Global Tax Trends
Impact on US MNCs

December 1, 2017

Panel

Panelists

Michael J. Caballero, Partner, Covington & Burling LLP, Washington, DC

Robert B. Stack, Managing Director, Washington National and International Tax, Deloitte, Washington, DC

Louise Weingrod, Vice President, Global Taxation, Johnson & Johnson, New Brunswick, NJ

Douglas Poms, Deputy International Tax Counsel, Office of International Tax Counsel, U.S. Department of Treasury, Washington, DC

Kenneth W. Wood, Deputy Associate Chief Counsel (International – Transfer Pricing & INTL Programs), ACCI, Internal Revenue Service, Washington, DC

Chair

Pam Olson, U.S. Deputy Tax Leader & WNTS Leader, PricewaterhouseCoopers LLP, Washington, DC

Agenda

- **BEPS and its progeny**
- **Tax and the digitalizing economy**
  - **OECD digital project**
  - **EU digital initiative**
  - **AOA/Profit splits**
- **ATAD 1 and 2**
  - **Hybrids**
  - **Interest limitations**
  - **Disclosure**
- **State aid**

Global tax trends in a BEPS world

1. Digital	2. Hybrids	3. CFC rules	4. Interest	5. Harmful tax practices
6. Treaty abuse	7. PEs	8. – 10. TP	11. Data gathering	12. Disclosure
13. TP Doc & CbCR	14. Disputes	15. MLI	GAAR	Exit taxes

- OECD
- Multilateral instrument
- ATAD

Tax and the digitalizing economy

OECD digital project

- Current phase began with request from the G20 for interim report on developments in the taxation of the digital economy by April 2018. BEPS Digital report had recommended follow-up report in 2020
- The “interim” report is expected to make substantive recommendations, rather than simply describing the unilateral actions observed since October 2015
- OECD call for public input now closed, with public consultation held on November 1, leading to April 2018 report

OECD digital project
Progress

- A BIAC meeting was held on the West Coast between the OECD and US Digital businesses in June. A similar meeting was held with non-US businesses in September in Paris
- The meetings discussed business models in the sector, and the impact of digitalization on other sectors
- OECD's director for tax policy and administration said expanding the definition of permanent establishments would be considered as OECD complies with the G20 mandate for a 2018 report on tax issues in the digital economy

> *"That's what we're working on, with the idea of further expanding the PE definition that includes something that would track the digital presence of a company"*
>
> *"possible interim measures such as an alternative tax on e-sales ('ALES')"*
>
> *Pascal Saint-Amans*

EU digital initiative

MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES

Bundesministerium der Finanzen

Il Ministro dell'Economia e delle Finanze

MINISTERIO DE ECONOMÍA, INDUSTRIA Y COMPETITIVIDAD

POLITICAL STATEMENT

JOINT INITIATIVE ON THE TAXATION OF COMPANIES OPERATING IN THE DIGITAL ECONOMY

Being able to appropriately tax the companies operating in the digital economy is a major challenge for the European Union.

We should no longer accept that these companies do business in Europe while paying minimal amounts of tax to our treasuries. Economic efficiency is at stake, as well as tax fairness and sovereignty

We support the ongoing work on those questions at the G20/OECD level and are looking forward to the progress report in spring 2018. The European Commission has also taken important initiatives with the proposals for directives on a Common Consolidated Corporate Tax Base (CCTB and CCCTB). These proposals are useful, and we must continue to work actively on them.

These initiatives must nevertheless be complemented. We would like to move ahead quickly at EU level. Therefore we ask the EU Commission to explore EU law compatible options and propose any effective solutions based on the concept of establishing a so-called "equalisation tax" on the turnover generated in Europe by the digital companies. The amounts raised would aim to reflect some of what these companies should be paying in terms of corporate tax.

This proposal is practical. It does not call into question the essential work on CCTB and CCCTB. The Commission could decide to propose a legislative initiative accordingly. It will demonstrate our commitment to appropriately tax the companies of the digital economy in a way that reflects their genuine activity in the EU.

Ministers' signatures

Bruno LE MAIRE	Wolfgang SCHÄUBLE	Pier-Carlo PADOAN	Luis DE GUINDOS

EU digital initiative

- All three branches of the EU Executive (Estonian Council Presidency, Commission, Parliament) have expressed a desire to tackle the tax challenges of the digital economy. Possible "solutions" include:
  - Digital PEs
  - "Personal data" as 4^{th} apportionment formula
- Some individual EU Member States have also suggested an Equalization (Turnover) Tax
- Some pressure for the EU to await the OECD's recommendations before moving forward, but Estonian presidency has said one bad result better than 28 bad results ...

EU digital initiative

European Council Presidency (Estonia, 7/1/17 – 12/31/17)

- Estonia wants to be remembered as "the Digital Presidency" and has prioritized work in this area. A discussion paper presented to the European Council identified:

"This situation is a clear failure of the international tax rules that undermines the principle of tax neutrality."	"Quick fixes" could include levy on streaming, and online advertisement taxes.	"…the most promising way forward… amend the current corporate tax rules to fill in the gap…"	"…would entail modifying the concept or permanent establishment and enhancing the rules of attribution of profits..."

- The Estonian presidency also held a conference in September, at which IBFD outlined some potential "solutions"

EU digital initiative

IBFD proposed solutions (Estonian Conference)

- *"Both concepts can be bundled together, where WHT constitutes a toll charge for cross-border business, or operate separately"*
- *"Both concepts can operate in the presence of transfer pricing rules (based on arm's-length and non-arm's-length methods) and of formulary apportionment"*

Withholding Tax	Virtual PE
• 10% rate (15% to unregistered taxpayers or those in territories with low CT rates) • Applies to all B2B deductible payments (unless exemptions are met) • Could also include B2C if new agents collection mechanism developed	• Triple threshold: users, time, de minimis • New article 5(8) in OECD MTC • Upfront profit allocation of 1/3 to PE before application of revised TP rules • New systems to collect on behalf of other states

EU digital initiative

European Commission

- Digital taxation was identified as a priority by Commissioner Moscovici in September:

“Focus on taxation of businesses which “pay little or no tax in Europe, because they have no headquarters or shops on European soil”

“Either we do something in the framework of the CCCTB, or something specific. Personally, I am deeply committed to the CCCTB”

- Vice-President Dombrovskis has reiterated the CCCTB is “a long-term solution to the issue of taxing digital giants” and committed to present a Commission proposal on short term solutions by November 29
- The Commission seeks a common EU position by December so the EU can speak with “the same voice” within the OECD
- An initial paper released in September confirms the Commission favors CCCTB in the longer term, and turnover/withholding taxes as interim measures

EU digital initiative

European Parliament (ECON Committee)

- As part of its review of the Commission's latest CCCTB proposal, the ECON Parliamentary Committee is considering recommending an additional profit splitting metric:

> *"The formula apportionment for the consolidated tax base should comprise* ***four*** *equally weighted factors, namely labour, assets, sales by destination* ***and collection and use of personal data of online platforms and services users ("DATA")****."*

> *"Those equally weighted factors should reflect a balanced approach to distributing taxable profits amongst the relevant Member States and should ensure that profits are taxed where they are actually earned."*

EU digital initiative

Informal Groupings

- On September 11, Italy, France, Germany, and Spain issued a joint press release:

"We should no longer accept that these companies do business in Europe while paying minimal amounts of tax to our treasuries."	"We would like to move ahead quickly."	"… we ask the EU Commission to explore … options and propose … solutions based on the concept of establishing a so-called 'equalisation tax' on the turnover …."

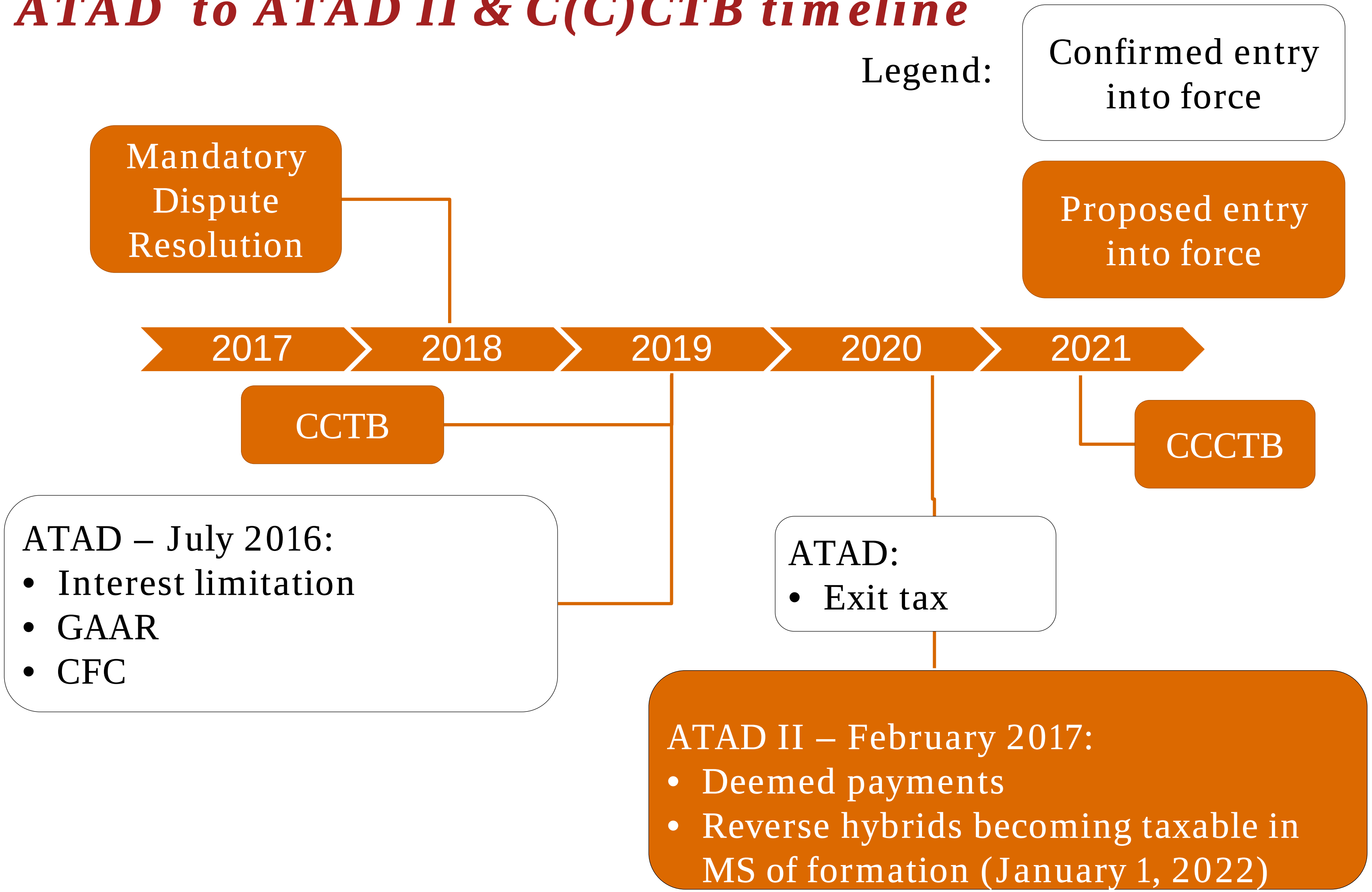
- Romania, Bulgaria, Slovenia, Greece, Portugal and Austria expressed support at the subsequent ECOFIN meeting, which theoretically opens the door for enhanced cooperation procedures

Tax and Digital

Virtual PE vs Diverted Profits Tax

HIGH LEVEL COMPARISON	UK DPT	Virtual PE *(example only, based on various proposals made)*
Threshold	Activities structured to ensure that a PE is not created	Sales, data, users, server, or a combination thereof
Rate	Punitive rate	Domestic rate
Treaty change	Not required (“anti-avoidance”)	Required
Tax creditable in US	Dependent on facts and circumstances	Dependent on facts and circumstances

ATAD to ATAD II & C(C)CTB timeline



Anti-Tax Avoidance Directive (ATAD)

- The ATAD consists of five legally-binding anti-abuse measures (including a rule on hybrid mismatches), which Member States should apply against common forms of aggressive tax planning.

- The European Commission (EC) published four new draft EU Directives in October 2016 with proposals to:

  - Harmonize corporate tax bases across EU Member States, including a super-deduction for R&D and notional interest deduction for equity financing, in the form of a ***Common Corporate Tax Base Directive***.

  - Consolidate the results of entities in an EU corporate group under a single filing and apportion the profits to Member States according to labor, assets and sales via a ***Common Consolidated Corporate Tax Base Directive***.

  - Update rules on hybrid mismatches via an amending document known as ***ATAD II***, and

  - Extend double taxation dispute resolution mechanisms in the EU so that an Arbitration Committee can be set up to deliver a binding decision under a ***Dispute Resolution Directive***.

ATAD II
Hybrid Mismatch Rules

- ATAD II, expands hybrid mismatch rules to arrangements involving non-EU third countries (e.g., US), and
- Hybrid mismatch definition now also involves permanent establishments, hybrid transfers, imported mismatches and dual resident mismatches.

A hybrid mismatch could result in:	
Double deduction	*Deduction without inclusion*
Non-taxation without inclusion	*Double tax credits*

ATAD II measures to be taken by Member States (depending on the circumstances):		
Denial of deduction	*Inclusion of income*	*Limitation of tax relief*

Interest limitations (Action 4)

- Action 4 aims at curbing tax optimization based on the erosion of the tax base through interest deductions (together with Actions 2 (hybrid mismatch arrangements), 3 (strengthen CFC rules) and 8-10).
- 3 main areas of identified risks:
  - Groups placing higher levels of third party debt in high tax countries
  - Groups using intragroup loans to generate interest deductions in excess of the group's actual third party debt expense
  - Groups using third party or intragroup financing to fund the generation of tax exempt income

"*These "opportunities" create competitive distortion between groups operating internationally and those operating in the domestic market and a negative impact on capital ownership neutrality. It reduces the revenues available to governments and affects the integrity of the tax system (…) through base erosion and profit shifting.*"

EU Mandatory Disclosure Proposal

Commission proposals

- Any "cross-border arrangement" would be reportable if it meets one of the hallmarks
- Any one of the adviser, intermediary, or party to the in-scope transactions being subject to EU law would trigger the requirement to disclose
- Generally the obligation to report would be with the adviser (within 5 days of the arrangements being made available to the taxpayer)
- Where the adviser has no obligation to report, the taxpayer would need to report itself within 5 days of the transactions being entered into
- Situations where the adviser may not have an obligation to report (and thus obligation would fall on "business):
    - Advice is legally privileged
    - Adviser is not subject to EU law
    - No adviser involved (i.e. internal tax team led projects or transactions for which no internal or external tax advice was taken)

Mandatory Disclosure Rules
Hallmarks

Main benefits test passed and any general hallmark from…

- Confidentiality from authority or other promoters
- Contingent fee based on size of tax advantage
- Standardised documentation (including standard forms)

Main benefits test passed and any specific hallmark from…

- Use of losses to reduce taxable profits
- Lower taxed revenue streams (e.g. capital, gifts)
- Transactions resulting in round-tripping of funds

No main benefits test required and specific hallmark from…

- Hybrids or recipient stateless, low*/ preferentially taxed or exempt
- Assets subject to depreciation in more than one country
- Claiming double taxation relief more than once
- Transfers of assets where material difference in amounts are treated as payable
- Exchange of Information standards circumvented

**on EU blacklist or half the average rate of the EU CT rate at the end of the previous calendar year*

A quick recap: what is State Aid about?

Article 107(1) TFEU

“Save as otherwise provided in the Treaties, any aid granted to a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”

State Aid
Background

- From 2014, the Commission has opened several high profile investigations into Member States' tax regimes and certain multinationals' tax rulings
- The question in a state aid investigation is whether a business (or sector) has been offered a more favourable deal by a government than other taxpayers
- In June 2016, The Commission published a Notice to clarify its interpretation on the notion of State Aid: State Aid is unlawful if it gives rise to a selective advantage from the use of public resources which also affects cross border trade
- High profile investigations include Amazon (Luxembourg), Apple (Ireland), Starbucks (Netherlands), Fiat (Luxembourg), McDonalds (Luxembourg), Engie (Luxembourg) and most recently part of the UK CFC Regime
- Member States are also submitting all rulings issued between 2010 and 2012 to the Commission for further investigation
- To date, the Commission has issued final decisions on the Starbucks, Fiat, Apple and Amazon cases, and ruled that there was state aid in all cases
- All these decisions have been appealed or are expected to be appealed

State Aid

Recent developments – case law update

- In December 2016, CJEU published its judgment on the (joined) cases *Commission v World Duty Free Group and Santander* (whether allowing amortisation of shares in a “foreign company” is State Aid)
  - The selectivity criteria was ruled to be met, because only those acquiring foreign shares could benefit
  - CJEU noted that (i) a significant number of number of claimants, that are (ii) spread across a wide range of industries, is not sufficient to demonstrate the measure is not selective
- In June 2017, the German Federal Fiscal Court referred questions on its Real Estate Transfer Tax to CJEU:
  - The Courts question whether the tax exemption provides a selective advantage to certain undertakings because it requires (i) a restructuring in the sense of the German Restructuring Act, (ii) a 95% shareholding between a controlling and a dependent company and (iii) a minimum holding period of five years before and five years after the restructuring.

State Aid

Recent developments – case law update continued

- In October 2017, Commission gave its final decision in Amazon case (no written decision available yet) where Commission that Luxembourg had given unlawful State aid by allowing an excessive return to be paid away from Luxembourg to an entity (an SCS) which had insufficient substance to justify the level of profit it earned
  - Little detail in the press release – need detailed written decision
  - Appears not concerned as to the Luxembourg tax treatment of the SCS – solely focusing on TP
- In October 2017, Commission started proceedings against Ireland for failure to collect retrospective amounts owed from Apple as a result of the earlier Apple decision
- In October 2017, Commission announced opening of a initial investigation into aspects of the UK CFC regime which was introduced in 2013. The Press Release does not give much detail but seems to focus on the Finance Company Partial Exemption provisions in the UK CFC rules. We await further clarification from the Commission

State Aid

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Impact of US tax reform on global tax developments

- Tax reform provisions would dramatically alter the taxation of cross border operations
- House provisions include:
  - Territoriality
  - Foreign minimum tax
  - Related party transaction excise tax with ECI election alternative
  - Interest limitations
  - Mandatory deemed repatriation
- Senate provisions include:
  - Territoriality
  - Foreign minimum tax (GILTI)
  - Related party transaction alternative minimum tax (BEAT)
  - Interest limitations
  - Domestic IP carrot
  - Mandatory deemed repatriation