

Association of International Certified Professional Accountants

Comments on the OECD Public Consultation

Addressing the Tax Challenges of the Digitalisation of the Economy

May 2019

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Executive summary

Overview

In our view, a consensus-based, equitable, and successfully durable rebalancing of multi-jurisdictional taxing rights must have four elements:

- (1) Any rules extending taxation nexus to businesses that lack a physical presence in a jurisdiction should be clear, measurable, predictable, and applied consistently and neutrally across all industries and business models, and across all jurisdictions;
- (2) The arm's-length standard, which is based on economic reality, is flexible enough to accommodate many of the concerns raised and provides a basis for addressing these concerns. Exceptions to the arm's length standard should consist solely of rules that are specific and limited in scope for attributing profits and losses to a jurisdiction. It is vital that any such rules are clear and administrable in their application and give proper regard to all value creating activities and business investment that takes place in other jurisdictions;
- (3) All participant Inclusive Framework jurisdictions must agree:
 - (i) to adopt and fully implement the new consensus to ensure that all income is properly taxed only once across all applicable jurisdictions, and
 - (ii) to immediately repeal any previous unilateral actions, including temporarily enacted provisions related to digital services, whether currently in effect or pending; and
- (4) All participant Inclusive Framework jurisdictions must include compulsory effective and practical mechanisms in their treaties and other bilateral agreements to resolve any controversy over taxing rights, such as mandatory binding arbitration, as a minimum standard subject to peer review to ensure prompt resolution of any situations potentially resulting in double taxation.

In framing our discussion, we have viewed the policy issues arising from the taxation of the digitalization of the economy through the prism of our Tax Policy Concept Statement 1: "[*Guiding principles of good tax policy: A framework for evaluating tax proposals.*](#)" Specifically, the following principles are most relevant to this discussion:

- **Equity and Fairness** – Similarly situated taxpayers should be taxed similarly.
- **Certainty** – The tax rules should clearly specify how the amount of payment is determined, when payment of the tax should occur, and how payment is made.
- **Effective Tax Administration** – Costs to collect a tax should be kept to a minimum for both the government and taxpayers.

- **Economic Growth and Efficiency** – The tax system should not unduly impede or reduce the productive capacity of the economy.
- **Appropriate Government Revenues** – Tax systems should have appropriate levels of predictability, stability and reliability to enable the government to determine the timing and amount of tax collections.

Revised profit allocation and nexus rules

Based on the elements and principles outlined above, we think that two of the proposals in the Revised Profit Allocation and Nexus section of the Consultation Document (“Section 2”) – the “user participation” proposal and the “significant economic presence” proposal – are unlikely to form part of a consensus-based and durable solution to rebalance taxing rights. Our opinion is that the only proposal that meets the four element criteria listed above is the “marketing intangibles” proposal. Although we do not take a formal position on this proposal, we think that as the Inclusive Framework discusses modifying principles that have successfully underpinned the international tax framework for nearly a century, they should focus on addressing the significant design and implementation issues related to the marketing intangibles proposal.

Global anti-base erosion proposal

We think that the proposals in the Global Anti-Base Erosion section of the Consultation Document (“Section 3”) address low- or non-taxation as opposed to the allocation of taxing rights. It appears the Section 3 proposals reflect a desire by a subset of countries to expand the scope of the Base Erosion and Profit Shifting (BEPS) project without allowing time to judge the results of the numerous reforms already implemented as a result of the BEPS project. The BEPS reforms have resulted in considerable changes in behavior among multinational enterprises. Due to the crucial need to reach a global consensus on the issues around the first pillar, we encourage the Inclusive Framework members to focus their energies solely on resolving the complex issues around the first pillar, i.e., the reallocation of taxing rights and related nexus issues. We recommend delaying any consideration of the Section 3 proposals until after sufficient time for a review of the efficacy of the changes already made can occur.

Background

Action 1 report

Tax challenges arising from the digitalization of the economy have been an ongoing and growing concern for tax administrators. These issues were reviewed as part of the Organisation for Economic Co-operation and Development's (OECD) BEPS project and discussed in their report on *Addressing the Tax Challenges of the Digital Economy*¹ (Action 1 Report) issued in 2015.

The Action 1 Report recognized that the digitalization of the economy represents challenges for international taxation, but acknowledged the difficulty, if not the impossibility, of ring-fencing the digital economy from the rest of the economy. Specifically, the Action 1 Report concluded that attempting to isolate the digital economy as a separate sector would inevitably require drawing arbitrary lines around what is and is not digital economic activity. The Action 1 Report recognized that the digitalization of the economy is continuing to advance, and the digital economy is increasingly the economy itself. Therefore, the OECD concluded that it is inappropriate to attempt to apply special tax rules only to companies that have a high degree of digitalization.²

Interim report

In 2018, the OECD released the report titled *Tax Challenges Arising from Digitalization – Interim Report 2018* (Interim Report),³ in which over 110 countries agreed to work on a consensus-based solution to tax challenges arising from the digitalization of the economy. The Interim Report, which was agreed to by all members of the Inclusive Framework, identified the progress made by countries in moving towards a consensus-based solution, but also highlighted the differences in positions that many countries still held.

The Interim Report identified three characteristics frequently observed in highly-digitalized business models:

- Cross-jurisdictional scale without mass which allows businesses in many sectors to locate various stages of their production processes across different countries, and at the same time access a greater number of customers around the globe. Digitalization also allows heavy involvement in the economic life of a jurisdiction by some highly digitalized enterprises without any significant physical presence and allowing these enterprises to achieve operational local scale without local mass.

¹ https://read.oecd-ilibrary.org/taxation/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report_9789264241046-en#page1.

² Action 1 Report, paragraph 364.

³ https://read.oecd-ilibrary.org/taxation/tax-challenges-arising-from-digitalisation-interim-report_9789264293083-en#page1.

- Reliance on intangible assets, including IP which is either owned or leased by the company and is capable of being located in any jurisdiction, not necessarily the ones where economic activity occurs or users are located.
- Data and user participation are characteristic of and frequently unique to highly digitized businesses. One example provided was social media, as without data, networks and user-generated content, such businesses would not exist as they are today. Such social media activities can occur across jurisdictional borders and can operate with little or no physical presence in the jurisdiction where the users are located.

Further, the Interim Report highlighted that countries have divergent views of the degree that these characteristics should result in changes to the international tax rules and are largely divided into three groups:

- Concerns around the impact of digitalized businesses are largely confined to those highly digitized businesses, and there is no case for wide-scale changes to the international tax standards.
- The economy is becoming more digitalized and the concerns around the impact of digitized businesses on existing international tax standards are not exclusive to highly digitalized companies but apply to all companies.
- The existing international tax standards, as modified after the BEPS Action items in 2015, has sufficiently addressed the concerns of double non-taxation, but it is too early to fully assess the impact of all of the BEPS measures or consider further changes.

Consultation Document

After issuing the Interim Report, the Inclusive Framework agreed to continue developing proposals on a “without prejudice” basis through the Task Force on the Digital Economy (TFDE). The latest result of this work is the public consultation document titled *Addressing the Tax Challenges of the Digitalisation of the Economy* issued in February 2019 (Consultation Document). The Consultation Document sets out a number of proposals that could form part of a “long-term solution to taxation of the digitalized economy” by changing the existing international tax framework on the allocation of profits rights and nexus rules.

The Consultation Document outlines a two-pillar approach. The first pillar outlined three policy choices to revise the profit allocation generated by digital activities and the related nexus rules. The second pillar, which runs separate from and parallel to the three policy choices in the first pillar, addresses a proposal to adopt a global anti-base erosion platform. In this document, we only address the policy choices outlined in the first pillar.

Revised profit allocation and nexus rules

General comments

For nearly a century, jurisdictions have allocated the rights to tax the business income of multinational enterprises based on physical presence nexus rules and profit allocation rules using the arm's length principle. This internationally-agreed upon framework has generally produced an equitable allocation of taxing rights among jurisdictions and a principles-based framework for resolving competing jurisdictional claims to taxation (thereby avoiding double taxation issues). This framework has also allowed for certainty and stability within the tax system for the benefit of both tax administrations and taxpayers and has provided a platform for enormous global economic growth by facilitating cross-border trade and investment. The BEPS project slightly modified these rules to address concerns that some companies were able to artificially shift profits to jurisdictions where value creation was not occurring (generally low or no-tax jurisdictions) or convert profits into untaxed stateless income. In general, the BEPS changes did not substantially transform the traditional rules for allocating taxing rights or nexus rules between jurisdictions with legitimate claims to tax the business income of multinational enterprises.

The proposals in the Consultation Document would substantially modify the traditional profit allocation and nexus rules to address concerns that the existing international framework does not provide a market jurisdiction with sufficient rights to tax the creation of economic value by some digital businesses. We are concerned that the Consultation Document asserts that the arm's length principle has flaws and is likely inadequate to address issues raised in the taxation of the digital economy, but the Consultation Document fails to provide any explanation or support for this assertion.

A clear and public discussion on any perceived flaws and inadequacies of the arm's length principle is necessary before considering any radical departure from the existing framework. It is generally recognized that the arm's length principle leads to a relatively objective, symmetrical, and economics-based allocation of profits, with flexibility to adapt to changes in circumstances. Further, the arm's length principle ensures a level playing field with respect to transactions between associated companies and those between independent companies.

We acknowledge that reaching a broad-based consensus on the issues raised by the digitalization of the economy are challenging. We are encouraged, however, that the OECD has shown meaningful progress by the issuance of the Consultation Document and the apparent willingness of the interested parties at the OECD public consultation conference in Paris in March 2019 to reach a global consensus on the first pillar issues. Such global consensus is crucial for the proper functioning and administration of the global economy. If the Inclusive Framework members continue to focus their efforts on reaching this global consensus, a global solution by the end of 2020 is a realistic possibility.

We applaud and encourage jurisdictions with concerns about the current system for working within the OECD’s consensus-based approach in developing an international approach to resolving these issues. Jurisdictions should not act unilaterally with such cross-border taxation issues as unilateral actions generally lead to double taxation, business uncertainty, and lengthy and expensive controversy for both businesses and governments, which in turn discourages investment, job creation, and trade between countries.

In our view (which is echoed in many of the other responses submitted to the Consultation Document), a consensus-based and successfully durable rebalancing of taxing rights must have four elements:

- (1) Any rules extending taxation nexus to businesses that lack a physical presence in a jurisdiction should be clear, measurable, predictable, and applied consistently and neutrally across all industries and business models, and across all jurisdictions;
- (2) The arm’s-length standard, which is based on economic reality, is flexible enough to accommodate many of the concerns raised and provides a basis for addressing these concerns. Exceptions to the arm’s length standard should consist solely of rules that are specific and limited in scope for attributing profits and losses to a jurisdiction. It is vital that any such rules are clear and administrable in their application and give proper regard to all value creating activities and business investment that takes place in other jurisdictions;
- (3) All participant Inclusive Framework jurisdictions must agree:
 - (i) to adopt and fully implement the new consensus to ensure that all income is properly taxed only once across all applicable jurisdictions, and
 - (ii) to immediately repeal any previous unilateral actions, including temporarily enacted provisions related to digital services, whether currently in effect or pending; and
- (4) All participant Inclusive Framework jurisdictions must include compulsory effective and practical mechanisms in their treaties and other bilateral agreements to resolve any controversy over taxing rights, such as mandatory binding arbitration, as a minimum standard subject to peer review to ensure prompt resolution of any situations potentially resulting in double taxation.

Based on these elements, we think that two of the proposals in Section 2 of the Consultation Document – the “user participation” proposal and the “significant economic presence” proposal – are unlikely to form the basis of a consensus-based and durable rebalancing of taxing rights. We are not prepared to necessarily support the “marketing intangibles” proposal at this time, but we generally think it offers the best opportunity of the options presented for reaching a global consensus within the OECD’s timeline. We recommend that the TFDE and the Inclusive

Framework focus their efforts on significant design and implementation considerations related to the marketing intangibles proposal.

User participation proposal

The user participation proposal focuses on the value created by certain highly digitalized businesses through developing an active and engaged user base from which they solicit data and content contributions. The proposal is premised on the idea that soliciting sustained engagement and active participation of users is critical in developing value for the digital business as users contribute to the creation of the brand, the generation of valuable data, and the development of a critical mass of users which help drive market power. Specifically, the proposal focuses on value created through social media platforms, search engines, and online marketplaces.

However, this proposal is problematic as it would apply to only certain types of industries, companies and specific business lines within companies. It would not apply to other digitalized companies and activities such as e-commerce websites, SaaS businesses, and online data services that do not rely on user participation but have raised similar concerns over whether the existing international tax framework properly allocates those business' profits. The "ring-fencing" (or targeted treatment) of certain activities is contrary to the basic tenet that tax policy is neutral, fair, and efficient. For businesses with both in-scope and out-of-scope activities, the determination of revenue and profits subject to tax and some form of profit allocation is likely to prove confusing and burdensome to taxpayers, unnecessarily complex for tax administrators to review, and generally render this proposal un-administrable.

The OECD reviewed proposals similar to the user participation proposal in its Action 1 Report but concluded that 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. Specifically, the Action 1 Report concluded that, as the digitalization of the economy continues to advance and that the digital economy is increasingly the economy itself, it is inappropriate to apply special tax rules only to companies that have a high degree of digitalization. We agree with the conclusion reached by the OECD.

Finally, the user participation proposal fails to meet the first element of the principles we outlined above, specifically that any rules extending taxation nexus to a business that lacks a physical presence in a jurisdiction is applied consistently and neutrally across all industries and business models. It is possible, however, that certain elements of this proposal could prove useful in designing implementation rules for the marketing intangible proposal.

Substantial economic presence proposal

The substantial economic presence proposal is based on the view that the digitalization of the economy and other technological advances have enabled business enterprises to be heavily involved in the economic life of a jurisdiction without a significant physical presence. According

to this view, these technological advances have rendered the existing nexus and profit allocation rules ineffective and it is increasingly necessary to impose global formulary apportionment.

Although simple in concept, this proposal faces significant design and implementation challenges. Very few details of this proposal are described in the Consultation Document, making it appear that this proposal has not undergone detailed discussions in the TFDE as a workable and lasting solution. We briefly outline below some of the difficulties faced by this proposal.

In order to properly function and ensure that all income is taxed only once, a global consensus to establish the same criteria and apportionment formulas with the same applicable definitions is necessary, along with an agreement to not change such criteria and formulas or definitions unless mutually agreed by the Inclusive Framework participants. We think that obtaining such a global consensus in definition and application is doubtful to occur, as countries are reluctant to surrender such decisions on such basic elements of their tax system to others. Even if a consensus was possible, there is substantial complexity in developing acceptable definitions.

Consider, as an example, the problem of defining revenue and determining where it is “generated.” For instance, is a customer’s digital “location” based on their physical location, their collection location, their shipping address, or where title passes? If the customer location(s) is in a different jurisdiction from the website location (stored on a server), does one allocate part of the revenue to the server location? How is revenue measured in a cross-border digital context when intangibles are employed in two or more countries in the generation of that revenue? In-depth consideration and consensus on how to properly address global supply chain issues, such as the “revenue” added in each location and step in the supply chain are likely necessary. Yet, the proposal as described appears to preclude the use of traditional transfer pricing or another economic-based approach to accomplish these determinations.

As recently as 2017, the OECD considered and rejected a global formulary apportionment approach. As stated in the OECD Transfer Pricing Guidelines: “Global formulary apportionment, sometimes mentioned as a possible alternative [to the arm’s-length principle], would not be acceptable in theory, implementation, or practice.”⁴

Further, any controversy over apportionment would require a global audit of the multinational enterprise by the tax authorities in each jurisdiction that challenges the apportionment. Due to the global audits required, each jurisdiction in the Inclusive Framework must agree to adopt and apply identical statute of limitation provisions to such a global audit regime.

Given the procedural difficulties identified above with a formulary appointment approach, we think that to abandon the arm’s length standard and adopt formulary apportionment would prove difficult. In addition, significant challenges exist in creating an appropriate measure (formula) of

⁴ For a further and more extensive discussion of formulary apportionment, see the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, paragraphs 1.15-1.32.

the tax base to reflect the varied economic realities of all situations and could disregard tax neutrality in decision making with controlled transactions. Thus, the result would be contrary to the very purpose and intent expressed in the Consultation Document.

Due to the complexity and magnitude of the outstanding issues, it appears unlikely the Inclusive Framework could reach consensus on this proposal within the timeframe laid out by the OECD.

Marketing intangibles proposal

The other proposal discussed in the Consultation Document, the marketing intangibles proposal, most closely aligns with existing internationally-agreed principles. This proposal is based upon the concept of allocating income from marketing intangibles for all businesses, not just digitalized businesses.⁵

As discussed in the Consultation Document, the proposal recognizes an intrinsic link between the marketing intangibles and the market jurisdiction, which is seen as manifesting itself in two ways. First, some marketing intangibles (such as brand and trade names) are reflected in the favorable attitudes in the minds of customers and are likely created in the market jurisdiction. Second, other marketing intangibles (such as customer data, customer relationships and customer lists) are derived from activities targeted at customers and users in the market jurisdiction, supporting the approach of taxing intangibles that were created in the market jurisdiction.

Considering the link between marketing intangibles and the market jurisdiction, the proposal would modify current transfer pricing and treaty rules to require the allocation of profit from marketing intangibles and the risks associated with such intangibles to the market jurisdiction. The proposal would entitle the market jurisdiction to tax some portion of the non-routine income properly associated with such intangibles and their attendant risks. All other income and risks are then allocated among group members based on existing transfer pricing principles. One consequence of this proposal is that market jurisdictions are given a right to tax highly digitalized businesses – even in the absence of a taxable presence – recognizing the importance of marketing intangibles for such business models.

The proposal emphasizes that only marketing intangibles would become taxable in a market jurisdiction. According to the Consultation Document, trade intangibles are not seen as possessing a similar intrinsic functional link with market jurisdictions and are excluded from the same treatment. For example, a patent used to build an efficient car engine allows it to achieve the same mileage independent of location and regardless of who made or bought it.

⁵ The term “marketing intangibles” has the same meaning as is set forth in the OECD Transfer Pricing Guidelines: “an intangible . . . that relates to marketing activities, aids in the commercial exploitation of a product or service and/or has an important promotional value for the product concerned. Depending on the context, marketing intangibles may include, for example, trademarks, trade names, customer lists, customer relationships, and proprietary market and customer data that is used or aids in marketing and selling goods or services to customers.” (OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, p. 27).

The proposal would modify the current profit allocation and nexus rules to require that the non-routine or residual return of a multinational enterprise group attributable to marketing intangibles and their attendant risks are allocated to the market jurisdiction, regardless of the following:

- Which legal entity owns such marketing intangibles;
- Which entities factually perform or control development, enhancement, maintenance; protection, and exploitation (DEMPE) functions related to those intangibles;
- How risk is attributed under the existing transfer pricing rules; and
- How the existing transfer pricing rules would ordinarily allocate income related to the marketing intangibles and their related risks.

Numerous challenges exist in determining how to properly allocate marketing intangibles amongst jurisdiction including the ability to identify:

- The entities containing the marketing intangibles (whether a single entity or multiple entities);
- The marketing intangible assets that are subject to the enhanced tax nexus;
- The amount of routine profit from those marketing intangibles;
- The amount of non-routine profit associated with those marketing intangibles;
- Which jurisdiction should receive a portion of the routine profit;
- The amount of routine profit to be allocated to such jurisdictions (presumably utilizing the existing transfer pricing framework);
- Which jurisdictions should receive a portion of the non-routine profit; and
- The amount of the non-routine profit to be allocated to such jurisdictions (applying a new consensus-based approach).

Recommendations for design elements

As previously discussed, we consider the inclusion of four elements essential to achieving a successful and durable consensus-based modification to the existing international tax framework. Although we have not taken a formal position on the marketing intangible proposal, we think it represents the most likely basis for a successful global consensus within the OECD's timeframe. Therefore, we have provided thoughts below on the application of each of those elements to the marketing intangibles proposal.

Deemed nexus standard

Any rules extending taxation nexus to businesses that lack a physical presence in a jurisdiction should be clear, measurable, predictable, and applied consistently and neutrally across all industries and business models, and across all jurisdictions.

The marketing intangibles proposal contemplates a new tax nexus threshold that, if met, would subject a business without a physical presence in a jurisdiction to tax within that jurisdiction. Any

new standard for deemed, non-physical presence nexus should have a narrow focus and apply only to the appropriate type of income allocated to the jurisdiction under this proposal. Jurisdictions should not attempt to broaden the nexus to include other income, including all forms of royalties from non-marketing intangibles.

The proposal suggests that a multinational enterprise would have tax nexus in each jurisdiction in which “significant marketing intangibles” held by the business are derived and/or used. Accordingly, it is essential for the Inclusive Framework to agree upon a definition of such “significant marketing intangibles.” The definition must clearly identify which customer data constitutes a “marketing intangible” that would contribute to a determination of tax nexus as well as establish a threshold level at which a brand or trade name constitutes a “marketing intangible” that would contribute to a determination of tax nexus.

In designing the proposed deemed nexus standard, the Inclusive Framework should consider the following issues:

- Avoiding low or trivial thresholds for tax nexus which would have limited cost-benefit for taxpayers and tax administrators. For example, the mere knowledge of a brand should not be a sufficient threshold to impose taxation. Rather, establish a minimum revenue level generated within a country as the applicable threshold.
- Merely selling into a jurisdiction should not give rise to a deemed tax nexus. Favorable market conditions and property sales or the performance of services alone do not necessarily constitute the creation of marketing intangibles.
- Adjusting the allocation downwards if the jurisdiction is already taxing revenue from the marketing intangibles through a unrelated party distributor, who has taken on the full-risk involved in the transaction. In which case, any value created from the exploitation of marketing intangible income is already being taxed in the jurisdiction on an arm’s-length basis.
- Adjusting the allocation downwards if the jurisdiction is already taxing revenue from the marketing intangibles through the manufacture and sale of branded products licensed from the taxpayer. In which case, the value created from the exploitation of marketing intangible income is already taxed in the jurisdiction on an arm’s-length basis.
- Adjusting the allocation downwards by providing appropriate exceptions where a remote seller or service provider is not actively accessing the market jurisdiction in a manner that is likely to lead to profits or an increase in value of the marketing intangibles for the seller or service provider.
- Adjusting the allocation to take into account the location and extent of DEMPE functions performed surrounding the creation and maintenance of the marketing intangibles.

Revisions to existing allocation rules

The only deviations from the arm's length standard for attributing profits and losses to a jurisdiction needed are rules which are specific and limited in scope. It is vital that any such rules are clear and administrable in their application and give proper regard to all value creating activities and business investment that takes place in other jurisdictions;

The marketing intangibles proposal aligns most closely to the principles underlying the existing international tax framework, appears most neutral in its application, and for many businesses may produce results that are broadly consistent with appropriate outcomes under the current tax nexus and profit allocation rules and principles generally agreed upon in bilateral advance pricing agreements.

There remains significant design and implementation considerations related to that proposal which are identified in the Consultation Document. Specifically, the Consultation Document suggests alternative methodologies for isolating profits and losses specially allocated to marketing intangibles from other profits including the application of normal transactional transfer pricing principles or a revised residual profit split analysis that apply more mechanical approximations. While each approach merits further discussion, we prefer the approach which applies existing transfer pricing principles. We think that the allocation of routine returns and the allocation of profits attributable to product and other trade intangibles should remain based on existing principles that reflect economic reality.

In our view, use of the arm's length standard is the appropriate method to split world-wide aggregate non-routine profits between marketing and non-marketing intangibles. In addition, we think that the determination of total non-routine marketing return should be calculated using traditional transfer pricing principles. Any consensus agreement should affirmatively state that the adherence to the arm's length principle would continue to apply.

The Consultation Document also discusses an alternative revised profit split. While meriting ongoing study, residual profit splits can be extremely complicated to implement and administer. Even a reasonable approximation of a residual profit split frequently relies on data that is not generated or maintained real-time in the ordinary course of business. Applying a traditional residual profit split analysis to the global operations of all multinational enterprises would require an enormous commitment of resources by both the taxpayer and each of the tax authorities represented in the Inclusive Framework.

As noted above, a consensus-based and successfully durable rebalancing of taxing rights must, among other items, be clear, measurable, and predictable and should apply consistently across all jurisdictions. We do not think that a highly-complex method, such as the residual profit split, is the best solution in a multilateral context where simpler and more administrable method can be devised.

After traditional transfer pricing principles have been applied to identify any non-routine market profit or loss, it is appropriate to consider employing a formulaic or mechanical approach (for example, such as an allocation based on revenue) to allocate such non-routine market profit or loss from marketing intangibles among market jurisdictions. However, as the relative contribution of marketing and non-marketing intangibles can vary dramatically by industry and between businesses within industries, any formulaic or mechanical approach must take such differences into account where requisite.

Thus, any simplifying approach should take economic considerations into account as much as possible and explicitly limit its application to marketing intangibles. The approach must provide a clear definition of routine versus non-routine returns and differentiate between marketing versus non-marketing intangibles. Finally, this approach needs to provide those tax authorities with limited expertise or resources a practical framework to properly apply such an approach.

Global consensus on full adoption and implementation

All participant Inclusive Framework jurisdictions must agree to adopt and fully implement the new consensus to ensure that all income is properly taxed only once across all applicable jurisdictions. They must also immediately repeal any previous unilateral actions, including temporarily enacted provisions related to digital services, whether currently in effect or pending.

Significant work is necessary for the Inclusive Framework to develop a globally agreed upon standard for allocating non-routine profits and losses from marketing intangibles among market jurisdictions. In making such allocation, the Inclusive Framework countries need to explicitly agree on the final approach developed to ensure that all jurisdictions are applying the same rules in a fair and equitable manner.

Any such agreement must recognize that under certain circumstances, a small amount or no additional marketing intangible income is allocable to a particular jurisdiction. Any allocation of profit to a jurisdiction using a simplified formulaic or mechanical approach should be based on some level of economic reality.

The agreement must recognize the possibility that losses as well as profits are potentially allocable to a jurisdiction where a business has no physical presence and incurs no expense. A failure to allocate such marketing intangible-related losses properly to those market jurisdictions could result in an overallocation of losses to jurisdictions in which the business performs routine functions or develops trade intangibles.

We have previously indicated our belief that countries should not implement temporary measures, such as a digital services tax while the OECD consultation process is underway. We recognize that some nations have already or intend to implement such measures. As part of the global consensus, members of the Inclusive Framework must agree to immediately repeal, without preconditions, any related unilateral actions which have been put in place.

Mandatory binding arbitration for dispute resolution

All participant Inclusive Framework jurisdictions must include compulsory effective and practical mechanisms in their treaties and other bilateral agreements to resolve any controversy over taxing rights, such as mandatory binding arbitration, as a minimum standard subject to peer review to ensure prompt resolution of any potential double taxation situations.

With the expansion of the allocation of taxing rights, the introduction of non-physical presence nexus rules, and the widespread adoption of a complex residual profit split mechanism, it is anticipated that there will be an increase in controversy and a risk of multiple layers of taxation. It is essential that new bilateral and multilateral advanced pricing agreement programs are developed specifically tailored for such rules.

It is also critical that global dispute resolution procedures are improved and mandatory binding arbitration is established as a minimum standard for all tax administrations in the Inclusive Framework. The OECD must also establish a robust peer review program to ensure these standards are maintained and properly implemented.