Tax Seminar
22 May 2019

Agenda

- The global tax environment
- OECD developments
- EU developments
- Digitalization of the economy
- Anti abuse measures
- Climate change initiatives and tax

The Global Tax Environment at a Glance

Global Environment

- Fair tax → responsible tax
  - NGOs
  - Investors
  - Public
  - Industry (A-team)
- Combatting aggressive tax planning
  - "Concepts have evolved over time, which makes it impossible to navigate from."
    - A traditional starting point is the OECD, BEPS and EU definition of aggressive tax planning, which covers exploitation of technicalities in a tax regime or as exploitation of inconsistencies between tax regimes in order to reduce tax liability contrary to the intention of the tax legislation.
    - More recent initiatives, including DAC6 goes a lot further than this and so does some of the elements in ATAD.

CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

Global Environment

- Let’s first take a look at the current landscape through the corporate lens:
  - Clearly more emphasis on responsible tax (better notion than fair taxation)
  - BEPS introduced a lot more complexity (in an already system)
  - Much and increasing uncertainty
  - Increasing controversy
  - GAAR type rules are on the move
  - “Aggressive” authority behavior
  - Increased public attention
  - Increased political attention
  - Poor quality in the tax legislation
  - Transparency
    - Rulings
    - CbC
    - MDR

CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

Global Environment

- So what do corporates actually do to navigate in this landscape?
  - Most realize that they have to be responsible in their tax matters as well as in other areas.
  - Therefore, they develop and communicate tax policies and tax strategies, which set out guidelines for their corporate behavior. The quality and meaningfulness of such documents have increased dramatically over the most recent years and now actually are useful communication tools.
  - Several corporates introduce systematic processes to handle the requirements.
  - This may also include a regular review of the existing structures in light of more recent legislation and case law etc.

ADVISORY©
INDEPENDENT TAX CONSULTING

BEPS Developments

- Changed behaviour
- Latest initiatives
- MLI status

BEPS Developments

- Impact?
  - Concrete impact takes time.
  - Some indications of changed distributions set-ups among global MNEs.

- Public Consultation Document, 13 February 2019 – Addressing the tax challenges of the digitalization of the economy.
  - Evidence that BEPS is already having an impact, but…
    - BEPS risks remain for highly mobile intangible income-producing factors (both concerning highly digitalized and more traditional MNEs).
    - Broader tax challenges remain – e.g. ”scale without mass”, value of data, and user participation.
  - Commitment to work along two paths towards a consensus-based solution in 2020.
    - Revised profit allocation and nexus rules.
    - Global anti-base erosion proposal.

The Multilateral Instrument

OECD/G20 Base Erosion and Profit Shifting Project

Developing a Multilateral Instrument to Modify Bilateral Tax Treaties

ACTION 15: 2015 Final Report

The Multilateral Instrument

- 87 countries have signed the instrument, while 25 countries have deposited instruments of ratification.
  - 6 further countries have signified their intent to sign.

- Number of CTAs ranges from 2 (Curaçao) to 121 (the UK).

- Countries have chosen the parts that makes sense relative to their jurisidictions.
  - Denmark has chosen everything, whereas *inter alia* Jersey has chosen only the minimum standards.

The Multilateral Instrument

- Denmark has chosen to implement the *'full package'*.
- As Denmark negotiates DTAs based on the OECD MC, adoption of the MLI entails that current and future DTAs would be based on the same 'Model'.
- Danish ratification took place 28 March 2019.
  – MLI applicable to CTAs from 1 January 2020 regarding withholding taxes.
  - Other taxes: for fiscal years which commence 6 months after the entry into force for the latest of the parties.

CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

The Multilateral Instrument

- MLI includes 16 amendments
- Minimum standard
  - Prevention of abuse (BEPS Action 6)
    - Article 6: Preamble
    - Article 7: PPT or LOB
  - Improved dispute resolution (BEPS Action 14)
    - Article 16: Improvements to MAP
    - Article 17: Corresponding adjustments
- Double domiciled companies
  - POEM ”tie-breaker” withdrawn – solved on the basis of mutual agreement including several facts, including place of management, registration etc.
- Expansion of PE definition
  - Commissionaire arrangements
  - Preparatory and auxiliary
  - Anti-fragmentation
- Mandatory Binding Arbitration

The Multilateral Instrument

Necessary analysis following the ratification
1) Domestic law of the contracting states
2) Content of the bilateral DTC
3) Adoption of MLI
4) Concrete reservations and elections
5) Content of MLI
6) MLI guidance
7) Commentary to the OECD model 2017
8) Content of underlying BEPS-reports

Current OECD and EU Initiatives Regarding the Digitalization of the Economy

CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

OECD – Towards 2020

- Digitalization raises broader tax challenges in respect of the allocation of taxing rights, due to:
  - Scale without mass,
  - Heavy reliance on intangible assets,
  - Data and user participation.

    = Value is created in market states not - sufficiently - taxed there!

- 3 high level proposal are presented.


Public Consultation Document

ADDRESSING THE TAX CHALLENGES OF THE DIGITALISATION OF THE ECONOMY

13 February – 6 March 2019

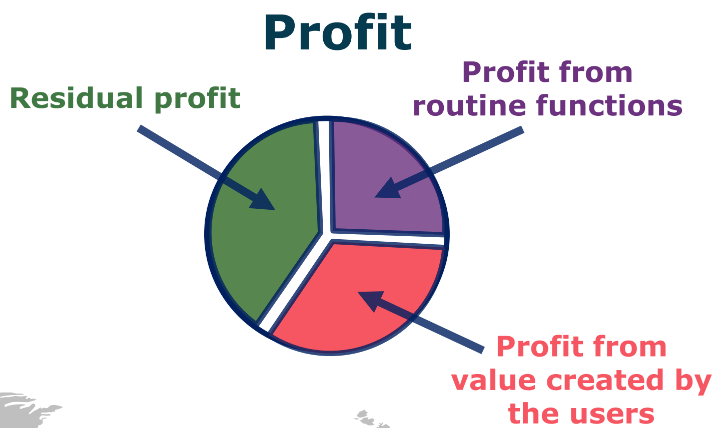
OECD
BETTER POLICIES FOR BETTER LIVES

OECD – Towards 2020

1: User Participation

- Perception:
  - Users are critical to the value creation.

- Targeted at:
  - Social media platforms
  - Search engines
  - Online marketplaces

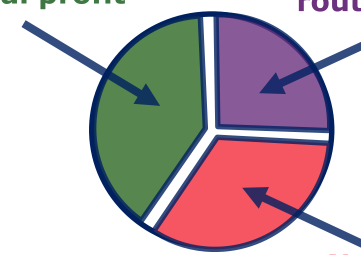


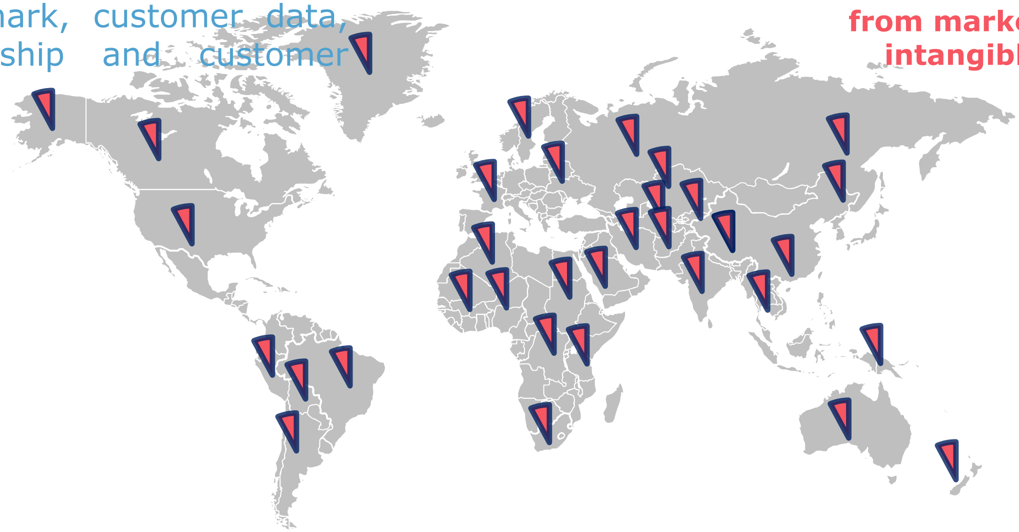
OECD – Towards 2020

2: Marketing Intangible

- Perception:
  - Allocation of profit value creation of marketing intangibles.
- Targeted at:
  - Functional link between marketing intangibles and the market jurisdiction.
    - Brand and trademark, customer data, customer relationship and customer lists.

Profit





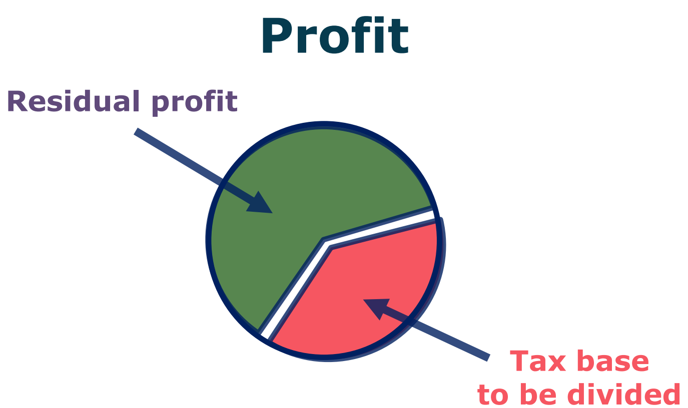
OECD – Towards 2020

3: Significance economic presence

- Perception:
  - Physical presence is not required to be heavily involved in the economic life.

- Targeted at:
  - A purposeful and sustained market interaction via digital technology.

Nexus = revenue + X



CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

OECD Proposals

- Global anti-base erosion proposal

  - Aim: To mitigate profit shifting to entities subject to no or low taxation.

  - Idea: To allow all countries to ”tax back” profits where other countries have not sufficiently exercised their primary taxing rights.

  - Design: A systemic solution designed to ensure that all internationally operating businesses pay a minimum level of tax.

  - Content: Two new rules implemented by way of changes to domestic law and DTTs.

OECD – Towards 2020

- Global anti-base erosion proposal

Rule	**Mechanics**	**Questions**
Income inclusion rule	Taxation at parent/HQ of income in controlled entities and branches if subject to low taxation in the jurisdiction of establishment/residence.	• Just a broad CFC rule? • Level of minimum rate? • Role of ”substance”? • Need of safe habours? • Need of coordination? • Breach of EU Law?
Tax on base eroding payments	1) *Undertaxed payments rule:* No deduction for payments to a related party if payments are not subject to sufficient taxation. 2) *Subject to tax rule:* Treaty benefits only granted if the income is sufficiently taxed in the other state.	• Just a broad hybrid mismatch rule? • Level of minimum rate? • Covered payments? • How to deal with conduit or imported arrangements? • How to avoid complexity? • Need of coordination?

EU – From ATAD to CCCTB

- Anti- Tax Avoidance Directive (ATAD) adopted in 2016

- The Commission's Digital Tax Package of 21 March 2018
  - Directive proposal on a digital services tax (DST) → ✝
  - Directive proposal on significant digital presence → ?

- The Commission's long term solution → CCCTB
  - "2CTB": General rules for computing taxable income
  - "3CTB": Consolidation combined with formula apportionment

European Commission

Anti Abuse Measures

Abuse in EU Law

- Danish cases on beneficial ownership – Decisions rendered in march 2019.
  - Notion of abuse:
    - First, objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, **the purpose of those rules has not been achieved** and,
    - Second, a subjective element **intention to obtain an advantage** from the EU rules **by artificially creating the conditions** laid down for obtaining it.
  - Examination of facts in particular whether economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting from an improper advantage.
  - Tax payer must have the opportunity to adduce evidence to the contrary.

Abuse in EU Law

- Guidelines:
  - A group of companies may be regarded as being an artificial arrangement where it is not set up for reasons that reflect economic reality, it's structure is purely one of form and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law.
  - I.a. where, on account of a conduit entity interposed in the structure of the group tax on the dividends is avoided.
  - All or almost all of the dividends/interests are, very soon after their receipt, passed on to entities which do not fulfil the conditions.
  - Passing on of payments with a minor spread and where only activity.
  - Absence of actual economic activity.
    - Analysis of all the relevant factors relating, in particular, to the management of the company, to its balance sheet, to the structure of its costs and to expenditure actually incurred, to the staff that it employs and to the premises and equipment that it has.
  - Indications of an artificial arrangement.
    - Various contracts (including "in substance obligations") existing between the companies involved in the financial transactions at issue, giving rise to intragroup flows of funds,
    - By the way in which the transactions are financed,
    - By the valuation of the intermediary companies' equity, and
    - By the conduit companies' inability to have economic use of the dividends/interests received.
    - Closeness in time of new tax legislation, and, the setting up of complex financial transactions.

Abuse in EU Law

- Immaterial that some of the beneficial owners are resident in tax treaty state.
  - The existence of such a convention cannot in itself rule out an abuse of rights.
- Take always:
  - No longer a requirement that concrete anti abuse provisions have been implemented.
  - MS must deny benefits on the basis of the EU notion of abuse.
  - Threshold for abuse:
    - Apply to all EU law instruments.
    - Deviate from previous decisions on holding companies.
    - Impact on the GAAR and other situations?

ADVISORY©
INDEPENDENT TAX CONSULTING

Topics to watch?

Topics to watch

- Implementation of ATAD CFC rules – Gilti and OECD initiative.
- DAC 6 – The Mandatory Disclosure Regime.
- Climate initiatives and tax law.
  - Green (climate) bonds
  - EU Emission Trading Regime – Emmission Allowances and credits

CORIT Advisory P/S

CORIT ADVISORY P/S
LYNGBY HOVEDGADE 17, 2. SAL
2800 KONGENS LYNGBY
DENMARK

WWW.CORIT-ADVISORY.COM

P: +45 40 42 22 84
E: CORIT@CORIT.DK