase cross-border trade and support the recovery of the global economy, the EU and individual countries should be focused on simplifying their tax systems rather than add more complexity and unilateral measures.

- The primary objective of reform of the international tax rules should be to define rules which accurately tax the remote creation of value – ie, to identify an equitable and sustainable method of allocating taxing rights without the need to limit the scope to one particular sector or set of activities.

- In the event the EU were to proceed with its digital levy, it should focus on developing the work started by the OECD and ensure any measure is profit-based and should encompass only those measures which have received multilateral support by the Inclusive Framework. It must apply instead of, rather than in addition to, national digital services taxes and other unilateral measures.

- As EU Member States engage in the OECD process, we urge that any final proposals avoid double taxation and ensure that they do not inhibit cross-border trade, investment, and economic growth. To avoid multiple layers of tax within a single supply chain, adversely impacting small and large businesses alike, any levy should not apply to business-to-business transactions. Measures to be taken to avoid double taxation should include a mechanism to roll back or phase out existing national DST measures.

- The digital levy should be compatible with EU law (eg, the Four Freedoms) as well as be aligned with international obligations.

- The Ottawa Principles regarding taxation of e-commerce should be observed and guide the Commission's work: neutrality; efficiency; certainty and simplicity; effectiveness and fairness; and flexibility and sustainability.