ETAF answers to the OECD Public Consultation Document

on the

Secretariat Proposal for a "Unified Approach" under Pillar One

The European Tax Adviser Federation, ETAF, is a European umbrella organisation for more than 280.000 tax professionals from France, Germany, Italy, Belgium, Romania and Hungary. The European Tax Adviser Federation thanks the OECD for the opportunity to comment on the roadmap Secretariat Proposal for a "Unified Approach" under Pillar One.

ETAF welcomes that the OECD is tackling the challenge of taxation of the digital economy seeking to achieve progress towards a global consensus-based solution. ETAF has listed below the main comments to the OECD Secretariat Proposal.

Scope:

- ETAF agrees with the approach of non-ring-fencing the digital economy, but to rather look at the impact of the digital technology in connection with other IPs (e.g. brands, patents, etc.) on the creation of value within the market jurisdiction.
- ETAF welcomes and recommends to focus on the scope of the proposal taking into account solely digitalized consumer-facing businesses which use digital technologies to access and create value in certain market jurisdictions without any physical presence and thus escaping from the company taxation in such countries. However, ETAF calls on OECD to ensure that the rules within the framework of the Unified Approach will not add a further layer of taxation, more complexity or bureaucracy for traditional companies which represent the core of the European business.
- ETAF proposes to clarify how MNEs should segment their financial accounts between B2C (consumer-facing) and B2B (non-consumer-facing) activities without adding more complexity to their management.
- ETAF recommends to further clarify the impact of these new rules and to determine the type of taxation to solely corporate tax, thus not affecting other areas of taxation (e.g. value added tax).
- ETAF agrees to determine the scope to MNE groups with a consolidated revenue equal or higher than € 750 million in coherence with country-by-country-reporting requirements.

New nexus:

- ETAF supports the application of country specific sales threshold linked to the size of the country in order not to exclude from the nexus rule small countries where the "sales" of a particular MNE are limited in absolute terms (but relevant considering the market size). Considering that such threshold should be easy to calculate (to avoid adding complexity for MNEs and tax authorities) and comparable between the various jurisdictions, an example can be a percentage threshold calculated as a ratio between the sales of the MNE (during period X) in a certain jurisdiction and the GDP of that jurisdiction (in the same period X) as provided by the OECD or the IMF.

- ETAF recommends to further clarify the approach for a worldwide acceptance of these new rules. In particular, ETAF is concerned with regard to the legal basis of the "*standalone rule*" proposed by the OECD. ETAF wonders if updating the Permanent Establishment rule to include the new nexus rule would not simplify the whole process.

Calculation of group profits for Amount A:

- The tax base of the MNE groups single companies should be added together according to the accounting standard of the headquarter of the group, prepared in accordance with the GAAP or the IFRS. Profits and losses arising from intercompany transactions between the companies of the MNE should be ignored when calculating the consolidated tax base. The ideal approach would require a segmentation of the group profit for business lines and regional profitability. However, the need for simplification suggests to opt-out the segmentation that could result in an additional administrative burden for the companies and tax authorities involved.

Determination of Amount A:

- ETAF wonders if this approach is lacking of one step, that is the one of allocating the portion of profit attributable to the traditional DEMPE (Development, Enhancement, Maintenance, Protection, Exploitation) functions of the marketing intangibles to the jurisdiction(s) that has carried out such functions. To solve the matter, besides of the sales, a premium allocation key (marketing costs?) could be added to allocate additional profit to the jurisdictions carrying out DEMPE functions connected with such marketing costs. Otherwise, it should be clearly stated that the profit linked with the DEMPE functions of the marketing intangibles should be treated alternatively as a Trade Intangible (and thus allocated to the "v%" mentioned by the Secretariat Proposal) or as part of Amount C. The risk of non-defining these specific functions and the connected profit is double-taxing such profit, one time in the jurisdiction where these DEMPE activities take place and a second time in the market jurisdictions subject to the new nexus rule of Amount A.

Elimination of double taxation in relation to Amount A:

- Updating the rule concerning Permanent Establishment with the new standalone nexus rule implies updating the OECD Model Tax Convention (Article 7 – Business Profit) to include such new rule. As a consequence, Article 23A (Exemption Method) and 23B (Credit Method) of the OECD Model Tax Conventions (and the Commentary on these articles) should be updated in accordance with this new rule (or at least make direct reference to such new rule) in order to eliminate the risk of Double Taxation by using tools which are already in place.

Amount B:

- The different level of remuneration linked to the distribution functions depends on the actual type of distribution function carried out, the assets used and the risks assumed. The functions of a commission agent are different from the ones of a limited risk distributor, which are different from the functions of a full-fledged distributor. Therefore, the fixed percentage to be applied (e.g. a mark-up on the cost sustained by the distributors, in order to ensure them with a certain level of remuneration), should take into account all these differences. This would require a clear definition of the different types of distributors and attributing to each of them a certain fixed percentage.

Amount C/dispute prevention and resolution:

- The further development and combination of already existing instruments, like the ICAP (International Compliance Assurance Programme) and APAs (Advance Pricing Agreements) might provide a high level of certainty for taxpayers and tax authorities about the level of profitability linked with activities carried out in the market jurisdictions that go beyond the baseline marketing/distribution activities captured by Amount B.