

ADDITIONAL COMMENTS RECEIVED
ON PUBLIC DISCUSSION DRAFT

**BEPS ACTION 1:
ADDRESS THE TAX
CHALLENGES OF THE
DIGITAL ECONOMY**

18 April 2014



Summary/Action

This note contains a compilation of the additional comments received with respect to the public discussion draft on BEPS Action 1 (Address the Tax Challenges of the Digital Economy).

An invitation for comments was published on the OECD Website on 24 March 2014, with a deadline of 14 April 2014.

TABLE OF CONTENTS

AFDEL	4
CPA Canada	7
Medef	10

Commentaires de l'Association Française des Editeurs de Logiciels et Solutions Internet (AFDEL) concernant le projet de document soumis à consultation relatif à l'action 1 du plan d'action BEPS de l'OCDE

L'AFDEL soutient l'affirmation des principes suivants, retenus par le projet de document :

- ü **Principe de non-discrimination entre économies.** L'économie numérique correspond à l'économie elle-même. Les préoccupations relatives à l'économie numérique doivent être traitées à travers le plan d'action BEPS dans son ensemble. Loin d'être l'apanage exclusif de l'économie numérique, les pratiques d'optimisation fiscale sont le fait de grands groupes, tous secteurs confondus, tant le contexte concurrentiel en matière fiscale s'y prête en Europe ou ailleurs, et tant les montants en jeu sont considérables.
- ü **Principe de prévisibilité et de simplicité proposé par l'OCDE.** Il convient de particulièrement veiller à la qualité de la réglementation. Si les règles de taxation sont aisément compréhensibles, les contribuables peuvent anticiper le montant de leur impôt et se prémunir de tout sentiment d'insécurité.
- ü **Principe d'efficience, de flexibilité et de la transparence pour garantir que le système fiscal est capable de s'adapter aux évolutions.** Rechercher à taxer un modèle économique spécifique ne correspond pas à une approche idoine. En réinventant les usages, le numérique change les comportements sociaux et économiques. Les chaînes de valeur s'en trouvent bousculées en permanence, ce qui impose aux entreprises de se réinventer elles-mêmes.
- ü **Pas de taxe numérique spécifique (cf. taxe sur les données).** Les outils numériques, qu'ils reposent ou non sur un modèle d'audience ou de collecte de données, proposent – gratuitement ou non – des services à haute valeur ajoutée. Bien plus, ils représentent pour beaucoup d'utilisateurs de formidables espaces de liberté d'expression et d'opportunités de création de toute nature. Le statut des données personnelles, qui est au cœur de leur financement dans le cas de la gratuité, fait l'objet de travaux européens qui conduiront à un cadre réglementaire stabilisé assurant le développement des usages dans le respect indispensable des libertés publiques.
- ü **Avoir une approche pragmatique du statut d'établissement stable (option 3.1).** En effet, les contours de ce concept sont encore incertains et seront également limités par les contraintes imposées par les conventions fiscales. Il semble cependant inapproprié de traiter ce point à travers la question spécifique de l'économie numérique. Il devrait trouver place dans la discussion relative à l'action n°7 du plan d'action (*Develop changes to the definition of PE to prevent the artificial avoidance of PE status in relation to BEPS, including through the use of*

commissionaire arrangements and the specific activity exemptions. Work on these issues will also address related profit attribution issues).

- ü La digitalisation de l'économie doit permettre de simplifier et d'améliorer la collecte des informations fiscales (option 3.5.1). Les nouvelles technologies devraient permettre de faciliter l'enregistrement et le respect des procédures fiscales par les fournisseurs non-résidents dans le pays d'importation.
- ü Création d'un processus d'enregistrement simplifié et de nouveaux seuils de déclaration pour la TVA.

Pour autant, certaines des options avancées par le projet de document suscitent des interrogations ou se fondent sur une analyse erronée de l'économie numérique :

- ü Identifier un nouveau régime fiscal fondé sur une « empreinte numérique significative » (option 3.2). Cette idée se fonde sur une conception erronée consistant à affirmer que certains modèles d'affaires sont entièrement numériques et d'autres non. Or, comme le projet de document l'indique, l'économie est aujourd'hui globalement digitale. Un tel changement placerait donc l'ensemble des entreprises sous ce nouveau régime fiscal.
- ü Le statut de « présence numérique significative » pourrait être attribué par un pays indépendamment des autres (option 3.2).
 - o Cette piste repose sur une analyse erronée des pratiques contractuelles en cours. Les contrats conclus localement sont de moins en moins nombreux.
 - o Cette piste présuppose que l'essentiel des biens et services d'une entreprise est utilisé ou consommé dans un pays unique. Or, le numérique permet aux entreprises, y compris aux plus petites d'entre elles, de déployer une offre à l'échelle globale et de se positionner sur tous les marchés sans distinction. Le numérique permet aussi au consommateur de passer aisément d'un pays à un autre pour trouver l'offre qui leur convient le mieux.
- ü Le statut de « présence numérique significative » fondé sur l'usage des données personnelles. Les données ne constituent pas un actif intangible. Elles n'ont pas de valeur intrinsèque. La création de valeur a lieu lors de leur transformation en informations, connaissances et actions ; en aucun cas lors de la collecte.
- ü Le concept d'établissement stable virtuel (option 3.3). Ce concept couvrira de fait toutes les activités économiques et engendrera probablement un risque de double taxation pour les entreprises digitalisées. Pour une même activité, ces dernières auront un établissement stable et, probablement, un établissement stable virtuel dans un pays différent ; ce qui engendrera des contentieux entre l'actuelle définition de l'établissement stable et le nouveau concept d'établissement stable virtuel.
- ü La localisation d'un site web comme base de taxation (option 3.3). La localisation des données n'est pas une façon idoine de taxer les actifs immatériels ou de créer une nouvelle

base taxable. En effet, la localisation des données est sans importance pour l'activité économique qui résulte de l'usage de ses données.

- ü La création d'une taxe indirecte sur les transactions digitales, collectées par les institutions financières impliquées dans les paiements (option 3.4). Cette piste soulève de nombreuses questions car les cartes de crédits et les moyens de paiements électroniques sont utilisés pour consommer tous types de biens et de services. A titre d'exemple, les paiements mobiles sont utilisés pour le stationnement des voitures et les paiements électroniques sont utilisés par certains restaurateurs. En outre, la localisation du « e-commerçant étranger » ne peut pas être déduite de la méthode de paiement. Dans l'Union Européenne, la réglementation SEPA autorise une entreprise à détenir un compte bancaire dans n'importe quel Etat membre, indépendamment de son siège social.
- ü Demander à des fournisseurs non-résidents d'enregistrer un compte de TVA dans de multiples juridictions étrangères sans recourir à des régimes et des seuils d'enregistrement simplifiés confrontera les entreprises à un risque accru de non-conformité.

A propos de l'AFDEL

L'Association Française des Éditeurs de Logiciels et Solutions Internet, AFDEL, a pour vocation de rassembler les éditeurs autour d'un esprit de communauté et d'être le porte-parole de l'industrie du numérique en France. L'AFDEL compte aujourd'hui plus de 350 membres (CA global : 8 Mds€) dans toute la France : grands groupes de dimension internationale dont les premiers français (60 % du Top 100 France en CA), PME et Start up. L'AFDEL est membre de la FIEEC et de la CINOV et participe à la gestion de la convention collective Syntec-CINOV et de l'offre de formation de branche. www.afdel.fr

April 17, 2014

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France
By email: ctp.beps@OECD.org

Re: BEPS Action 1: Address the Tax Challenges of the Digital Economy

To whom it may concern,

On behalf of the Chartered Professional Accountants of Canada (CPA Canada) Commodity Tax Committee (the “CTC”), I am pleased to provide our comments on the Public Discussion Draft “BEPS Action 1: Address the Tax Challenges of the Digital Economy” (the “Document”). We support the work of the OECD in its development of international guidance on VAT/GST matters and in its work addressing the tax challenges raised by the digital economy. In particular, we support the efforts of the OECD to achieve increased harmonization in VAT/GST treatment of digital supplies, as significant divergences of rules exist in this area resulting in uncertainty, additional costs and distortions of competition. It is our view that effective taxation of such electronic supplies can only be achieved where a more uniform approach is adopted by jurisdictions.

The Committee has had occasion to consider the Document and offer the following:

- In principle, the CTC agrees that a move to taxation at place of consumption based on residence is the best approach to make certain taxation occurs where individual consumption takes place. However, this could result in fundamental changes for business that sell cross border to local customers. As such, any compliance requirements to be imposed on businesses to collect and remit VAT/GST need to be managed proportionally in order for such changes to ultimately be effective and to ensure that VAT/GST does not inadvertently become a barrier to trade. If the compliance burden is too high (both in terms of cost and risk) businesses may not appropriately comply or choose not to supply customers in some countries due to the complex VAT/GST requirements or not.
- The following simplification measures are recommended to ensure that compliance requirements are reasonable and proportionate:
 - For ‘business to business’ transactions it makes sense to rely on a reverse charge or self-assessment mechanism to account for the VAT/GST at the place of consumption by the customer.



- Where it is determined that a non-resident registration may be appropriate (e.g., cross border ‘business to consumer’ transactions) registration thresholds should be introduced. The use of thresholds could help tax authorities manage audit and the risk factors associated with non-established businesses.
- Where it is determined that a non-resident registration may be appropriate, simple to administer registration, submission and payment methods (e.g., online portals) should be mandatory in order to achieve proportionality and optimise compliance. In this regard consideration should be given to allow global or regional registrations, such as the model in place in the EU. Also, it is recommended that a single regime should apply to cover similar sub-national situations, such as Canada or the US.
- It should be made clear that any form of a VAT/GST registration does not in itself result in a ‘permanent establishment’ and does not as a result give rise to any other tax obligations (e.g., a liability to corporate tax). Moreover, such a registration should not result in any additional reporting or withholding tax obligations simply due to a simplified form of VAT/GST registration.
- The role of technology may offer more efficient collection mechanisms in the future and greatly diminish the compliance burden on vendors. Financial incentives, such as a compensation mechanism that operates in certain sales tax jurisdictions, may encourage developments in this area by non-tax authorities (e.g., real time accounting and remittance of VAT/GST to tax authorities by payment providers).
- Finally, as regards Exemptions for Low-Valued Goods it is the CTC view that countries should focus on improving their import VAT/GST processing systems. This needs to be balanced with any expected increase in VAT/GST revenue resulting from abolishing or reducing import exemption thresholds. Should suppliers be, however, required to charge VAT/GST on supplies made to consumers in other countries we believe that a simplified registration, reporting and payment mechanisms should be put in place. Please see our comments above.

I trust the above is helpful and as always, please free to contact me should you wish to discuss or require clarification of any of the points raised.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Bain", written in a cursive style.

John Bain
Chair, CPA Canada Commodity Tax Committee
Partner, KPMG LLP



C.c. CPA Canada Commodity Tax Committee (CTC)

- Sania Ilahi, Vice Chair, CTC, Partner, Tax Services, Ernst & Young LLP
- Danny Cisterna, Indirect Tax/Financial Services, Deloitte
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Pascal Saint Amans
Director
OECD Centre for Tax Policy and Administration

CC: Raffaele Russo
Marlies de Ruiter

April 14th, 2014

Comments on BEPS action 1: Tax challenges of the digital economy

Dear Pascal,

MEDEF is pleased to provide comments on the Discussion Draft “Address the tax challenges in the digital economy” issued on the 29th of March (hereafter “the draft”).

Due to the very short timeframe and the fact that this Draft is only suggesting options without going into all the details, we will mainly focus on the general debate.

1. MEDEF shares the view that addressing the digital economy in the tax area is a new, complex and challenging issue. Moreover, particular attention should be paid to the fact that digital features can be found in most, if not all, sectors and activities.

MEDEF believes that in the global digital marketplace, it is vital for players to operate on a level playing field. Market needs that competitive conditions are established amongst players coming from different level of the value chain and/or from different regions of the world. The re-establishment of a level playing field would ultimately benefits consumers.

MEDEF thus welcomes the statement that the digital economy should not be treated as a separate sector and that a sector-based taxation would be neither appropriate nor feasible (paras. 59 & 205) and that BEPS does not aim at changing existing international standards and believes that the Ottawa framework principles of "*neutrality, efficiency, certainty and simplicity, effectiveness and fairness, and flexibility*" are a good starting point for evaluating options (para. 204 and following).

However, we note that these statements seem to be in contradiction with the following points:

- most options draw a line between "traditional" and digital activities, which is very difficult to delineate without discrimination,
- the draft does not take into account the possible evolution of the business, such that the different options might be outdated in the very near future,
- at various points in the draft, changes or extensions in existing tax principles and standards are envisaged to address digital evolution, such as the abandonment of physical presence as a taxation principle,
- the draft mentions a formulary apportionment option for deduction of interest payments (para. 157) or transfer pricing issues (para. 165) which depart from a strict adherence to the arm's length principle, although the works for the corresponding Actions have not been finalised.

2. MEDEF agrees that the measures developed in the course of the BEPS project and the current work on VAT/GST should alleviate some of the BEPS issues encountered in the digital economy:

"The comprehensiveness of the BEPS Action Plan will ensure that, once the different measures are implemented in a coordinated manner, taxation is more aligned with where economic activities take place. This will restore taxing rights at the level of both the market jurisdiction and the jurisdiction of the ultimate parent company, with the aim to put an end to the phenomenon of so-called stateless income" (para. 146)

"In addition to the basic framework discussed above, it is expected that as described in section V, the development of the measures envisaged in the BEPS Action Plan will effectively address the BEPS concerns that arise in the digital economy, which may substantially impact the scope of the broader tax challenges raised by the digital economy." (para. 208)

This also explains why the final report may include options and proposed measures that are not listed in the draft and might not be subject to comments and discussion with all stakeholders: "*it is anticipated that the final report on the tax challenges of the digital economy will analyse a number of potential options to address the broader tax challenges raised by the digital technology. These options will include several that have already been proposed to the Task Force, as well as options that may be proposed by stakeholders in response to this discussion draft*" (para. 202).

Digital economy is a sensitive subject and is linked to many others BEPS Actions.

As a consequence, MEDEF suggests postponing the deadline for Action 1 to December 2015: any concern affecting digital economy should be addressed through BEPS Actions on transfer pricing, tax treaty abuse, hybrids and harmful tax practices. If those BEPS actions are appropriately addressed, there should be no need for specific measures.

In any case, MEDEF believes that another round of discussions with stakeholders would be necessary once all the options have been identified by the Task Force.

We hope our contribution will give you a clearer insight into our expectations. We remain at your disposal to interact on any of the above issues and will also be pleased to answer any questions you may have regarding these comments.

Yours sincerely,

Vanessa de Saint-Blanquat

Options

1. *Modification to the exemptions from PE status by amending or removing Article 5-4 of the OECD Model Tax Convention.*

OECD, Model Tax Convention, art. 5-4: *"Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:*

- a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;*
- b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;*
- c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;*
- d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;*
- e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;*
- f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character."*

The removal of Article 5-4 of the OECD Model Tax Convention or the removal of subparagraphs (a) through (d) would result in new PEs being recognised for all entities previously benefiting from these exemptions, compelling groups to assess and reorganise their group entities, creating insecurity, generating administrative costs (registration). Furthermore, it should be noted that recognising PEs in such cases would represent a very low taxable base, as auxiliary activities and storage, display and delivery do not generally generate substantial profits.

We do not support this option.

2. *Nexus based on significant digital presence (for wholly digital businesses)*

Contrary to the modification of the exemption, this proposal would only apply to enterprises engaged in a fully dematerialised digital activity.

As such, this option appears contrary to the neutrality principle according to which "taxation should seek to be neutral and equitable between forms of electronic commerce and between conventional and electronic forms of commerce. (...)" and to the statement in the Discussion Draft that the digital economy should not be treated as a separate sector and that a sector-based taxation would be neither appropriate nor feasible:

"The Ottawa framework conditions noted that taxation should seek to be neutral and equitable between forms of electronic commerce and between conventional and electronic forms of commerce. Taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation. This is consistent with the decision reached by the Task Force that ring-fencing the digital economy as a separate sector and applying tax rules on that basis would be neither appropriate nor feasible." (para. 205)

"As digital technology is adopted across the economy, segmenting the digital economy is increasingly difficult. In other words, because the digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy. Attempting to isolate the digital economy as a separate sector would inevitably require arbitrary lines to be drawn between what is digital and what is not. (...)" (para. 59)

Besides, it may prove extremely difficult to differentiate between wholly digital businesses and others. The "significant" digital presence (para. 212) is of no help in this respect as no indication is given concerning the notion: which threshold or criterion should be met? Moreover, no specification is given concerning businesses with a dual activity (one fully dematerialised and one traditional). Which one should prevail? Will the company be subject to a double standard (one nexus for fully dematerialised activity and another one for traditional activity)? This would trigger the risk of double taxation should the contracting States take different views on the qualification of a business.

Moreover, it is not clear whether the elements listed at para. 213 are to be understood cumulatively or alternatively. If they are alternative, how many of them (or to what extent) should (they) be met? In addition, the penultimate bullet point ("The legal or tax residence and the physical location of the vendor are disregarded by the customer and do not influence its choices") seems particularly odd. Customers scarcely take the location of the vendor into account. Should this be the case, how is this supposed to be assessed or even known?

Additionally, we are concerned by the explanation of "significant" given at para. 214. This is the high point of this option. However, instead of giving a definition, the draft only provides for examples. We understand they are only illustrative. The lack of a strict definition leaves the door open for arbitrary and subjective interpretations. As an example, should "a significant number of contracts" be understood as a majority of them (in number or in amount?) or according to a specific threshold? The same goes for the expression "substantial payments".

It may be also difficult to determine the taxable base for the new nexus, this issue having not yet been addressed by the Task Force, as acknowledged in paragraph 216: "It would also require consideration of how profits would appropriately be attributed, and whether doing so would require modification of the current rules for the attribution of profits to PEs." In this respect, it is extremely difficult to provide in-depth comments, since the option is not clearly outlined.

Furthermore, the new nexus would be mainly determined according to customers' location. MEDEF is concerned that this proposal will create a precedent and a new standard of taxation by giving the consumers' country the right to levy tax. In this respect, it would constitute a tremendous shift from current principles governing the OECD Tax Model Convention and existing tax treaties: source States are likely to ask for increased taxation of profits deriving from consumption in their countries either from digital economy businesses or more conventional businesses, thus giving priority to highly populated countries; from a transfer pricing standpoint, the new standard would give priority to place of delivery rather than the usual standards of functions, risks and assets set out in the OECD Transfer Pricing principles.

Finally, both options are also based on the customers' behaviour or data, using personal information (para. 213: "influence its choice"; para. 214: "widely used or consumed in the country"; para. 215: "using personal data"). We are particularly concerned by the possible infringement into personal life and privacy. As mentioned above, how are the intent of the consumer and his consumption habits supposed to be assessed or even known? Who should bear the burden of proof?

3. *Virtual PE*

With respect to the "virtual fixed place of business PE", MEDEF considers that existing OECD guidelines on servers should not be modified and that such virtual PEs raise the questions of (i) determining when an enterprise carries on business through a website and (ii) determining the taxable basis to be attributed to such website. Furthermore, identifying a virtual PE in the country where a server is located is likely to create triangular cases between the State of residence of the enterprise, the State of source and the State of the server location, and thus result in double or triple taxation. Finally, such virtual PEs would result in new PEs being recognised, including for conventional businesses. In this respect, such option appears contrary to the neutrality and equity principles, since taxation would differ depending on whether an enterprise uses electronic forms of commerce or not.

With respect to the "virtual agency PE", this option is similar to the "Significant Digital Presence" option, since the criterion for identifying a PE would be the place where "*contracts are habitually concluded on behalf of an enterprise with persons located in the jurisdiction through technological means, rather than through a person*" whereas one of the criteria for the Significant Digital Presence is "*a significant number of contracts for the provision of fully dematerialised digital goods or services are remotely signed between the enterprise and a customer that is resident for tax purposes in the country*" (para. 214). Once again, such option appears contrary to the neutrality and equity principles, since taxation would differ depending on whether an enterprise uses electronic forms of commerce or not.

With respect to the "on-site business presence PE", determining whether a PE may or may not exist appears arbitrary at best, since it relies on "economic presence". Once more, such option is likely to

multiply existing PEs and multiply double or triple taxation issues, and appears contrary to the neutrality and equity principles.

4. WHT on digital transactions

The option to impose a withholding tax on certain payments made by resident of a country for digital goods or services provided by foreign e-commerce provider also appears to be contrary to the neutrality and equity principles.

Furthermore, it raises several concerns:

- From a theoretical standpoint, as for the Significant Digital Presence, such option is based on the recognition that the source State should be allocated a portion of the profit derived from consumption of goods or services by its residents (i.e., based on the place of location of the customers). Source States are thus likely to ask for increased taxation of profits deriving from consumption in their countries either from digital economy businesses or more conventional businesses on the grounds that there is no reason to distinguish between electronic forms of commerce and conventional ones.
- From a practical standpoint, as already identified in the Discussion Draft, it may prove extremely difficult to tax such digital transactions, since the customer, the bank which realises the payment, the server where the transaction is realised and registered, and the provider may all be located in different jurisdictions.

5. Consumption tax

Although it is not specific to digital economy, it remains an important issue as companies face situations of abusive use of VAT exemption, difficulties in collecting VAT for example when the provider and the consumer are not located in the same country. This leads to unfair competition. There is an urgent need for this problem to be dealt with: reduce compliance and administrative burden and simplify registration regimes are probably the most efficient.