Position Paper

Insurance Europe contribution to the OECD's work on possible solutions to the tax challenges of digitalisation

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General comments

- Insurance Europe welcomes the OECD's efforts to address the taxation challenges that digitalisation brings to the international tax system.
- Insurance Europe believes that any adaptations to digital business models should focus on aggressive base erosion and profit shifting (BEPS) rather than on challenging the existing international tax system as such.
- The OECD's initial proposals go far beyond the mere taxation of digital business models and would lead to fundamental changes in the existing international tax system. Both pillars of the proposal are too vague at this stage and would therefore result in significant legal uncertainty and increased administrative burdens for taxpayers and tax authorities.
- The innumerable problems resulting from such a profound change to the international tax system have not adequately been considered yet and Insurance Europe believes that this should be done before any legislative action is taken.
- The consultation suggests it is possible that proposals under both Pillar 1 and Pillar 2 be introduced. Insurance Europe does not see how this could be achieved without it resulting in double taxation.
- The various problems and questions listed in this paper are reflective of the complexity of the OECD's proposals. Due to the early stage of the draft and the related uncertainties, Insurance Europe would appreciate a continuous exchange of ideas between the OECD and interested stakeholders throughout the entire consultative process.

At this stage, Insurance Europe has the following fundamental concerns relating to the various proposals made and would urge the OECD to consider them in its ongoing work:

Comments on the revised profit allocation and nexus rules (Pillar 1)

- Profits will not be measured on the same basis between different countries, as they will typically be based on the accounting standards applied in each territory. Whilst a common accounting basis may be used for a group's consolidated results, different bases may be used for tax purposes. This will

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result in mismatches, which will then lead to double taxation. This issue is particularly important for the insurance business, which can be very long-term. Irrespective of the accounting basis used, the same overall profit (or loss) will arise over the life of the contract. However, the profit (or loss) arising on an annual basis may be very different. There is then a clear risk of a mismatch between the recognition of profit under the "income inclusion" rule when no actual tax has yet been incurred.

- The Marketing Intangibles or Significant Economic Presence proposals could result in a large increase in taxable establishments of insurers, especially as wholesale insurers often underwrite risks where the policyholder is unable to find coverage in their home jurisdiction. The impact would be a greater administrative burden and more multinational transfer pricing disputes between the relevant tax authorities, placing more pressure on tax authorities. The position of insurance brokers, who act as principals for other customers would also need to be addressed. Insurance Europe also points out that the application of the Marketing Intangibles or Significant Economic Presence methods could result in taxation contrary to the EU Treaty.

Comments on the global anti-base erosion proposal (Pillar 2)

- The rules proposed by the OECD until now are too general and would apply to a much broader set of business models than the digital-driven ones. Because insurers are already subject to a large number of strict regulatory requirements in all jurisdictions, it may be necessary to carve out the insurance sector from any new measures introduced by the OECD's work on digitalisation.
- For insurers, digitalisation offers different means to run their business, but it does not change the intrinsic nature of their operations. In particular, the large majority of insurers' activities require a local presence for regulatory reasons. In this context, the OECD's anti-base erosion proposals could override the arm's length principle and result in a conflict between the regulatory and taxation position of insurers. This is because the arm's length principle is implicit in the regulatory basis for insurance companies. Insurance Europe believes that dealing at arm's length should not be abolished or replaced by other rules, as it currently functions well in the insurance business.
- As currently envisaged, the OECD's proposals would result in the weakening of the Tax Territoriality Principle, the consequences of which would go further than the OECD's initial objectives; this would create legal uncertainty.
- The OECD's proposals do not include any discussion as to how losses should be dealt with. The way in which losses will be reflected in the proposals and in particular the "income inclusion" rule needs to be addressed. Losses can arise in insurance both in respect of large claims event in a single year, eg, earthquake and in respect of timing matters, eg, start-up costs.
- Related parties only require a 25% shareholding. Joint venture arrangements are common within the insurance industry, and in some territories are the only way in which a foreign entity can access a market. The commercial agreements governing joint ventures will place specific limits on the activities that shareholders can undertake (including on the rights and ability to extract profits from the joint venture). The Pillar 2 proposals therefore need to address commercial situations where an overseas entity's activities are not wholly within the control of the related shareholders.
- Clear, practical and timely dispute resolution will be required to ensure that the proposals do not result in double taxation. The consultation does not give any details as to how the proposed "co-ordination or ordering rule" would work.
- The various provisions of the BEPS Action Plan, a widely-adopted project that reformed international taxation, have only recently been implemented in national law, so that countries have not had time to form a complex view on the practicalities and the effects of these new rules. Introducing additional rules in this context could prove to be detrimental.