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**Committee of Experts on International  
Cooperation in Tax Matters  
Twenty-third session**

Virtual meeting of 19 - 29 October 2021

Item 5(c) of the provisional agenda

**Issues related to the United Nations Model Double Taxation Convention between Developed and Developing Countries**

**Work Plan relating to the United Nations Model Double Taxation  
Convention between Developed and Developing Countries**

***Summary***

The Economic and Social Council's mandate to the Committee of Experts requires it to "keep under review and update as necessary" the United Nations Model Double Taxation Convention between Developed and Developing Countries (the UN Model). The Committee approved a substantial update to the UN Model at its 22<sup>nd</sup> session. However, the last membership of the Committee identified a number of issues relating to the UN Model that remain outstanding. It recommended that this membership of the Committee should consider working on those issues.

The Committee is asked to decide whether and how it wishes to pursue work that would lead to an update of the UN Model (while potentially leaving open the question of when such an update would be finalized). This note further describes the issues identified by the last membership of the Committee as potential areas for future work relating to the UN Model. It requests that the Members of the Committee identify any issues, in addition to those identified by the prior membership of the Committee, that should be addressed and to determine what items should be prioritized in pursuing this work. Finally, the Committee is asked to decide whether to establish a Subcommittee on the Update of the UN Model, as has been the practice in the past, to carry forward the work and, if so, to agree on the composition of, and a mandate for, the Subcommittee.

## Introduction

The *United Nations Model Double Taxation Convention between Developed and Developing Countries* (the UN Model) was first published in 1979 and revised in 2001, 2011 and 2017. The Committee is charged by the Economic and Social Council to “keep under review and update as necessary” the UN Model and the *Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries* (the Manual).<sup>1</sup>

2. At its 22<sup>nd</sup> session in April 2021, the Committee approved a substantial revision of the UN Model that includes the addition of Article 12B on income from automated digital services as well as other important changes to the treaty text and commentaries dealing with collective investment vehicles, pension funds and real estate investment trusts, offshore indirect transfers and permanent establishments. However, the last membership of the Committee identified a number of issues relating to the UN Model that remain outstanding and recommended that this membership of the Committee should consider working on those issues. Accordingly, the provisional agenda developed during the last (the 22<sup>nd</sup>) session of the Committee referred to those issues in item 5(c).

3. The Committee is asked to decide how it wishes to pursue work that would fulfil the Committee’s mandate with respect to updating the UN Model. This note also describes the issues identified by the last membership of the Committee as potential areas for future work relating to the UN Model. It invites the Members of the Committee to identify any issues, in addition to those identified by the prior membership of the Committee, that should be addressed, and to determine what items should be prioritized, in pursuing this work. Finally, the Committee is asked to decide whether to establish a Subcommittee on the Update of the UN Model, as has been the practice in the past, and, if so, to agree on a mandate for the Subcommittee.

### The inclusion of computer software in the definition of royalties

4. The provisional agenda includes this issue as a separate item 5(c)(i) because it had progressed further than the other issues that were referred by the last membership of the Committee (and discussed below). The purpose of including a specific reference to computer software in the definition of royalties would be to expand the scope of article 12 beyond payments relating to the use of a copyright in the computer software. The importance of such a change has only increased as a result of other changes to the UN Model made at the 22<sup>nd</sup> session of the Committee, as discussed in paragraphs 8 to 10 below.

5. A detailed history of the Committee’s discussions of the issue from the ninth Session of the Committee in October 2011 to 2020 is contained in [E/C.18/2020/CRP.13](#) (i.e. the paper presented for the Committee’s 20th Session in June 2020). At the 21<sup>st</sup> session of the Committee of Experts on International Cooperation in Tax Matters, the Committee discussed note [E/C.18/2020/CRP.38](#) (Inclusion of Software Payments in the Definition of Royalties). In particular, that note included a draft change to the definition of royalties to include a reference to computer software, along with a discussion of the pros and cons of including the change. However, it did not include a draft Commentary explaining the need for, and effect of, the addition to the definition. Accordingly, at the 21<sup>st</sup> session, the Committee agreed that continued work on the issue would be carried on by the Subcommittee on the basis of a paper to be prepared by the Secretariat. The report of the 21<sup>st</sup> session notes:

45. That paper would include proposed Commentary and could also include changes to the proposal intended to address technical issues, such as the treatment of software that forms part of tangible goods and the fact that the domestic law of some States differed on the question of whether the transfer of software to an end-user should be considered as the acquisition of property or as a license.

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<sup>1</sup> Options relating to the update of the Manual are discussed in E/C.18/2021/CRP.23.

6. Between the 21<sup>st</sup> and the 22<sup>nd</sup> sessions of the Committee, the Subcommittee on the Update of the UN Model produced multiple drafts of treaty text and Commentary, including a public discussion draft. The Subcommittee described its work in [E/C.18/2021/CRP.9](#) as follows:

3. During its meetings, the Subcommittee considered a number of technical issues relating to the proposal itself, as anticipated in the directive from the Committee, as well as with respect to the Commentary. These issues generally relate to the treatment of computer software that is embedded in physical goods or that is bundled with the acquisition of other goods and services, which requires line-drawing between Article 12 and Articles 7, 12A, 12B and 14. Although the Subcommittee had productive discussions around these issues, there was not sufficient time to draft a full Commentary on which the Subcommittee could agree; therefore a majority of the members of the Subcommittee believe that further technical work is necessary before the Committee can make an informed decision as to whether to adopt the proposal.

4. Accordingly, a majority of the Subcommittee found that they could not recommend that the proposal and its Commentary be adopted in its current form. However, because some countries already include computer software within the definition of royalties in their bilateral treaties, it was believed that it would be useful for the technical work to continue. They also believe that the work that has been done, reflected in the draft Commentary, should not be discarded. At the same time, it must be noted that a minority of the participants in the Subcommittee disagree with the proposal to include computer software in the definition of royalties as a matter of principle. On the other hand, a minority of the participants in the Subcommittee would adopt the modified proposal and Commentary in its current form; if the Committee does not adopt the proposal, those members of the Committee would want to include a minority view in the Commentary on Article 12, as described in Section 3 of the note, in the 2021 version of the UN Model.

7. Discussions during the 22<sup>nd</sup> session of the Committee reflected the various positions expressed by the Subcommittee. They are described in the following excerpt from the report of that session:

17. Ms. Peters then turned to the one remaining open issue under agenda item 3 (b), as presented in note [E/C.18/2021/CRP.9](#), the issue of whether the definition of royalties in article 12 of the Model Convention should be revised to refer explicitly to payments for computer software. Such an addition would expand the scope of article 12 beyond payments relating to the use of a copyright in the computer software. She invited the secretariat to summarize the work that had been done by the Subcommittee since the twenty-first session of the Committee, including three meetings and the release of a public discussion draft in February 2021.

18. Ms. Peters asked the Committee to consider first the threshold question of whether it could agree to include the proposed change to the treaty text and the proposed changes to the commentary set out in section 2 of the note. While some members of the Committee expressed the view that the technical work in the proposed commentary was sufficiently advanced to be included in the 2021 Model Convention, other members believed that more work was necessary, especially regarding the treatment of software embedded with other goods and services and the interaction of the proposed change to article 12 with articles 12A and 12B. Observers who intervened in the discussion similarly expressed views on either side of the issue.

19. With no majority of the Committee in favour of making the change to the definition of royalties, no change was made. Ms. Peters then turned to the second issue, that of a minority view to the commentary on article 12 expressing support for the modification of the definition of royalties to include payments for computer software, as described

in section 3 of the paper. After discussion, it was agreed that the new paragraph would be included with minor modifications and the commentary would state that it was supported by a large minority of the Committee. The Committee also agreed on the wording of an elaboration on the existing minority view included in the current paragraph 12 of the commentary on article 12 of the Model Convention.

20. Finally, the Committee supported a recommendation to the next membership of the Committee that it continue to work on the issue, on the basis of the technical work reflected in note [E/C.18/2021/CRP.9](#).

8. The addition of Article 12B (Income from automated digital services) to the UN Model increases the importance of this issue. Under Article 12B, if a consumer accesses computer software from the cloud (without downloading the software to his own computer), the source State would have a right to tax payments made for that access. However, if the consumer were to download the software for his own use, the source State would not have such a taxing right over payments made by the consumer because the payment would not fall under either Article 12B (because not to procure a service) or under Article 12 (because not for the use of a copyright in the software, as described in the Commentary to that Article). This discontinuity in treatment creates traps for the unwary and should be addressed.

9. The addition of a new minority view described in paragraph 19 of the report of the 22<sup>nd</sup> session also increases the need for a resolution of this issue. That minority position, included in the Commentary to Article 12, reads as follows:

15. In the view of a large minority of the Members of the Committee, Article 12 should allow for source State taxing rights even in cases where the user of computer software is not exploiting the copyright in the software. In their view, Article 12 is intended to cover payments for the letting of property, which is broader than use of the copyright. For example, if a company that is a resident of State S uses in its business human resources software that is owned by a company that is a resident of State R, payments made for that use would not be covered by the current definition of royalties in paragraph 3 of Article 12. In their view, Article 12 should address circumstances in which the owner of the computer software earns profits from letting another person use that computer software, without having the owner establish any presence in the state where it is used, or where the user resides, which would satisfy the requirements of Article 5 for the existence of a permanent establishment. In the view of those Members, a person that is making payments for the use of, or the right to use, computer software is making a payment in consideration for the letting of that intangible property just as a person that is making payments for the use of industrial, commercial or scientific equipment (already included in paragraph 3) is making a payment in consideration for the letting of tangible property.

States sharing this view may want to include at the end of paragraph 3 the following sentence:

The term also includes any consideration for the use of, or the right to use, any computer software, or the acquisition of any copy of computer software for the purposes of using it.

Although this minority view describes the arguments in favor of including such a provision, it does not address the technical issues referred to in paragraph 3 of [E/C.18/2021/CRP.9](#) (excerpted in paragraph 6 above). Accordingly, the scope of the provision, particularly as to its application to software embedded in physical products or used in connection with a contract for services, is unclear. Revising and finalizing the guidance in [E/C.18/2021/CRP.9](#) therefore is a matter of some urgency as it can be

expected that some countries will begin to adopt in their bilateral treaties the language included in the minority view.

10. Finally, during its discussions on computer software, the Subcommittee identified some ambiguities regarding the scope of Article 12A and its potential overlaps with Articles 12, 12B and 14. Providing clarity regarding the scope of these provisions is important because the rules regarding source State taxation could differ as among the different articles. This guidance could be developed in conjunction with work on Article 12.

11. Because this work is well advanced, it is anticipated that it could be completed by 2023.

#### **Other technical issues referred by the prior membership**

12. The prior Subcommittee on the Update of the UN Model had identified a number of other issues that could potentially result in changes to the UN Model, including its Commentaries, but that the subcommittee was not able to address during the last membership of the Committee. These appear in the second section of [E/C.18/2020/CRP.37](#), which was discussed at the 21<sup>st</sup> session of the Committee. The Committee recommended that these issues be considered by the next (this) membership of the Committee, but did not suggest the relative priorities to be given to each of the issues.

13. The following issues were set out (and described in more detail) in [E/C.18/2020/CRP.37](#):

- (a) Article 5 (6) of the United Nations Model Double Taxation Convention between Developed and Developing Countries, Permanent establishment with respect to insurance activities, including the treatment of reinsurance;
- (b) Article 3, reference to the mutual agreement procedure for interpretation of undefined terms;
- (c) Commentary on articles 7, 9 and 25, self-initiated adjustments;
- (d) Time limits for profit adjustments under articles 7 and 9;
- (e) Changes to article 25 (Mutual agreement procedure);
- (f) Amendments to the commentary on article 15 related to payments made upon termination of employment;
- (g) Clarifications on the application of article 17 (Artistes and sportspersons);
- (h) Tax treaty issues relating to emissions permits/credits;
- (i) Possible issues related to article 1 (2) dealing with transparent entities;
- (j) Application of the Model Convention to sovereign wealth funds;
- (k) Treatment of accrued interest in the commentary on article 11;
- (l) Tax treaty provisions related to the exploration and extraction of natural resources;
- (m) To what extent a tax treaty can result in increased taxation;
- (n) Whether the mutual agreement procedure should deal with issues that had already been decided by the courts of one of the States (i.e., it is noted in note [E/C.18/2020/CRP.37](#) that, while the commentary on article 25 already indicates that the competent authorities of a

contracting State may be constrained by a court decision rendered in that State, it suggests that access to the mutual agreement procedure cannot in that case be denied without the situation of the other competent authority being directly addressed. It has been suggested that this question should be examined);

(o) Whether article 8 should be fundamentally revised, including as to the treatment of shipping income from international traffic;

(p) Interaction between article 21 (3) and the source rule of article 18, alternative B.

14. During the discussion of this topic at the 22<sup>nd</sup> session, the Committee discussed other possible issues that could be considered by this membership. For example, the Committee had not been able to finalize a redraft of article 13(6) which had been prompted by the consideration of transfers of shareholdings by transparent entities, as discussed in note [E/C.18/2020/CRP.33](#). One additional substantive topic, a fresh look at the attribution of profits under article 7 with a view to simplification and reducing disputes, was suggested by a Committee member. An observer suggested that the Committee work on the development of a United Nations multilateral instrument to implement changes to the Model Convention, in particular the addition of article 12B, but there was no support from the Committee for that suggestion.

15. The Committee is invited to consider the topics set out in paragraphs 12 and 13. In particular, the Committee is asked to consider the following questions:

- Are the issues described in those paragraphs important to developing countries so that they should form part of the work of the Committee?
- Are there additional issues relating to the UN Model, including its Commentaries, that are not described in those paragraphs but that are important to developing countries so that they should form part of the work of the Committee?
- Which of those issues should be given priority in the Committee's work programme?

### **Recommendation**

16. In light of the Committee's conclusions with respect to the questions set out in paragraph 15, the Committee is asked to decide how it will fulfil its mandate to keep the UN Model under review and update it as necessary. Throughout its last several memberships, the Committee has established a Subcommittee to consider possible changes to the UN Model, although the work of other subcommittees (such as the Subcommittee on Tax Issues related to the Digitalization of the Economy during the last membership) has also led to such changes. The Committee therefore is asked to decide whether to establish a Subcommittee on the Update of the UN Model.

17. If the Committee decides to establish such a subcommittee, it is also asked to agree on the criteria for participation in the subcommittee. In the past, the subcommittees focused on the update of the UN Model have consisted only of members of the Committee, other government officials and representatives of other international organizations. This structure has worked well and it is recommended that the same approach be adopted during this membership of the Committee. However, there are several potential topics (for example, computer software, international shipping, insurance) where early technical input from stakeholders might be advisable. For those topics, the Committee might want to encourage the establishment of working groups to facilitate such input without changing the composition of the Subcommittee itself.

18. The Committee is also invited to discuss the possible timing of an update to the UN Model. The frequency of updates has varied over time. Alternatively, the Committee could decide not to make a decision in that regard at this time, but to wait until a later date, after the Committee has agreed on changes to be made to the UN Model, so that it can consider whether those changes justify the publication of a new version.

19. If the Committee decides to pursue work on the UN Model through a subcommittee, it may want to keep in mind the mandate of the Subcommittee on the Update of the UN Model during the last membership, which read as follows:

The Subcommittee is mandated to consider, make recommendations and provide proposed drafting for the next update of the United Nations Model Double Taxation Tax Convention (the Update) focusing on issues of the most relevance to developing countries.

The Subcommittee will report to the Committee at its sixteenth session in 2018, and at each session thereafter, with a view to finalizing its work no later than the twenty-first session in 2020.

20. The mandate above allowed the Subcommittee some flexibility to address emerging issues that arose during the course of its membership of the Committee. If the Committee decides to establish a Subcommittee on the Update of the UN Model, it is asked to consider for approval the following possible mandate, which adopts the same flexible approach:

The Subcommittee is mandated to consider, make recommendations and provide proposed drafting for the next update of the United Nations Model Double Taxation Tax Convention (the Update) focusing on issues of the most relevance to developing countries.

The Subcommittee will report to the Committee at its twenty-fourth session in 2022, and at each session thereafter, with a view to making a recommendation on the timing and content of the Update no later than the twenty-ninth session in 2024.

In undertaking its work, the Subcommittee shall consult broadly and seek to engage with academia, international organizations working in the field, civil society and business stakeholders.