ACTION 1: TAX CHALLENGES OF THE DIGITAL ECONOMY

Background Documents:

OECD Discussion Draft: March 24th, 2014
BIAC Response: April 14th, 2014
OECD 2014 Report: September 16th, 2014
OECD 2015 Report: October 5th, 2015

Last updated: June 2016

TOPIC	BIAC COMMENTS	OECD RESPONSE
General comments	1. BIAC endorses wholeheartedly the Discussion Draft's conclusion that there should not be a separate taxation regime for the digital economy however it is defined.	The conclusion of the Final Report is in line with the Discussion Draft.
	2. BIAC endorses the view that the principles established in the Ottawa Taxation Framework (1998) – neutrality, efficiency, certainty, simplicity, effectiveness and fairness, and flexibility – are relevant and should constitute the basis to evaluate taxation policy in relation to the Digital Economy.	The Final Report sets out these principles as overarching principles of tax policy, alongside equity.
New business models	3. BIAC strongly agrees with the Discussion Draft in that it is difficult, if not impossible, to distinguish the digital economy from the larger economy.	This is reiterated strongly in the Final Report. It is noted that the digital economy and its business models do not generate unique BEPS risks.
	4. The Discussion Draft suggests that e-commerce companies enjoy a competitive advantage over their offline counterparts due to cost reductions. However, the digitalization of certain forms of commerce has not resulted in a net reduction of costs. Instead, digitalization has shifted these costs to new operational areas.	Comment not specifically acknowledged and para. 120 (para. 64 in discussion draft) of the Final Report states that "e-commerce companies are able to "eliminat[e] the need for many of the wholesalers, distributors, retailers, and other intermediaries that were traditionally used in businesses involving tangible goods." However, the point made is largely moot as it is recognised that a significant and increasing proportion of commerce is e-commerce and the two business models are not inimical to one another.
	5. The misimpression of the amount of business substance actually required to operate a significant digital economy enterprise distorts discussions on the appropriate nexus rule for such companies through the false implication that such enterprises lack substance	Although the same assertion re personnel is made in para. 158 of the Final Report, the creation of a new nexus is not one of the OECD's final recommendations.

	outside the market jurisdiction. For example, BIAC disagrees on the assertion that digital/internet companies are able to "carry on economic activity with minimal need for personnel to be present." (Para. 98 of the DD).	
	6. Discussion draft overstates concerns about the mobility of intangible assets, users and business functions in the digital economy.	Concerns remain overstated. Policy recommendations made in respect of Action 3 (CFCs), Action 7 (PE) and Actions 8-10 (Transfer Pricing) address BEPS issues arising from perceived increased mobility.
	7. The need to continuously innovate is not taken into account in determining profit attribution, although is acknowledged.	The necessity of investing substantial resources into R&D to stay successful in the digital economy is noted in the Final Report. Although the comment with respect to its relevance for profit attribution is not specifically dealt with in the Action 1 output, it is covered somewhat by the OECD's recommendations in respect of Actions 7 and 8-10.
Tax challenges opportunities for BEPS and tackling BEPS	8. BIAC believes a distinction needs to be drawn between actual presence "within a country" and sales "to a country".	A lack of clarity remains in the Final Report on this point (e.g. at para. 185).
	9. Risk that proposals in respect of tackling BEPS would substantially change the application of the arm's length principal in the direction of formulary apportionment.	Established transfer pricing guidance recommended to allocate taxing rights (value chain analyses and transactional profit split methods). Further work on transactional profit split methods is ongoing in 2016 and 2017.
	10. BIAC recommends countries impose VAT on a wider range of deliveries of digital goods and services and not adopt income tax rules that violate the Ottawa principles.	Final Report recommends the application of the OECD's VAT/GST guidelines, which were updated in 2015 partly in light of work on Action 1. Annex C of the Final Report provides possible approaches on VAT/GST collection on the import of low value goods. Annex D contains the chapter of the VAT/GST guidelines re cross-border supplies of services and intangibles.
	11. BIAC believes that the proposed option of a new nexus based on a significant digital presence clearly fails the Ottawa principles.	The creation of a new nexus was considered but not recommended in the Final Report. The report does note that jurisdictions may wish to introduce the new nexus approach as an additional safeguard against BEPS.

Potential Options	12. Withholding tax on certain payments made by residents of a country for digital goods or services provided by a foreign e-commerce provider should be at a very low rate.	Withholding tax on certain types of digital transaction was considered but not recommended in the Final Report. The report does note that jurisdictions may wish to introduce withholding tax on digital transactions as an additional safeguard against BEPS, providing they respect their own existing treaty obligations. It is noted in para. 298 of the report that, if the withholding tax were to be levied on payments made in consideration for digital goods or services, that the rate should be fixed at a relatively low amount that would more accurately reflect profit margins.
	13. Administrative concerns due to application of withholding tax as many of the transactions will be B2C and very low value.	Withholding tax on certain types of digital transaction was considered but not recommended - see above (point 12).
	14. BIAC opposes the adoption of virtual PE options because adoption would violate the Ottawa Principles.	Final Report does not recommend extension of the PE concept. It is acknowledged that this option was considered and, if it had been proposed, would have required a fundamental change to the global tax system. Instead, exceptions to PE status have been considered under Action 7 and are likely to be implemented via the conclusion of the multilateral instrument that modifies bilateral tax treaties under Action 15.
	15. Extending virtual PE concept to cover situations where websites are being hosted in a country would create serious compliance difficulties.	Final Report does not recommend extension of the PE concept - see above (point 14).
	16. Since VAT is the conceptually more appropriate tax on digital transactions, preference to a VAT over a withholding tax.	Final Report recommends the application of the OECD's VAT/GST guidelines, which were updated in 2015 partly in light of work on Action 1. See below for further details.
International VAT/GST Guidelines	17. BIAC welcomes and endorses the OECD's aims to provide a global VAT/GST framework based on two fundamental principles – the neutrality principle and the destination principle.	The new OECD International VAT/GST Guidelines were adopted by the CFA in 2015 and endorsed by more than 100 countries at the Global Forum on VAT in November 2015 as the preferred international standard for application of VAT/GST to cross-border services.

	18. BIAC endorses the approach outlined in Annex 3 and would recommend that it is included in a separate chapter in the Guidelines, to give it the importance it deserves.	Incorporated into Chapter 3 of the Guidelines (at c. 3. 3).
	19. BIAC believes footnote 24 , highlighting that a registration for VAT purposes does not constitute a PE in itself, should be given more prominence.	A sentence was added on this in para 337 of the Final Report: "At the same time, in considering simplified registration for VAT purposes, it is important to underline that registration for VAT purposes is independent from the determination of whether there is a permanent establishment (PE) for income tax purposes". Need to further monitor the global implementation.
	20. BIAC wishes to take the opportunity to highlight the interaction between VAT/GST and the other BEPS Actions (e.g. Transfer Pricing, PE, and Corporate Restructuring).	VAT issues were not thoroughly addressed in any other of the BEPS Action reports themselves but BIAC continues to work closely with WP9 to support the alignment of VAT/GST rules with other taxes.