
Opinion Statement CFE 2/2020 on the 2020 OECD Consultation on the Pillar 1 & 2 Blueprints

Issued by CFE Tax Advisers Europe

Submitted to the OECD Centre for Tax Policy and Administration on 14 December 2020

CFE Tax Advisers Europe is the European umbrella association of tax advisers. Founded in 1959, CFE brings together 33 national tax institutes, associations and tax advisers' chambers from 24 European countries. CFE was the initiator of the Global Tax Advisers Platform through which it is associated with more than 600,000 tax advisers worldwide. CFE is part of the EU Transparency Register no. 3543183647-05.

We would be pleased to answer any questions you may have concerning our Opinion Statement. For further information, please contact Stella Raventós-Calvo, Chair of the CFE Fiscal Committee or Aleksandar Ivanovski, Tax Policy Manager at info@taxadviserseurope.org. For further information regarding CFE Tax Advisers Europe please visit our web page <http://www.taxadviserseurope.org/>

1. Introduction

CFE takes note of the blueprints for Pillar 1 (review of profit allocation and nexus rules to reflect digital business models) and Pillar 2 (global anti-base erosion rules for a minimum effective taxation rate) published by the OECD Secretariat in October 2020 concerning work to advance international negotiations in an attempt to ensure large and highly profitable Multinational Enterprises, including digital companies, pay tax wherever they have significant consumer-facing activities and generate their profits.

CFE observes that in this publication the Inclusive Framework noted that progress has been made on developing technical and policy solutions to the working blocks for agreeing tax allocations rights. CFE stresses that many technical details are yet to be finalised depending on the direction taken by the members of the Inclusive Framework at political level. CFE notes the pivotal role the European Union and its Member states play in addressing the challenges of taxation of the digital economy, seeking to reach and contribute to a global solution to these challenges and working together with the OECD.

CFE have provided previous commentary and input in the context of the OECD consultation processes carried out between 2017 and the time of this statement being published. This Opinion Statement complements these previous opinion statements. CFE maintains the view that a coordinated international policy response is necessary in particular in order to avoid fragmentation of the EU Single Market from an EU perspective, and to avoid the risk of double or multiple-taxation. CFE supports collaborative work towards a future-proof, longer-term reform of the international tax system that addresses the tax challenges of the digitalisation of the economy.

CFE hopes to take part in the virtual consultation meeting that will take place in January 2021, and monitoring and informing our members on the progress of the EU proposals, further OECD developments and reviewing unilateral measures introducing national digital taxes will remain a priority for CFE Tax Advisers Europe organisation.

2. Comments on Pillar 1 & 2 Blueprints

CFE believes that establishing legal and tax certainty in the international taxation framework is of the utmost importance and must become a priority of policy makers. Whilst CFE appreciates the importance of measures to ensure fair taxation, at present, in CFE's view, it will be immensely difficult in reality for tax administrations, taxpayers and tax advisers alike to work with the suggested methodologies on a multilateral basis. Any new tax which deviates from settled tax practice and the international tax framework will inevitably lead to great tax uncertainty for all stakeholders. Uncertainty will result in non-uniform application to entities and practices beyond the anticipated scope of the new laws.

The interaction between existing international taxation rules based on the arm's length principle (ALP) with the proposed solution to allocate residual profits on a multilateral basis will inevitably result in immensely challenging practical issues and huge uncertainty. Processes required for tax certainty, such as audits, arbitration or MAP, would impact the multilateral agreement past facto, and leave a tangled web that will be a challenge for tax auditors, advisers, tax administrations and taxpayers alike.

Although introduction of unilateral actions by states have led to increased uncertainty, and have a global impact given the universality of the digital economy, it is clear based on the current Blueprints that the measures will also lead to increased disputes and uncertainty for taxpayers. Pillar One requires a broadening of the recognition of a market jurisdiction's taxing rights and new profit allocation rules, and it is not precisely clear which types of businesses will be included in this solution, given it is presently foreseen that both digital businesses and consumer-facing businesses are within the scope of new taxing rights proposed under Pillar 1. Beyond scope, revenue, profitability thresholds, treatment of losses and profit reallocation are all issues which remain unresolved under the current proposals. Certainty is required on these points for any solution to indeed be truly any sort of real solution in practice.

It should be again reiterated that the possible changes and increased administrative and compliance cross-border burdens will disproportionately affect the ability of smaller enterprises to carry out and expand their business domestically and cross-border. Similarly, the cost of double taxation will adversely affect SMEs far more the MNEs.

In this vein, we wish to raise the issue of practicability of the proposals: finding the equilibrium between simplicity, certainty, fairness and proportionality. The proposals in the Blueprints are very complicated and, as noted above, the new rules will create an enormous additional administrative burden for tax administrations and compliance burden for MNEs. Every opportunity should be taken to simplify the rules as much as possible, and take businesses which will not be significantly affected out-of-scope. Resolution around some of the outstanding issues around, for example, the scope of Pillar One and the application of safe harbours, may allow for some of the complexities to be removed. In addition, consideration could be given to more safe harbours which take businesses that are not significantly affected nor directly targeted out-of-scope.

With respect to implementation of the proposals, a roadmap for implementation of the pillars should be developed. Therefore, the next phase of work by the Inclusive Framework should continue to focus on the practical steps that are required to be taken in order to implement an agreed multilateral solution, such as phased implementation. The aim of a phased implementation would be to impose the compliance burden on only the largest MNEs and to reduce the administration burden on tax administrations, allowing experience and knowledge of the new rules to develop and the necessary resource to be built up. This could be achieved by imposing a much higher threshold for global revenue than the €750 million envisaged for a number of years. The table in paragraph 181 of the Blueprint of

Pillar One indicates that a threshold for global revenue of €10 billion would bring 350 MNEs within scope of the suggested activities. Dealing with this smaller number of MNEs for the first years of the operation of the new rules might be sufficient to mobilise resources of tax administrations.

It is vital that the most robust dispute resolution measures possible are implemented as part of the final solution agreed by the Inclusive Framework. Access to effective dispute resolution mechanisms has been identified by all stakeholders as a significant problem for taxpayers. The addition of one of these new taxes will further exacerbate scarce resources to deal with disputes, increase waiting lists before appropriate fora and ultimately contribute to increased tax uncertainty. CFE therefore welcomes the emphasis on mandatory binding dispute resolution to achieve tax certainty in the Blueprints and the work done around achieving tax certainty in respect of Amount A, in particular. We strongly support an approach that countries signing up to the new taxing rights must also sign up to mandatory multilateral binding dispute resolution for all aspects of the new rules.

Taxpayers' rights must be safeguarded. Implementation of any new tax must be done in a manner to avoid uncertainty for taxpayers, ensuring that sufficient information is provided. New tax obligations should not be overly onerous on taxpayers and proper controls should be exercised over tax obligations (particularly in the context of a withholding tax).

Finally, particularly with respect to Pillar 2, CFE believes that the constraints resulting from EU Law and double taxation conventions should not be underestimated. Within the EU, freedom of establishment, for instance, will prevent a Member State from taxing foreign profits only for the reason that such profits would not have been subject locally to sufficient taxation, subject to very limited exceptions; double tax treaties may also prevent the country where a parent company is established from taxing foreign profits under a CFC-type legislation. This is why CFE believes that Pillar 2 may be much more difficult to implement than what seems to be contemplated by the Blueprints and that, in any case, Pillar 2 should not be implemented on a unilateral basis and outside the framework of a multilateral convention.

3. Concluding Remarks

CFE supports the ongoing process of reaching a globally acceptable solution for the tax challenges of the digital economy. We also are cognisant of the fact that the preferred solution of the relevant international stakeholders, including the European Commission, is arriving at a common position on taxation of the digital economy, in absence of which a plethora of uncoordinated national measures throughout Europe could follow, potentially creating further opportunities for tax arbitrage.

However, from CFE's perspective the proposals are extremely complicated and in several cases could result in unintended outcomes that are not aligned with the policy objectives of the process.

Therefore, as a minimum, CFE considers that the final design of the OECD measures should reflect the following fundamental principles:

- Certainty for taxpayers and tax administrations,
- Simplicity and minimal compliance costs and complexities, and
- Absence of double or multiple taxation.

CFE believes that establishing tax certainty in the international taxation framework as well as the protection of taxpayers' rights is of utmost importance and must be a priority for policymakers. Accordingly, CFE believes that the focus for the ongoing work of the OECD must be on the need for certainty, and on minimising the enormous administrative burdens that will accompany any agreed solution. The solution should not be rushed for political purposes; the necessary amount of time should be taken in order to arrive at workable solutions that will withstand the scrutiny and test of time. A comprehensive solution should be able to keep within scope the ever-evolving nature of the digitalising business models, resolving the taxation challenges, but equally ensuring the sustainability of the process, which will justify the resources spent by taxpayers, their advisers and tax administrations on making the new rules a reality.

The CFE hopes that these comments will be helpful, and hopes to take part in the virtual consultation meeting that will take place in January 2021, and monitoring and informing our members on the progress of the EU proposals, further OECD developments and reviewing unilateral measures introducing national digital taxes will remain a priority for CFE Tax Advisers Europe organisation.