UNIVERSITA' DEGLI STUDI DI PADOVA

DIPARTIMENTO DI SCIENZE ECONOMICHE ED AZIENDALI
"M.FANNO"

DIPARTIMENTO DI DIRITTO PUBBLICO, INTERNAZIONALE E
COMUNITARIO

CORSO DI LAUREA MAGISTRALE IN
BUSINESS ADMINISTRATION

TESI DI LAUREA

DIGITAL TAXATION: HOW DOES THE ITALIAN VERSION COMPARE TO THE OECD's?

RELATORE:

CH.MO PROF. MARCELLO POGGIOLI

LAUREANDO: LUDOVICO MUSSO PIANTELLI

MATRICOLA N. 1206757

ANNO ACCADEMICO 2019 – 2020

Il candidato dichiara che il presente lavoro è originale e non è già stato sottoposto, in tutto o in parte, per il conseguimento di un titolo accademico in altre Università italiane o straniere.
Il candidato dichiara altresì che tutti i materiali utilizzati durante la preparazione dell'elaborato sono stati indicati nel testo e nella sezione "Riferimenti bibliografici" e che le eventuali citazioni testuali sono individuabili attraverso l'esplicito richiamo alla pubblicazione originale.

The candidate declares that the present work is original and has not already been submitted, totally or in part, for the purposes of attaining an academic degree in other Italian or foreign universities. The candidate also declares that all the materials used during the preparation of the thesis have been explicitly indicated in the text and in the section "Bibliographical references" and that any textual citations can be identified through an explicit reference to the original publication.

Firma dello studente

____

TABLE OF CONTENTS

Introduction…………………………………………………………………….……..1

Chapter I: The digital transformation of the economy……………………5

1.1 The digital market……………………………………………………………5

1.2 Digital Business Models…………………………………………………….....7

1.3 Why the taxation of digital multinationals is a problem ……………….…………9

Chapter II: Addressing the Tax Challenges of the Digital Economy…...12

2.1 G20 and the BEPS Project……………………………………………………..12

2.2 OECD/G20 BEPS Project, Action 1…………………………………………..15

2.3 The road to a consensus-based long-term solution……………………………17

2.3.1 Three proposals for new profit allocation and nexus rules……………………18

2.4 The OECD Programme of Work to Develop a Consensus Solution…………………..21

2.4.1 Pillar 1– The Unified Approach……………………………………………24

2.4.2 Pillar 2 – The GloBE Proposal……………………………………………...31

2.5 Evidence and analysis of combined effects of Pillar 1 & 2……………………………36

2.5.1 Understanding the reallocation of profit under Pillar 1………………………40

2.6 A critical analysis of the OECD Digital Taxation……………………………………..43

2.7 The European Commission (EC) Digital Services Tax Proposal……………………...48

2.8 How the European Countries are moving on Digital Services Taxes…………………50

2.8.1 USA vs Europe……………………………………………………………..52

2.9 Key issues regarding the legality of Digital Taxes in Europe…………………………54

2.9.1 Potential discrimination claims……………………………………………..55

2.9.2 State Aid Violations…………………………………………………………...57

2.9.3 The Legal Relevance of Intent………………………………………………...58

2.9.4 Proportionality analysis……………………….…………………………….....59

2.10 The relevance of recent decisions by the Court of Justice of the European Union on Digital Taxes……………………………………………………………………………60

Chapter III: The implementation of the Italian Digital Tax……………...63

3.1 The long course of the Italian Digital Tax implementation……………………...…...63

3.1.1 Italy's 2013 Web Tax……………………………………………………….63

3.1.2 The 2015 Web Tax…………………………………………………………….65

3.1.3 The "Transitional" 2017 Web Tax…………………………………………….65

3.1.4 The Italian Digital Services Tax (DST)……………………………………….67

3.2 A critical analysis of the Italian DST………………………………………………….70

3.3 A comparison between the Italian DST version and the OECD's proposals………….74

3.4 RPA-I: an interesting proposal for the future………………………………………….78

Conclusion……………………………………………………………………..80

References……………………………………………………………………...84

Figures

Figure 1. Defining, Conceptualising and Measuring the Digital Economy……………..……..6

Figure 2. The BEPS Project……………………………………………………………..13

Figure 3. Regional Composition of the OECD/G20 Inclusive Framework…………………..14

Figure 4. OECD Two-Pillar Approach……………………………………………………….21

Figure 5. Pillar One - Unified Approach……………………………………………………...24

Figure 6. Pillar Two - GloBE Proposal……………………………………………………….31

Figure 7. Combined effects of Pillar One and Pillar Two……………………………………37

Figure 8. The revenue gains across income groups…………………………………………..38

Figure 9. Extra CIT revenue gains…………………………………………………………39

Figure 10. A case of reallocation of multinational profits………..…………………………..40

Figure 11. Profit reallocation results……………………………..……………………...41

Figure 12. Announced, Proposed and Implemented Digital Services Taxes in Europe……...51

Introduction

The international tax law is a creature of domestic provisions and a series of bilateral or multilateral tax treaties between sovereign countries. International agreements are particular important in corporate taxation as they regulate the power to tax of source and residence countries avoiding international double taxation.

The taxation system we are working with today and the traditional permanent establishment (PE) definition largely ran off notions invented in 1920s. At that time generally enterprises were making money in a given jurisdiction thanks to a fix place of business with real assets and people operating from there.

And still today there are two general limitations on source taxation of business profits. On one hand, states can tax non-resident companies only if the company has a PE on their territory and on the other, if a non-resident has a PE in a source state, that state can tax only the income attributable to that PE. The source state consider the PE as an independent legal entity calculating an “arm’s length” income through the use of widely adopted transfer pricing guidelines.

Nonetheless, the most successful current digitalised business models rely on: scale without mass, intangibles, data and user participation trough social networks, collaborative consumption, e-commerce and cloud. All these new sources of value creation are dramatically mining the global tax system equilibrium.

Additionally lack of coordination and non-transparency in national legal regimes led to gaps and tax competition between states. This environment provided unique opportunities for multinationals to implement aggressive tax planning and profit shifting among jurisdictions.

Although governments were aware of these unresolved issues they did not undertake fundamental reform of the taxation of multinationals. For example, European countries welcomed for several years investments, productive factors and jobs, tolerating a certain amount of income erosion.

At the same time these dynamics made U.S. companies more competitive and U.S. shareholders richer. Consequently no stakeholder was complaining about tax avoidance.

After the 2008 crisis, countries started addressing tax planning problems because they were facing budgetary shortfalls. Politicians could no longer take this indulgent attitude towards corporate tax avoidance. Ordinary people were feeling the pain of the crisis and they started to

pretend corporations to pay their fair share of tax within countries where they were creating value and profit.

The ongoing Covid-19 crisis has increased these feelings even more. Companies like Amazon, Netflix and Zoom are stronger and profitable than ever while countries are facing difficulties in improving their healthcare systems and social protection.

Today the debate has reached an acute phase around how to redefine the concept of taxable presence and how much corporate profit should be allocated to the market countries.

This work critically analyses current proposals of international tax reform comparing two different approaches.
On one hand, a multilateral approach which suggests to address modern tax challenges through a consensus based solution; on the other hand the unilateral approach based on independent initiatives carried on unilaterally by sovereign countries.

In addition to the present introduction, this study is organized in three chapters and a conclusion as follows.

The first chapter is about the dramatic transformation of the entire economy and society due to the digitalisation process. This last revolution had a huge impact also on the way of conducting business, on the labour market and regulations.
It inevitably affected international taxation as well. This initial part of the thesis describes the characteristics of big tech companies and how internet and digitalization have changed their business models which less and less rely on permanent establishments. The notion of fixed place of business has moved away and the supply chain of multinationals has changed. As these digitalised multinationals can reach anyone with an internet connection anywhere on the planet, it’s getting harder for countries to track who is doing business with their citizens.

Then, there is an overview of the main problematics related with the taxation of these groups whose smartest tax directors have shown a brilliant creativity in minimizing their tax bills around the world without violating the law of any state.

The second chapter describes the role of supranational players as the OCED, the G20 and the European Commission in the debate for finding a comprehensive consensus based solution to tax the digital economy and to restructure international tax principles.

A radical tax reform addressing the challenges arising from the digitalisation of the economy is being discussed and two main problems have been individuated.

The first issue is the rise of digital technologies that are enabling several companies to reach cross borders customers without local employees offices or operations in market jurisdictions. Non-physical commercial arrangements are used by multinationals to blatantly avoid tax nexus in source states. This fact is creating some concerns about the adequacy of taxable physical presence and nexus rules.

So far, policy responses to this have been: OECD's Pillar One - Unified Approach, unilateral Digital Services Taxes (DSTs) and virtual permanent establishment rules. Italy as well, has implemented its own version of DST to extract some money from companies that are considered to be earning a conspicuous amount of money from Italian market but do not pay much taxes because of the outdated international tax system.

The second critical problem is related to the growing importance of intangible assets, like software and patents, as significant value drivers in the worldwide economy. These intangible properties can be easily moved by one jurisdiction to another without sustaining troubles and costs typically associated with a factory relocation. Most of these assets are shifted to lower tax jurisdictions. This instead is rising discussions of minimum tax policies like OECD's Pillar Two - GloBE Proposal and the U.S. GILTI.

After a brief introduction of BEPS Project, Action 1 is articulated under the OECD Inclusive Framework proposals: the "Unified Approach" and the "GloBE Proposal". There is also a critical analysis of these OECD guidelines, a study of profit reallocation mechanisms under Pillar One and a quantitative estimation of the combined effects of Pillar One and Two.

Then, the European Commission Digital Services Tax (DST) proposal is illustrated since several member states, including Italy, have based their unilateral DST on it.

The last part of this chapter focuses on explaining how the European digital tax could be challenged by the taxpayer with reference to possible EU law violations (nationality discrimination, fundamental freedoms principles, state aid doctrine).

The third chapter presents Italy as one of the first European countries to think about taxing the digital economy with sector-specific tax and summarises the history of the Italian Web Tax. After, it is reported the implementation of the Italian DST in the Italian Budget Law for 2020 and how much the Italian Government is expecting to rise in tax gain.

Even on this proposal a critical analysis is available. It is useful to compare the Italian version of digital taxation with the OECD's in order to note the main differences and criticalities.

Finally the Residual Profit Allocation by Income (RPA-I) is proposed as an interesting proposal that I consider of vital importance for the future reorganization of international taxation.

The conclusion expresses the impossibility of ring-fencing the digital economy in the overall tax reform, clarifying how negative and dangerous would be the proliferation of unilateral measures targeting multinationals operating only in the digital sector.

It also explores what seems to be the most probable scenario for 2021, underlying the taxpayers' needs for certainty and details and therefore a long term overview for future negotiations at an OECD level.

Chapter I

The digital transformation of the economy

1.1 The digital market

Twenty five years ago, the phenomenon of digitalization emerged on the scene causing a tremendous transformation of the existing industries, changing the nature of innovation, of product development and of our interactions. This process revolutionized the structure and the organization of our lives, giving a new order to the economy and the society.

Connectivity, "smart" digital services, Information and Communication Technologies (ICTs) are profoundly influencing human relationships and markets. One of the most disruptive changes regards the players' capacity to move easily across sector and industry borders. Increasingly, industries are blurring their boundaries and they are integrating different attributes to create new disruptive business models. Researches "*show that an emerging set of digital ecosystems could account for more than $60 trillion in revenue by 2025, or more than 30% of global corporate revenue*".[1]

Digitalization is registering a strong growth (15-25% per year) especially in the global South of the world. Roughly speaking, the digital economy is making up around 5% of global GDP and 3% of global employment.[2]

According to the International Monetary Fund the Digital Economy can be considered, in a broad sense, as the entire set of activities based on digitalised data and online platforms.[3] The economy is going digital through the widespread diffusion of information technologies. Today in fact we are surely used to talk about the "digitalised economy" when we are referring to the widest definition of the economy. (see Figure 1, "Defining, Conceptualising and Measuring the Digital Economy"[4]).

---

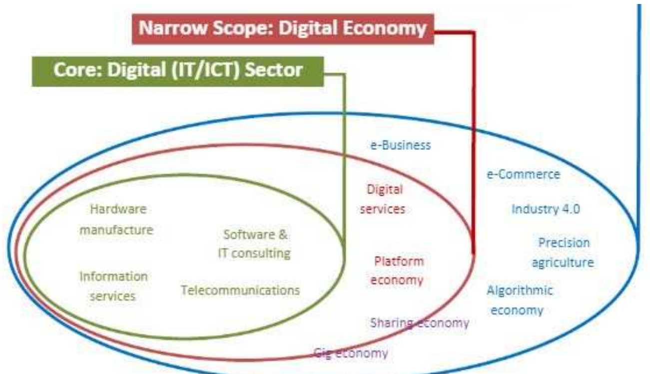
[1] Hirt Martin, *If You're Not Building an Ecosystem, Chances Are Your Competitors Are*, McKinsey & Company, 12 June 2018. In this article the author is describing the fast growing and the complexity of digitalised ecosystem and he underlines how much is important management's intuitiveness.

[2] World Economic Forum, *Expanding Participation and Boosting Growth: The Infrastructure Needs of the Digital Economy*, March 2015.

[3] International Monetary Fund, *Measuring the Digital Economy*, Staff Report, February 28, 2018.

[4] Manchester Centre for Development Informatics, *Defining, Conceptualising and Measuring the Digital Economy*, Paper No. 68, R. Bukht & R. Heeks, 2017.

Figure 1. Defining, Conceptualising and Measuring the Digital Economy



***Source**: Manchester Centre for Development Informatics, Paper No. 68, R. Bukht & R. Heeks, 2017.*

Online networks, smart phones, sensors are producing massive volumes of data supported by surprisal storage capacity, algorithms and stronger computing power. Traditional sectors, like manufacturing and car industry, are being transformed and digitalized through innovations.

There are plenty of opportunities offered by the digitalised economy and as a consequence relevant challenges need to be addressed.
For example, digitalization has a positive impact on companies in term of efficiency, cost and time savings in their operational and development processes. Data driven decisions are the new oil of the corporate decision making process. Business Intelligence and advanced data analytics are disrupting the common structure of conventional business models and value creation theories.

E-commerce, digital companies, cloud computing are creating monopolies in the digital market that still remains highly competitive and volatile. Continuous adjustments and investments in R&D are needed to compete and maintain a durable competitive advantage.
This revolution has radically changed the way of doing business confusing limits and roles of producers and customers. Furthermore, the labour market has also been revolutionized by automation and virtual intelligence.

"*Digital goods are mobile and physical presence of a company in the market country is often not needed*".[5] Intangible properties (patents, licences, brands, trademarks, copyrights…) are the assets that play the most important rule in business models focused on deep use of technology.

[5] HADZHIEVA, E., *Impact of Digitalisation on International Tax Matters*, Study for the Committee on Financial Crimes, Tax Evasion and Tax Avoidance, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2019. In this paper the author is making an interesting overview of the challenges created by digitalisation on new ways of creating value and of company's organization. She is also

The digital content market is expected to grow at a CAGR of 15% in the forecast period of 2020 – 2024.[6] Artificial intelligence will study consumer behaviours analysing trends and data present in social media channel and blog posts. Brands using AI are expected to gain a sustainable competitive advantage over peers.

The speed of change brought by the digital transformation is clear and it is generating big challenges in the public policy and regulations. The digitalization isn't bringing only a new way of making business but is transforming also traditional principles and laws.

Digitalization has several implications on tax policy and tax administration at both the domestic and international level. New business models in fact create a mismatch between taxation and value creation for digital activities. There is the need worldwide of interim measures and long-term solution.

1.2 Digital business models

Big tech companies (the famous GAFA Companies) seem to be unstoppable with their speed and transformational power. Today, they are really powerful holding data and private information that are providing them with unfair advantage over rivals. Additionally they have discouraged competition in the digital sector through their resources and control.[7] This fact is putting pressure on governments that are called to design and implement new policies that best fit issues brought by the digital age we are living in.

Current international corporate tax rules are not fit for the organizations of the modern global economy and do not intercept business models making profit from digital services in a country without being physically present.

"*Tax rules also fail to recognise the new ways in which profits are created in the digital world, in particular the role that users play in generating value for digital companies*".[8]

In fact, these companies are rapidly evolving their business models following great opportunities like Internet of things, Artificial Intelligence and Blockchain. Their competitive

---

discussing and comparing BEPS Actions, unilateral DSTs and the U.S. proposals.

[6] ReportLinker, *Global Digital Content Market 2020-2024*, June 2020.

[7] Warren E., *Here's how we can break up Big Tech*, March 8, 2019. In this blogpost the author is exploring some suggestions to restore healthy competition through regulations and prohibiting anti-competitive tech mergers.

[8] European Commission, *Fair Taxation of the Digital Economy*, March 21, 2018.

advantage is based on monopoly, network effects and extensive use of data and user-generated content.

The European Commission has studied the business models of the following categories: "*online retailer, social media model, subscription model and collaborative platform model*".[9] Instead, the OECD, identified four business models in its *Interim Report on Tax Challenges Arising from Digitalisation*: multi-sided platforms (Uber, Facebook), resellers (Amazon, Alibaba), vertically integrated firms (Huawei, Amazon) and inputs suppliers (Intel).[10]

Many of them have multiple business line, like Netflix which was a pure reseller at the beginning but then integrated film production into its business model.

However, three main characteristics, mining the foundations and principles of the global tax system, have been individuated in the previously mentioned business models: 1) scale without mass (minimal or no need for personnel or physical establishment to operate in market jurisdiction), 2) reliance on intangibles, 3) data and user participation trough social networks, collaborative consumption, e-commerce, cloud.

It has become very difficult to determine which is the jurisdiction eligible for taxation under the existing criteria and the business in many cases is managed without a physical presence in a country market. "*This makes tax enforcement, collection and identification of business tax functions (people, systems, financial data) difficult*".[11] Additionally, platforms through which are conducted transactions and exchange of services are difficult to be individuated and regulated. Companies, having no PE in a country and relying heavily on intangibles, structure themselves to minimize their tax liabilities and they prevent tax authorities to assess how income from such assets should be identified.

Connected users and devices are constantly generating tons of data that are collected by businesses and governments. In companies wishing to enhance their performance management and to accelerate decision making, data analysis, supported by great traceability networks, is becoming the new oil. Monetizing these data is becoming one of the preferred business models mostly adopted by big tech companies. The challenges for policymakers are complex as the digital economy is massive and still growing.

[9] European Parliament, *Impact of Digitalisation on International Tax Matters*, February 2019.

[10] OECD, *Interim Report on Tax Challenges Arising from Digitalisation*, September 2017.

[11] HADZHIEVA, E., *Impact of Digitalisation on International Tax Matters*, Study for the Committee on Financial Crimes, Tax Evasion and Tax Avoidance, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2019.

Today policy-making is trying to reorganize a new range of tools to regulate the actual situation. In its public consultation on *Fair Taxation and Digital Economy* of 19 March 2018, the European Commission identified four business models in which value creation is not linked to taxation according to existing rules:

- the digital platform mode, granting access to a marketplace, where users offer services among themselves in exchange for either a fee on transactions or a subscription;
- the digital platform model, granting access to content for users in exchange for a fee;
- the social media and advertising model, which typically involves a platform offering access to users for free advertising and other companies to whom the platform sell users' data;
- the distant sales model, where goods are sold via website and then physically delivered.[12]

1.3 Why the taxation of digital Multinationals is a problem

Multinational Enterprises (MNEs) and digital tech giants put into practice aggressive tax planning schemes to shift profits to low tax jurisdictions and avoid to pay fair taxes.
In the past, many of those organizations were put under pressure by Luxembourg Leaks, Panama Leaks and Paradise Papers.
Digital taxation through international consensus on nexus and profit allocation rules is a critical objective. The European Union seems to assume a leading role in the process for reaching an agreement in the international arena. European countries believe that a development of the digital economy is needed in order to expand and exploit its benefits, but they also think that a new approach must be adopted to avoid distortion of competition and of investment decisions.
Marteen de Wilde in his thesis "*Sharing the Pie; Taxing multinationals in a global market*" clarify three distortions in the current international taxation system: "obstacles", "disparities" and "inadequacies". These factors directly influence multinationals' decision on the actual and legal arrangement of their business affairs[13].

---

[12] European Commission, *Fair Taxation of the Digital Economy*, March 21, 2018.

[13] de Wilde, Maarten Floris, *'Sharing the Pie': Taxing Multinationals in a Global Market*, 43 Intertax 438, at 438-446, May 1, 2015. The author argues that countries are adopting diverse unilateral treatments of cross-border and domestic business activities for tax purposes, and that they create "obstacles" in the functioning of international markets. Uncoordinated states' international tax systems create gaps and overlaps producing double tax issues and non-taxation issues ("mismatches" – "disparities"). "Inadequacies" instead rise from outdated and flawed corporate income taxes).

There is the need to change the rules levying taxation of cross border business income and restructure accordingly national laws and international treaties.
The physical presence of a company in the market country is not needed because digital products and services are highly mobile or intangible. The more complex issue in the digital age is when you have transactions that don't recognize borders. This aspect is creating a problem involving the nexus principle of the outdated international tax system.

It's time that the very large digital companies who are occupying larger share of the economy begin to contribute to the public welfare through paying due taxation. These companies headquarter themselves in low tax states in Europe like Ireland, Luxembourg while generating most of their profits in wealthy states like France, Germany, Italy where typically tax rates are higher. Today we tolerate the problematic *that Apple, which earns about 2/3 of its revenue outside the United Nations, paid tax on its European operations at a rate of 0.005 percent in 2014t*".[14]

According to Pierre Moscovici "*digital companies pay an average 9%effective tax rate in the EU compared to other firms that pay 21%*".[15] European policymakers are experiencing political and media pressure and they are trying to address the problem through appropriate measures.

There is a negotiation going on. The point is setting the rules for a fair taxation system in the digital economy where it's difficult to identify the territorial location of a transaction.

The big challenges are indeed regarding civil-legal and economic fairness. The situation must be well managed and regulated because technology companies have typically high capitalization and profits and they tend to pay quite low aggregate global taxes. "*Multinational enterprises (MNEs) earn substantial rents in the current global economy. Governments have an interest in capturing some of these rents for their citizens or national treasuries, and regularly pursue policies to that end*".

At the same time, there is the fear that these actions could lead to economic distortion enhancing tax competitions if MNEs move their activities to low-tax jurisdictions. Meanwhile, countries such as France and United Kingdom introduce unilateral measures to address the digital taxation bringing risks like: economic incidence of taxation on final consumers, distortion of investments and innovation at an international scale.

[14] Taylor Harriet, *How Apple managed to pay a 0.005 percent tax rate in 2014*, August 30, 2016.

[15] European Commission, *Keynote Speech by Commissioner Moscovici at the "Master of Digital" event*, Brussels, 20 February 2018.

None uncoordinated action is recommended, but several technical and political problems have risen since the beginning of negotiations. Uniform measures to tax different digital business models have to deal with double taxation, different legislations, logistical problem tracking the localizations of the users, compliance issues and possible impediment to growth and technological progress.

There are political dynamics behind the digital tax implementation. Even if, the imagined digital tax is not just against or supposed to be toward American Tech Giants, but is toward any company from any country in the world, the U.S.A. Government believes that this formula is discriminatory setting thresholds hitting exclusively their multinationals.
It is evident that very small companies that offer internet services are not taxed at all according to the proposed idea of digital taxes and that the powerful Tech Giants obviously are exercising their influence in America to make their interests.

There is a political discussion that is less about the physical presence in one specific market, it's more about the fact that there is a perception that the market itself is driving value in some way. And this value need to be capture in terms of where companies pay tax.

Various digital tax measures have been created, the frustration grew over time throughout the global international tax systems. Every nation feels the political imperative to move forward with something that will address that issue. And thus various versions of digital services taxes are popping up in a number of jurisdictions. This fact is underlying the current dissatisfaction with the existing international tax system.

Evolution of the arm's principles over the last couple of years is evident: it was pretty much generally accepted from an international tax perspective that contractual rights and ownership of intangible property was really the largest driver in terms of deciding where global international tax profits were allocated amongst legal entities. But now there has been an evolution.

Chapter II

Addressing the Tax Challenges of the Digital Economy

2.1 G20 and the BEPS Project

By June 2012, the G20 Leaders publicly sustained the ambitious Action Plan on Base Erosion and Profit Shifting (BEPS) to fight international tax avoidance. The summer of that year, the work of the OECD on BEPS really began.

In February 2013, The OECD presented a report named "Addressing Base Erosion and Profit Shifting" stating that a set of interplaying rules would have enabled BEPS.[16] The situation was very complicated because domestic laws and rules were not coordinated internationally, policymakers and tax administrations were lacking of relevant information and data. And actually this condition is still in place and in evolution.

Anyway, six key areas of intervention were identified: (1) mismatches in entity and instrument characterization; (2) taxing profits of the digital economy; (3) intragroup financing, with companies in high-tax countries being loaded with debt; (4) transfer pricing issues; (5) anti-avoidance measures like CFC regime; (6) tax heavens and preferential regimes.

These 6 key areas were then broken down into 15 action points. In November 2015, the BEPS package of 15 measures was agreed by all OECD and G20 countries and endorsed by G20 Leaders.[17]

Public and expert advices were requested in order to present as soon as possible concrete possible solutions for closing the gaps in existing international tax rules that currently allow companies to hide or shift profits to low/no tax countries where little or no economic activity takes place.

BEPS are real and serious problems because they can discourage tax compliance of individuals who are reluctant to pay taxes when large multinationals can easily avoid them. Gaps and loopholes between domestic laws of different countries can distort competition by providing

[16] OECD, *Addressing Base Erosion and Profit Shifting*, OECD Publishing, February 12, 2013.

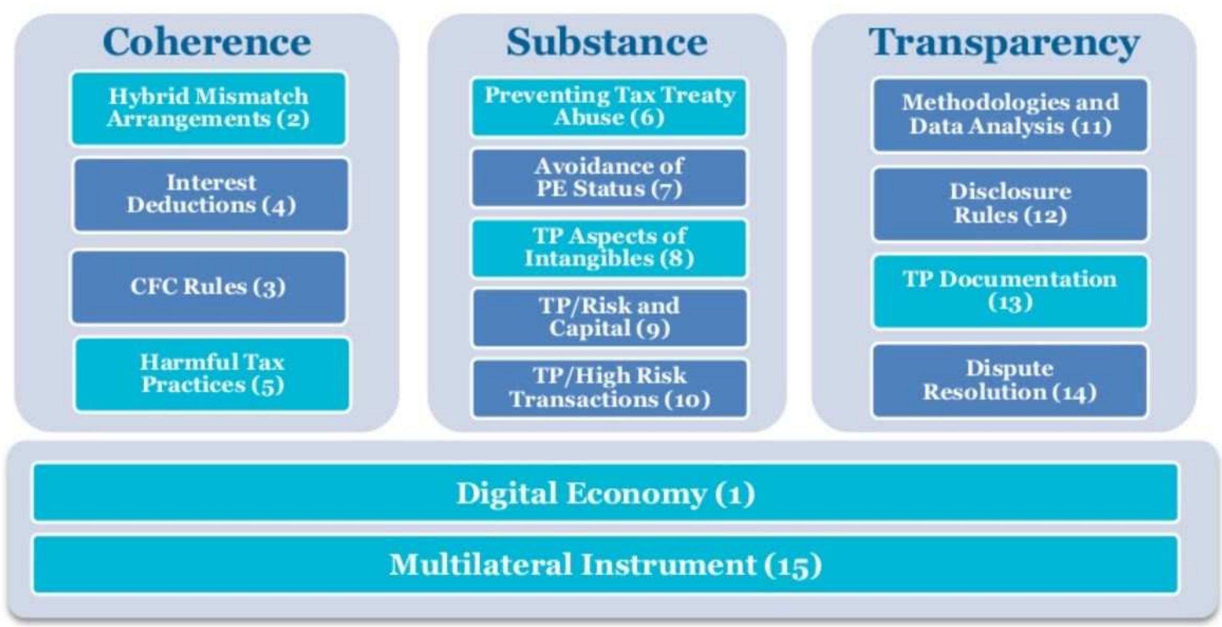
[17] OECD, *OECD/G20 Inclusive Framework on BEPS: Progress Report July 2017-June 2018*, 2018.

international companies with competitive advantage: they affect large enterprises investment decisions solely on the basis of taxation rules convenience.

Nevertheless, BEPS strategies draw their origin from mismatches in tax rules of different jurisdictions and they cost governments a lot of money. The sovereignty of countries and domestic laws are generating these problems. So only an internationally coordinated effort can positively change taxation rules of cross-border profits.

In this thesis I am discussing how the OECD and Italy are interpreting the difficulties that the digital economy poses to international taxation.
In specific my research is about BEPS Action 1: "*Address the Tax Challenges of the Digital Economy*", that is the first of the 15 measures individuated by the OECD Inclusive Framework.[18] Figure 2 provides an overall graphical presentation of the BEPS Project. As I said before, every action is correlated with and influences all the others. Coherence, substance and transparency are the three core principles guiding OECD and G20 countries in laying the foundations of a modern international tax framework.

Figure 2. The BEPS Project



***Source**: OECD/G20, Update on BEPS Project 2014 Deliverables and Beyond, Live Webcast slides, September 16, 2014.*

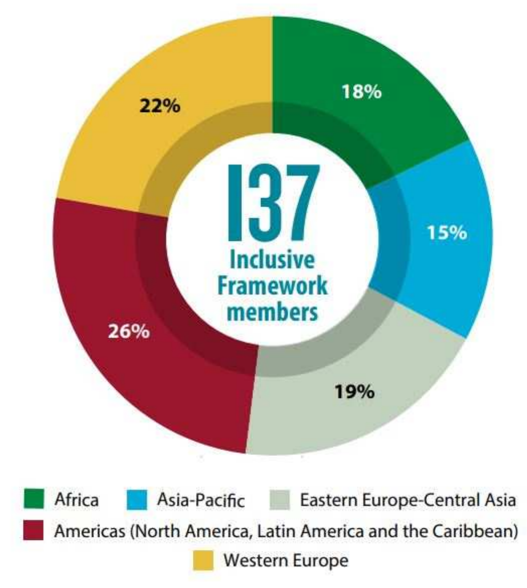
The OECD is trying to take inclusive decisions so that all countries and jurisdictions can benefit from a multilateral approach to tackling tax avoidance while monitoring impacts of their new measures on double-non-taxation and on double taxation.

[18] OECD, *Public Discussion Draft – BEPS Action 1: Address the Tax Challenges of the Digital Economy*, 24 Marche 2014 – 14 April 2014, 2014.

The Organization contributes to make tax planning more transparent and evident for tax authorities concerned and to effectively tax where economic activities really occur. There is a great commitment to understand how rules can be changed by introducing immediate applicable measures, or by rethinking international tax treaties or by adopting new domestic laws. Governments have the responsibility and the pressure to revise the rules.

The BEPS Project, which can be surely considered the most ambitious international tax policy initiative ever undertaken, is using, to accomplishing its missions, a multilateral forum: the OECD/G20 Inclusive Framework.[19] Figure 3 illustrates the representation by region of the IF member countries.

Figure 3. Regional Composition of the OECD/G20 Inclusive Framework



Source: *OECD, OECD/G20 Inclusive Framework on BEPS: Progress Report July 2019-July 2020, 2020.*

Established in 2016, this sort of council currently has 137 members, including 66 developing countries. The membership of the OECD/G20 Inclusive Framework comprises countries and jurisdictions from different geographic regions and reflects economic diversity. Inclusivity and diversity are positively affecting the quality of discussions going on and the high number of adhesions is a sign of great international commitment.[20]

All members participate on equal footing and tangible progresses have been made up to now.

In this Chapter, I will firstly introduce the OECD DST version and how OECD IF is working to change the international taxation system.

Then, I will present the European Commission Digital Services Tax (DST) because several member states, including Italy, have based their unilateral DST proposals on that proposed by the Commission.

[19] The very first Inclusive Framework meeting was held in Kyoto in June 2016. There were more than 100 delegations: G20 countries, G7 countries, developing countries and many jurisdictions were willing to sit at a negotiation table levelling the playing field.

[20] OECD, *OECD/G20 Inclusive Framework on BEPS: Progress Report July 2019-July 2020*, 2020. This report underlines the aim of the OECD to find a comprehensive solution based on assumptions without a prejudice basis.

In the end, in Chapter III, I will study the Italian Digital Service Tax comparing it to the precedents already mentioned.

2.2 OECD/G20 BEPS Project, Action 1

Addressing tax challenges brought by digitalisation, through the BEPS (Base Erosion and Profit Shifting) Project, is a priority for the OECD. In fact, not only legal and regulatory frameworks have been touched by this great change, but also the international tax principles. There is the need to reform tax rules in order to adjust to the evolving modern global economy.

The international tax regime we are dealing with now originated in the 1920s[21]: things have changed since then.
For years, pillars of the global tax system determined where the taxes were due (physical presence based on nexus rule) and the amount of tax to be taxed (profit allocation laws based on the arm's length principle).
MNEs introduced new important phenomena mining the foundation of historical taxation system: scale without mass, reliance on intangible assets and the centrality of data and user participation.

Intangible value drivers changed business model's organization and processes. The allocation of the taxing right on cross border activities of company that have no physical proximity in the target market is a central issue as well as the identification of data managed by big digital companies and their characteristics.

The 2015 *BEPS Action Plan 1 Report on Addressing the Tax Challenges of the Digital Economy*[22] is trying to set the implementation of a new system aiming to solve current disputes over these problems.
The remote intervention of digital activities without a taxable physical presence in the domestic economy is believed to be the central issue in the digital tax debate.

[21] For an historical background, see Ruth Mason, *The Transformation of International Tax* (April 15, 2020), American Journal of International Law, Virginia Public Law and Legal Theory Research Paper No. 2020-36, Virginia Law and Economics Research Paper No. 2020-08.

[22] OECD (2015), *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.

Since now there has been a phase of debates among the main players to decide the future of digital taxation. BEPS actions endeavour to provide remedies for jurisdictions in situation where income is subject to no or very low taxation.
Obviously, countries have different perspectives on the extent and the nature of these challenges and the subsequent implementations of possible measures.

After 2015, a new phase of work and research has been introduced to discuss policy proposals. The most relevant introductions are regarding the concepts of user participation, marketing intangibles, and significant digital presence. All these issues are directly affecting the inevitable change in nexus and profit allocation rules.

On nexus is evident that taxing rights need to go beyond the actual point of reference, the physical presence. "*On profit allocation, the significant economic presence proposal contemplates the use of a fractional apportionment approach with the possibility of using a withholding mechanism for collection while the user contribution and marketing intangible proposals would use a residual profit split approach*".[23]

For the OECD traditional nexus requirement being tied to physical presence just doesn't seem to fit the global economy anymore. Business profit should be taxed in the countries in which value is created, thus where users or customers are located.

The user participation principle (that can be applied to social media platforms, search engines, online marketplace for example) is based on the rationale that users are providing for free data and information that later on are monetized by digital giants. For this reason, states are thinking about a reallocation of profits of relevant businesses in those countries in which users are located.
There is this sense that users are providing real value and that their countries ought to be remunerated for that in some way. The problem is that currently we don't tax inputs into companies production.

The marketing intangible proposal instead (this solution is applicable to a broader range of businesses) treats the link between a market jurisdiction and marketing intangibles related to that jurisdiction.

The tax administration is trying to discuss difficult policy trade-offs, providing certainty and predictability through the use of simplified methods. The debate going on is aiming to ensure a

[23] OECD/G20 BEPS, *Addressing the Tax Challenges of the Digitalisation of the Economy*, Public Consultation Document, 13 February – 6 March 2019.

level playing field between small and large jurisdictions as well as the potential effect of the various options on revenue and taxpayer behaviours.

2.3 The road to a consensus-based long-term solution

I will try to reassume the most important milestones reached by Members of the OECD/G20 Inclusive Framework on BEPS (IF) so far.
There has been a great effort to take into consideration different opinions engaging a broad range of stakeholders (governments, companies, civil society…) to reach a comprehensive, consensus-based solution on the taxation of the digital economy.

October 2015:
BEPS Action 1 - Addressing the Tax Challenges of the Digital Economy.
In this report the concept of digitalization of the economy was clearly defined without providing solutions in terms of corporate income tax or mechanisms ensuring that digital companies would be paying fair shares of taxes where they operate. As a consequence, many unilateral measures crossed the mind of frustrated national policymakers across the world.

March 2018:
Delivery of the Interim Report.
The document showed real progresses and determined common features to be addressed and the analysis of different digital models.

January 2019:
Delivery of Policy Note.
This note expressed the agreement to examine proposals involving a two-pillar approach, Pillar 1 and 2, which could have formed the basis for consensus. This document also introduces something unusual: the fact that, under Pillar 1, solutions would have gone beyond the Arm's Length Principle.

28 May 2019:
Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy.

November 2019:
Public Consultation
Secretariat Proposal for a "Unified Approach" under Pillar One.

December 2019:

Public Consultation

Global Anti-Base Erosion (GloBE) Proposal under Pillar Two.

January 2020:

Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy.

Many tax people thought nothing would have come out of this BEPS Project. But to everybody's surprise, the OECD met its deadlines, and made lots of recommendations including some mandatory recommendations to the OECD countries and the G20 countries.

2.3.1 Three proposals for new profit allocation and nexus rules

Today there are evident distressed trends in the international tax system. On one side there are many tax disputes, unilateral measures and dissatisfaction on allocation of taxing rights. On the other side there isn't a common way to approach highly digitalised MNEs. Currently there are three proposals for the re-allocation of taxing rights from the Inclusive Framework members.

- **The first** (active user participation[24]) proposal is coming from the UK and the European countries: they are sustaining that, in the system/world coming from the digitalization, there are new business models (social media platforms, search engines, online marketplaces) where companies are making large use of people's data and monetizing these information in a third country. They want to tax highly digitalized business models by setting fresh rules. E-commerce is not new and there have always been cross boarders transactions without physical presence in different territories, they do not want necessary to change that, but they are fully committed to regulate taxation in case of highly digitalized business models. This proposal however wouldn't apply outside the digital space.
- **The second** one is a proposal coming from U.S.A. and it is subsequent to the Tax Cuts and Jobs Act (TCJA). Americans rethought their laws in different international taxation matters. They adopted a marketing intangibles approach through the introduction of the

[24] Aqib Aslam and Alpa Shah, *Tec(h)tonic Shifts: Taxing the "Digital Economy"*, IMF Working Paper, May 2020. At page 8, the two authors describe users' interactions with digitalised businesses: their role, their behaviours, and how they generate value for digital players.

GILTI (Global Intangible Low-Tax Income).[25] The U.S. have always expressively been against ring-fencing the digital economy trying to find a broader range of rules to pull in profit coming from different sectors. They argue that the system should recognize more taxing rights to markets where there is big return, excess return, above normal return, due to an interaction or a sustainable engagement with the market through advertisement or through marketing intangibles. "GILTI is intended to approximate the income from intangible assets (such as patents, trademarks, and copyrights) held abroad". Brand and trade name can favourably influence customers' minds and this value creation is generated in the market jurisdiction. Customer data, customer relationships and customer lists rises from an exchange with the population of the market jurisdiction. The connection between substantial activities and returns generated by marketing intangibles is difficult to detect.[26]

- **The third** proposal is supported by India, Colombia and by other developing countries. They are promoting the significant economic presence approach which is aiming to tackle problems cause by existing PE rules. Non-resident digital companies are substantially involved in the economic life of a jurisdiction without a significant physical presence. This proposal is studying factors that evidence a purposeful and sustained interaction with market jurisdiction. Examples of these connections are represented by the existence of a user base, of a website with local languages, of high volume of digital transactions with local forms of payment, of sustained promotional advertisement activities.[27]

The OECD didn't aggregate these preferences, it is not aiming to put forward the three competing proposals. It can take them only in consideration. It is clear that the OECD is sustaining a unique proposal, the Secretariat Proposal.

The OECD Public Consultation Document "*Secretariat Proposal for a 'Unified Approach' under Pillar One"*, published in November 2019, states literally "the proposals included in this

[25] Pomerleau Kyle, What's up with Being GILTI?, Tax Foundation, March 14, 2019. In this article the author clarifies the structure and purpose of GILTI. For more information see: Tax Policy Centre, *What is global intangible low-taxed income and how is it taxed under TCJA?*, May 2020.

[26] OECD/G20 BEPS, *Addressing the Tax Challenges of the Digitalisation of the Economy*, Public Consultation Document, 13 February – 6 March 2019.

[27] OECD/G20 BEPS, *Addressing the Tax Challenges of the Digitalisation of the Economy*, Public Consultation Document, 13 February – 6 March 2019.

consultation document have been prepared by the Secretariat, and do not represent the consensus views of the Inclusive Framework, the Committee on Fiscal Affairs (CFA) or their subsidiary bodies".[28]

At the moment the U.S. and the UK proposals seem to be considered whereas the Indian/developing countries perspective is absent. In effect, the Secretariat Proposal is the only one on the discussion table, there is no other conversations on other proposals.[29]

According to Allison Christians this is very unusual because normally the OECD is an aggregator of the policy preferences of its membership. A century ago the League of Nations adopted the same behaviour: without aggregating preferences, it pushed out several model agreements leading to a number of meetings over years and to the rises of bilateral tax treaties. The League of Nations aim was that those bilateral treaties would eventually create a de-facto harmonization leading to a potential multilateral agreement someday.[30]

So the OECD Secretariat Proposal is presenting a weakness: there is no "Plan B". Peter A. Barnes and H. David Rosenbloom sustain that the Secretariat proposal is absorbing all the oxygen in the international tax world and that "the sooner the OECD unveils its proposal, the sooner we can all analyse it and consider alternatives that might more successfully light the night".[31]

Plan B is represented by all unilateral digital taxes and the proliferation of them in different countries is representing a threat for the future of international taxation system. So by now there is no plan B and a strong hope to reach a consensus-based solution as soon as possible.

---

[28] OECD, *Public Consultation Document - "Secretariat Proposal for a 'Unified Approach' under Pillar One"*, OECD Publishing, November, 2019.

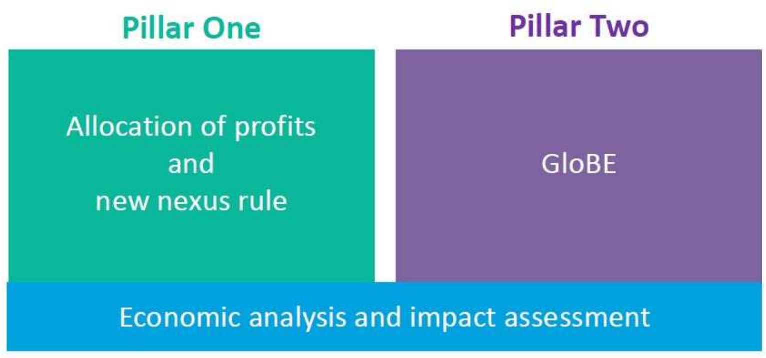
[29] The OECD''s Secretariat proposal is the only solution that provide for an international community agreement. The OECD staked an enormous amount of its institutional reputation on being the only body that can deliver a consensus based solution.

[30] Christians Allison, and Tarcisio Diniz Magalhaes, *A New Global Tax Deal for the Digital Age*, Canadian Tax Journal 67.4 (2019): 1153-1178.

[31] Tax Notes Federal, *A Seat at the Table: Thought Leaders Discuss OECD's Plans on Digital Economy Taxation*, 98Tax Notes Int'l, p. 1273, June 15, 2020.

2.4 The OECD Programme of Work to Develop a Consensus Solution

Figure 4. OECD Two-Pillar Approach



***Source**: OECD Tax Talks # 14 slides, OECD Two-Pillar Approach, Centre for Tax Policy and Administration, January 31, 2020.*

The OECD has identified several tax challenges belonging to two different category of taxes: for indirect taxes, BEPS Action 1 is addressing the collection of Value Added Taxes (VAT) and Goods and Services Taxes (GST) on the online purchase volume of goods and services from foreign suppliers; as regard direct taxes, Action 1 is targeting different digital issues related to nexus rules, data and characterisation.[32]

In the Policy Note *Addressing the Tax Challenges of the Digitalisation of the Economy*, approved on 23 January 2019, the Inclusive Framework (IF) members decided to provide solutions to the mentioned issues through proposals belonging to two pillars which could hopefully form the basis for consensus.

- Pillar One reviews international profit allocation and nexus rules via the "Unified Approach" Proposal;
- Pillar Two aims to establish rules ensuring that the profits of internationally operating businesses are subject to a minimum rate of tax thanks to the "GloBE" Proposal.[33]

---

[32] OECD (2020), *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Inclusive Framework, Paris, January 30, 2020.

[33] OECD, *Addressing the Tax Challenges of the Digitalisation of the Economy - Policy Note*, the Inclusive Framework on BEPS, January 23,2019. Even if the two proposals are targeting challenges of completely different nature, the International Framework thought that these issues had to be studied and developed in parallel as they could complete each other leading to potential reinforcing effects.

Despite the pandemic crisis and the fireworks after U.S. temporary withdrawal from negotiations, the OECD IF is making very good progresses and plans to release final blueprints on both pillars by October 2020.

The OECD Secretariat is trying to facilitate the conversations between different countries with regular public consultations: the final goal is that of finding a common solution which would fix problem in the long term. They are discussing to effectively change the rules to have a better system agreed by everybody and that changes rules in practice.
They are aiming to reduce ambiguity, to give an idea of practicability as regard the approach under Pillar 1 and Pillar 2.[34]
The secretariat proposal has the objective to design a common solution that would address the nexus and profit allocation rules for large MNEs groups (highly digitalised and consumer facing business) and at the same time to improve disputes resolution and prevention.

The Unified Approach is seeking an agreement, by the end of 2020, between the three proposals for new profit allocation and nexus rules advanced by UK, U.S., and developing countries. It focuses on a fair reallocation of taxing rights to market or user jurisdictions on nexus criteria unconstrained by physical presence and trying to reduce complexity at every stage.

The OECD approach is not moving away from the current ALP. It is simply going beyond the ALP, and it is using basilar formula and proxies. Policymakers need to find a way of coexisting with the ALP, limiting disruption and avoiding double tax and tax disputes.

The Unified Approach clearly needs to deal with the interactions with the ALP system. OECD members are structuring the new income allocation system and the new taxing rights with the ALP. They are looking to target the upper level of profitability of the more profitable companies.

There has been an economic analysis by collecting data, processing data, struggling with lack of data, to have significant information. They need lots of work to do and the outcome, the impact assessment, will depend on the number of hypothesis which still need to be decided. They have trends, country specific data that they need to cross-checks with other countries. They have not detailed data, but they are struggling to solve this problem.

---

[34] Several OECD Tax Talks are available at: https://www.oecd.org/ctp/tax-talks-webcasts.htm. These talks, hold by experts form the Centre for Tax Policy ad Administration, are providing the latest update on the progress made on the BEPS Project and some corporate tax statistics. They have the objective of clarifying the results achieved, and the upcoming developments in the OECD's international tax agenda.

The agreement on a common solution is absolutely challenging because it has political implications. Doubts about reaching a global agreement on digital tax have been steadily growing and every effort is questioned and analysed.

J. E. Stiglitz said that the OECD is gradualist and that current efforts are far from adequate. He claims that two subsidiaries belonging to the same multinational, exchanging goods and services across borders, value their trade "at arm's length", a principle that is inefficient because sometimes there are no competitive markets to which a firm can refer. Matters are very problematic in the services sector: for example, it is very difficult to value a production process without the managerial services provided by headquarters.[35]

There is now an ongoing economic analysis and impact assessment regarding: Pillar 1 (*nexus and profit allocation rules*) and Pillar 2 (*global anti base erosion proposal which tries to ensure that a minimum level of taxation is paid by multinationals*).

I have noticed that IF members are showing a strong support and full commitment for reaching a multilateral agreement with respect to Pillar 1 and 2. The process is going on strongly and the OECD members affirmed in Paris, by the end of January 2020, that they want to respect the G20 mandate timeline.

It is really important to remember that all members are working to find a consensus-based solution while respecting common principles with no prejudices.
The Inclusive Framework members showed a constructive attitude agreeing upon an outline of the architecture of a Unified Approach on Pillar One as the basis for negotiations and welcoming the progress made on Pillar Two.[36]

There is the high risk that many jurisdictions will adopt uncoordinated unilateral tax measures as national Digital Services Tax if the OECD IF will not deliver a comprehensive consensus-based solution this year.

---

[35] Stiglitz, Joseph E., *No more half-measures on corporate taxes*, Columbia Business School, Project Syndicate, 7 October 2019. Stiglitz argues that "the current proposals for reforming global taxation simply don't go far enough" and that "the OECD is canonizing gradualism"

[36] OECD (2020), *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Inclusive Framework, Paris, January 30, 2020.

2.4.1 Pillar 1 – The Unified Approach

Figure 5. Pillar One - Unified Approach

Source: OECD Tax Talks # 16 slides, Update on Pillar One, Centre for Tax Policy and Administration, July 22, 2020.

The architecture of the "Unified Approach" under Pillar 1 was drafted with inputs from the public consultations process and directed from the IF and Steering group. A recommended approach that draw its origins from the three concurrent proposals which have been put on the table by UK, USA, India. To have an overall understanding of the proposal the reader can observe Figure 5.

This Pillar is about a new taxing right agreement determining which companies will be in scope and of course the nexus of market jurisdictions to receive an allocation under Amount A (quantum of this amount, how is it calculated, allocation process). The clear purpose of this pillar is to reallocate a share of multinational companies' taxable profits to market jurisdictions.

The aim of this proposal is to allocate "routine" profits on the basis of the existing international tax system but to redistribute some "residual profit" to market jurisdictions (destination countries).[37]

Proposed reallocation of taxing rights (trough nexus and scope) under Pillar 1 would require improved tax certainty, including effective and binding dispute prevention and resolution mechanisms (those final mechanisms need to be developed so that the package will be complete).

[37] To understand principles and criteria to determine MNE group's non-routine profit see: Byrnes William, *Byrnes' Comments son the OECD's "Unified Approach" to Allocation of Profits of Digital Business*, Texas A&M University of law, Kluwer International Tax Blog, October 10, 2019.

In design and implementation of the solution, IF acknowledges the need to minimise complexity. This aspect is not obvious because there are also many developing/emerging countries involved and their economies.

Pillar 1 proposal for the Unified Approach articulates new layers impacting on scope, new nexus and profit allocation rules that should coexist with the existing transfer pricing rules, granting tax certainty in the system. This is a very ambitious task.
In the Unified Approach there are two critical dimensions: scope and nexus.

As regard the scope, the IF members are looking to large size MNE groups/businesses in term of global revenues (this represents the most possible indicator among those taken in consideration). Gross revenue threshold could, for instance, be the same as for CbC reporting (MNE groups with gross revenue exceeding EUR750M). But also additional thresholds will be considered such as the aggregate in-scope revenue and the profitability of certain segments to narrow the pull of companies within the scope.

The main activities that will be treated into this proposal are related to enterprises that are likely to derive meaningful value from interactions with consumers /users in market jurisdictions. There are two main categories of business models within the scope:

1) **automated digital services** (ADS) provided on a standardised basis to large population of customers though highly digitalized business models (online advertisement, intermediation platforms, online search engines, social media platforms, cloud computing services, digital content screening, online gaming…)[38];

2) **consumer facing businesses** (CFBs)with B2B and B2C business models, engaging with their customer base through targeted marketing, branding and use of individual data. Examples include personal computing products, clothes, branded foods, franchise models, automobiles. The draft pillar 1 blueprint report excludes from the scope of Amount A: extractive industries, commodities, financial services sector, construction, international airline and shipping businesses.[39] Products for commercial and professional use would be exempted.[40]

[38] An updated non-exhaustive list of business models that the OECD defines as "automated digital services" is available at page 10 of the following document: *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Inclusive Framework, Paris, January 30, 2020.

[39] Finley R., Soong Johnston S., *New Detail on OECD's Pillar 1 Proposal Emerges in Draft Report*, 99 Tax Notes Int'l, p. 718, August 10, 2020.

[40] Flignor P., Geelen P., De Rosa M., *OECD statement of Digital Tax Initiative highlights progress, sets timeline for consensus – key points on Pillar One and Pillar Two*, DLA Piper, 3 February 2020.

Now, if there is a big multinational or if a large section of activities of a certain company is within the scope, OECD's criteria need to assess the connection among this company/group and the particular market jurisdiction.

Here comes the problem of nexus rules. New rules will not be constrained by traditional or existing physical presence to establish a nexus, they will look to different measures of MNE groups interactions with the particular market: it has to be a sustained and significant involvement with that economy.

The Unified Approach will look to revenue thresholds with adaptations to take into account the respective size of the market jurisdiction/economy to satisfy both larger and smaller markets with a possibility to have a minimum level of activities required to fall in the nexus rules.
OECD representatives are looking to a more than 1 year picture of the MNEs activities with particular market. They do not want to disturb the existing system in bilateral treaties (no impact on PE rules for example..). They are looking to a more global assessment of the activities of the group and the application of these provisions in many different countries. They are avoiding to change existing concepts in bilateral treaties of PE that would create spill over effects.

Automated digital businesses are conducting their activities through the concept of "scale without mass", therefore the revenue threshold will be the only test to establish a nexus. For consumer facing business additional factors will be considered.

Profit allocation rules are determining how much profit will be allocated in a particular market jurisdiction or how countries will be entitled to tax. Three types of returns have been discussed: Amounts A, B, C. These amounts are the core elements of the proposal.
Amount A concerns the new taxing rights, B is about the improvement of the existing ALP system and C is about disputes resolution and prevention.

I will try to explain how the Unified Approach's three tier profit allocation mechanism works: 1) Amount A [portion (%) of deemed residual profit], 2) Amount B [fixed return for distribution functions], 3) Amount C [additional return based on TP analysis].

Amount A - It is the new taxing rights over residual profits that has to be determined in a formulaic manner at an MNE Group or segment level. This is the primary response to the tax challenges posed by the digitalisation of the economy. This is the amount attributed to digital Permanent Establishment.
OECD members would like to concentrate on group consolidated accounts, isolating different figures with a business line calculations (taking profit numbers that relate to different business

lines). Business line or regional segmentation may be required when a company has in-scope and out-of-scope activities.
So they start from the total profits of the group, they exclude a portion of that profitability which is deemed to reflect routine profit (it will be a given percentage) to define the excess.
Then, they will take a portion of this excess and will allocate it to the market or user jurisdiction. In their term this procedure will be equivalent to the upper portion of profitability. This upper residual portion of profit is then allocable to market jurisdictions. They are using proxies, an approach of deeming routine and residual profit.
It is correct to mention that the threshold levels of "deemed routine" or the "portion that will be allocable to market jurisdictions" are yet to be agreed: these key elements will form the basis of the blueprint that the OECD will present in October 2020.[41]

Amount B - This is not creating new taxing rights. There is no significant interaction between Amounts A and B, and that's because Amount A is an allocation of residual profit and Amount B is an allocation of routine profits associated with baseline marketing and distribution activities. Amount B is supposed to be determined at arm's length principles. Furthermore it is not directly related to the digital issues but it was included in the package as an attempt to try to simplify some aspects of Transfer Pricing and to reduce the administrative burden. Amount B is dealing with the improvement of the existing Transfer Pricing System and is intended to be applied to marketing and distribution functions. The goal is that of trying to fix a remuneration for distribution functions with extreme clarity to reduce the number of litigations in small developing countries. Policymakers are exploring different ways in which that might be achieved. They contemplate a baseline level of activities that would form the core of a fixed return approach by industry and region.
According to Stewart Brant, head of the Centre for Tax Policy and Administration's transfer pricing unit, the following activities are probably going to be included in Amount B: "importation of products, logistics, warehousing, limited sales and marketing staff, sales and order processing and finance functions".[42] In any case a final agreement on this positive list has not yet been reached.

[41] The OECD Centre for Tax Policy and Administration regularly updates stakeholders on recent developments and key issues to be solved in the upcoming months. Under Amount B there are still many benchmarking studies to be done on profitability indicators, on further technical details and definitions of baseline activities differentiated by industry or region.

[42] Finley Ryan, *OECD's Technical Work on Formulary Pillar 1 Approach on Schedule*, 99 Tax Notes Int'l, p. 531, July 27, 2020.

This Amount B only applies where there is a physical presence and could be interesting for developing countries because typically multinationals manipulate profits of distribution companies (through aggressive tax planning) and existing tax rules do not capture the value creation of localized marketing functions.[43]

Tax certainty (Amount C) - This component of the Unified Approach package used to be called Amount C since few weeks ago and as Amount B it is not setting new taxing rights. It is trying to address a certainty agenda of dispute prevention and resolution to prevent double taxation and end disagreement between taxpayers and tax administrations. Amount C it's an arm's length return for value-adding functions in traditional PE and subsidiary situations. If a company is realizing more than sales and marketing in a jurisdiction it is gaining additional returns, but through Amount C the company complies with binding and mandatory arbitrations in case of disputes.

There is an overall purpose of providing certainty for A, B, C. How to achieve tax certainty is different from Amount A that from Amount B&C (which involve more bilateral treaties or disputes).
The certainty agenda, in particular, refers to amount A: it is trying to make sure that amount A is calculated and administered in a way that is as certain as possible.
Amount A is going to be applied on a multilateral basis: disputes will likely affect the taxation of Amount A in multiple jurisdictions. A new effective and binding dispute prevention and resolution mechanisms is required for Amount A.
According to a copy of the Draft Pillar 1 Blueprint Report delivered on August 3 2020 by the OECD Centre for Tax Policy and Administration and the Committee on Fiscal Affairs to Tax Notes there should be two distinct dispute prevention and resolution mechanisms for Amount A and beyond Amount A.
As regard early tax certainty and prevent disputes for Amount A, there are some standardized self-assessment return and documentation package for MNE groups, available for the calculation of Amount A and the allocation between relevant jurisdictions.[44]
The lead administration, which probably will be the jurisdiction where the parent company is located, will have to file these documents with the group and validate the overall return. The entire package then is sent to the other tax administrations relevant to the MNE's operations.

---

[43] Martin Hearson, *The OECD's Digital Tax Proposal: Untangling the Impact of 'Pillar One' on Developing Countries*, International Centre for Tax and Development Blog, 10 October, 2019.

[44] Finley R., Soong Johnston S., *New Detail on OECD's Pillar 1 Proposal Emerges in Draft Report*, 99 Tax Notes Int'l, p. 718, August 10, 2020.

If a MNE group would like to have early certainty for Amount A, the group should require to the lead tax administration an initial assessment with a panel review comprising representatives of affected (six to eight) tax administrations if needed.
Once the review is performed the MNE group can approve or refuse the outcome. However, if an agreement is not reach on Amount A, then a determination panel will be created and its decision will be binding.

Draft Pillar 1 Blueprint Report anticipates that "a significant majority of MNE groups within the scope of Amount A submit a request for tax certainty for the first year(s) following the introduction of the rules".[45]

On the contrary, Amount B is in a bilateral world: Amount B will reach tax certainty mainly agreeing on using fixed rates of return on baseline distribution and marketing activities.

Tax certainty building block involves disputes under the existing Transfer Pricing system. On one hand there are countries that have adopted in their policy (treaty policy) the mandatory / binding arbitration, while on the other hand there are countries that do not such policy.
The OECD is trying to explore a new system based on multilateral aspects and bilateral relationships, it is trying to bridge existing gaps. The OECD is exploring innovative approaches to dispute resolution and is enhancing MAP and domestic measures.

The draft report underlines the need of a new multilateral convention that provides an international framework to coordinate multiple jurisdictions' provisions and that, in the determination of Amount A and in the elimination of double taxation, would overrule all bilateral tax treaties.[46] According to the report this would be the best way to remove treaty obstacles to the implementation of Pillar 1.

Obviously the new multilateral convention infrastructure as well as its legal functioning require ongoing works in a number of areas: definitions, proxies, percentages, differentiation for business models, use of financial accounting and business line segmentation, elimination of double taxation, treatment of losses and implementation / administration.

[45] Finley R., Soong Johnston S., New Detail on OECD's Pillar 1 Proposal Emerges in Draft Report, 99 Tax Notes Int'l, p. 718, August 10, 2020.

[46] Soong Johnston S., *OECD Draft Blueprint Mulls New Pillar 1 Multilateral Convention*, 99 Tax Notes Int'l, p. 799, August 10, 2020.

Any agreement on the solution to adopt would require the withdrawal of all unilateral measures that the Inclusive Framework members have already implemented to resolve challenges of the digital economy. Unilateral Digital Services Taxes are clear examples.

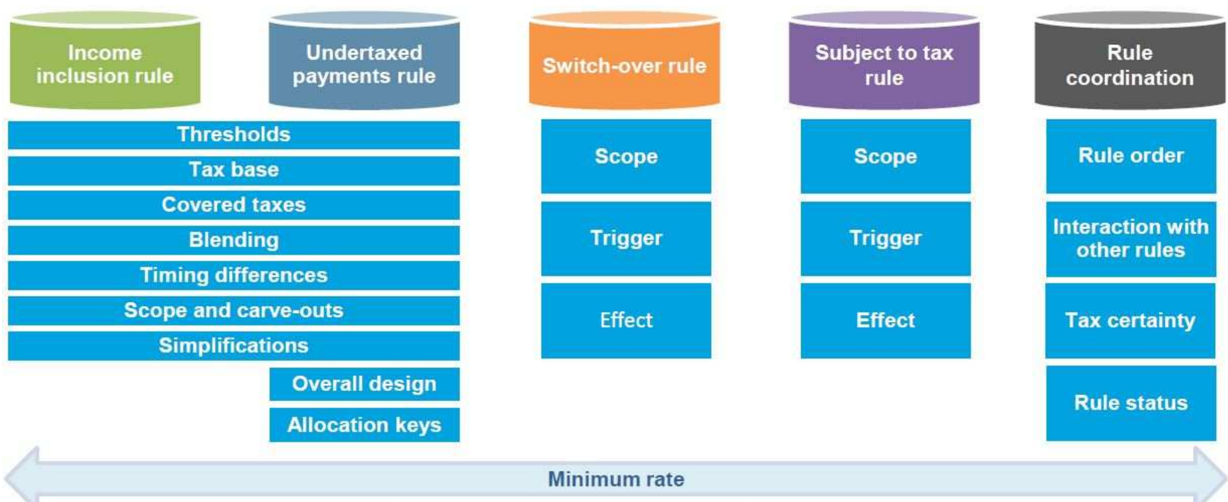
The OECD aims to deliver to the G20 finance ministers a final blueprint report by October 2020, a starting point to reach a real international political agreement. At the moment this timeline seems to be unrealistic given the challenges of the COVID-19 pandemic and political difficulties.

Many are expecting that the report on the Pillar 1 blueprint will leave uncomplete crucial elements of the proposed regime, such as the formula for the reallocation to market countries of profits generated by a multinational group. At the moment, the minimum tax rate under Pillar 2 still needs to be determined.[47]

[47] VanderWolk Jefferson, *INSIGHT: Tax and Digitalization-Policy Should Not Be Based on Myths*, Bloomberg Tax, Transfer Pricing Report, August 11, 2020.

2.4.2 Pillar 2 – The GloBE Proposal

Figure 6. Pillar Two - GloBE Proposal



Source: OECD Tax Talks # 16 slides, Update on Pillar One, Centre for Tax Policy and Administration, July 22, 2020.

Pillar 1 is a question of "where you tax??", Pillar 2 is a about "whether large businesses are taxed", so it's a question of minimum taxation, a certain minimum tax that all international operating businesses should pay. There is no architecture and no unified approach for this pillar, they are exploring some parameters. This Pillar is not limited specifically to the digital economy, because it addresses more widely profit shifting.

This pillar aims to eliminate risks related to mechanisms of profit-shifting to jurisdictions where multinationals can be subject to no, or very low, taxation (race to the bottom).

While respecting the sovereign right of each jurisdictions to set its own tax rates, Pillar 2 proposal strengthen the power of all countries to tax back profits where other jurisdictions have not sufficiently exercised their primary taxing rights at the agreed minimum rate.[48]

GloBE proposal was initially proposed by Germany and France and it was inspired to the "GILTI" (Global Intangible Low-Taxed Income) regime and the "BEAT" (Base Erosion and Anti-Abuse Tax) introduced by the U.S. in December 2017 through the "TCJA" - Tax Cuts and Jobs Act.[49]

---

[48] OECD/G20 BEPS, *Addressing the Tax Challenges of the Digitalisation of the Economy*, Public Consultation Document, 13 February – 6 March 2019.

[49] Riccardi Sacchi Andrea, *Implementing a (Global?) Minimum Corporate Income Tax: An Assessment from the Perspective of Developing Countries*, Copenhagen Business School, CBS LAW Research Paper No. 20-15, August 6, 2020.

The best way to fight profit shifting and tax competition probably is to introduce a global minimum corporate effective tax rate which would discourage low tax jurisdictions to set tax rates below this minimum.

The introduction of a global minimum level of tax will influence behaviours of both taxpayers and jurisdictions. Taxpayers should be discourage to engage in profit shifting and jurisdictions will have a common floor to preserve and increase the attractiveness of a given area as a location to carry out business operations.[50]

However, things under Pillar 2 are in track and various design options remain under discussion. For example the Inclusive Framework has not yet fixed the actual minimum rate to be applied under GloBE proposal.[51]

I will try to reassume the main purposes and the rationale of Pillar 2:

1) ensuring that all internationally operating businesses pay a minimum level of tax;

2) address remaining BEPS issues;

3) multilateral solution to avoid uncoordinated rules, increased complexity and risk of over-taxation;

4) reduce pressure on developing countries that, in a race to the bottom, become even more dependent on natural resource taxation to finance their public needs, while enlarging the number of free zones or other incentives to attract foreign direct investments;

5) address profit shifting risk from intangibles but not ring-fenced to digital economy;

6) lay down a structure coexisting with the U.S. recent GILTI regime.

Pillar 2 is a combination of two inter-related sets of rules capturing income subject to taxation below a still-to-be-agreed minimum rate. There are many rules interplaying in this proposal so I have inserted Figure 6 in the text to help the reader to visualize the framework under discussion. The first set of rules treats a global controlled foreign corporation rule, while the second applies to deductible payments made to recipients and taxed below the minimum rate.[52]

---

[50] Chand Vikram, *International Tax Competition in light of Pillar II of the OECD project on Digitalization*, Kluwer International Tax Blog, May 14, 2020.

[51] OECD (2020), *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Inclusive Framework, Paris, January 30, 2020.

[52] Larking Barry, *What the World Thinks of Pillar 2*, 98 Tax Notes Int'l, p. 185, April 13, 2020.

The first one link profits generated by foreign subsidiaries or branches, that are taxed at a rate below the agreed minimum rate, to the taxable income of a group parent. These profits would be taxed in the parent jurisdiction by taking in consideration the gap between the effective foreign tax rate and the minimum tax rate.

There are two rules addressing this problem: *the income inclusion rule* that would be a domestic rule requiring a shareholder to report a proportionate share of the income of a subsidiary where income is not taxed enough and *the switch-over rule* that enable the application of the income inclusion rule to foreign branches and subsidiaries that would otherwise exempted under bilateral tax treaties.

The income inclusion rule is something that many countries already have in the form of CFC rules, so the basic mechanisms are familiar to taxpayers and tax administrations. It focuses on outbound investments.[53] This rule would grant the minimum taxation of a multinational group's income, protecting the tax base of the parent jurisdiction as well as other jurisdictions where the group operates by reducing the incentive to put in place intra-group financing, or other profit shifting strategies.[54] The OECD International Framework is making a large use of financial accounts as a starting point for income determination and it is studying how to address different tax and financial accounting systems.

As I mentioned before, the IF is struggling to reduce complexity and potential complaints costs and it is carrying on the technical work on the combination of low-tax and high-tax income to determine the effective tax rate.
Where multinationals' income is taxed below the minimum rate, the income inclusion rule would apply as a top up to achieve the minimum rate of tax. This would create a global standard that sets a floor for tax competition and a level playing field for all jurisdictions.
The problem is that today there is significant variance in corporate income tax rate across Inclusive Framework members.

There are some concerns about whether the design of *the income inclusion rule* should be based on a country-by-country basis (tax competition could be restricted to a certain extent) or a global

[53] See Lammers Jeroen, *Less is More - Can Developing Countries Gain Tax Revenue by Giving up Taxing Rights?*, page 14, Copenhagen Business School, CBS LAW Research Paper No. 20-16, August 7, 2020.

[54] OECD (2020), *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Inclusive Framework, Paris, January 30, 2020.

blending basis (competition may prosper as high tax and low tax rate of different countries are blended with each other).[55]
The adoption of a fixed global percentage tax rate, that provides transparency and smooths rule coordination, seems to be the simplest approach to adopt.[56]

The switch over rule should be introduced into tax treaties to permit a residence jurisdiction to switch form an exemption to a credit method for profits attributable to a PE that are subject to an effective rate below the minimum rate.[57]

The second key element of this proposal contains tax on base-eroding payments with *the undertaxed payment rule* (under domestic legislation) denying deductions or imposing source-based taxation in respect of intra-group payments (not subject to tax or above a minimum rate) and *the subject-to-tax rule* (under tax treaty legislation) imposing withholding tax at source on payments made to recipients taxed below the minimum rate and denying treaty benefits on items of income where the payment is not subject to tax at the minimum rate.[58]
Under these rules if a company in State A made a payment to the subsidiary in State B and the receipt in State B is subject to an effective tax rate below a certain threshold, then A could deny a deduction or impose a tax on the payment.
Several countries see *the undertaxed payment rule* as a backstop, a defensive rule, to the income inclusion rule.

The OECD's Pillar 2 suggests that both MNE's residence states (*income inclusion rule*) as well as MNE's source states (*undertaxed payment rule*) could set a minimum taxation regime. Both the *income inclusion* and the *undertaxed payment* rules would address low tax states and tax heaves.

The *undertaxed payment rule* is applicable only if a company has a taxable subsidiary or PE in the source state. If a low taxed company sells products or deliver services, without a nexus, in other states, then only the *income inclusion* is applicable.

[55] Chand Vikram, *International Tax Competition in light of Pillar II of the OECD project on Digitalization*, Kluwer International Tax Blog, May 14, 2020. In this article, the author explains that even if the GloBE proposal could set some limits, there would still be room for tax competition above the minimum tax rate decided.

[56] OECD (2019), *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Inclusive Framework on BEPS, Paris, May 29, 2019.

[57] Dechsakulthorn S., Glenn K., Law S. B., Myszka J., *Treatment of Losses Under OECD Pillars 1 and 2*, 99 Tax Notes Int'l, p. 323, August 5, 2020.

[58] Simmons & Simmons, *OECD update on its Two-Pillar Approach to taxing the digital economy*, February 7, 2020.

The inclusion of foreign profits in the domestic income generates as a consequence worldwide income taxation. Foreign rates below the domestic minimum tax rate would no more attract domestic investments and profits, and all domestic taxpayers would face the same minimum tax burden regardless of where they earn profits.

The OECD proposal is suggesting both source-based and residence-based taxation granting all states the right to tax revenues generated by minimum taxation. So an international agreement on which states, in which cases has the priority in taxing low taxed or untaxed foreign profits is absolutely needed.
A priority rule, for example, could assign the taxing right to the source state with the obligation of the residence state to avoid double taxation or it could limit source taxation in favour of residence taxation.[59]

There is still the need of further considerations on how the four rules (*income inclusion*, *switch-over*, *undertaxed payment*, *subject-to-tax*) will interact. Relevant practical and policy issues may arise in the future because these rules will inevitably make changes in domestic laws and double tax treaties.

There is a clear understanding that the situation should not lead to the contemporaneous application of different rules. OECD researchers are trying to avoid double taxation, there is the need of rules' coordination in design and practice. Unilateral actions to attract more tax base and to protect existing tax base, would generate bad consequences for all countries.[60] The IF is targeting also simplifications to reduce compliance costs, and compatibility with international treaty obligations.

[59] Schreiber Ulrich, *Remarks on the OECD/G20 Program of Work: Profit Allocation and Minimum Taxation*, University of Mannheim, January, 2020. The author underlines the need of an "ordering rule" that only the OECD can set in cases where more than one states apply the rules to the same structure. There could be difficulties to agree on this rule among states.

[60] OECD (2019), *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Inclusive Framework on BEPS, Paris, May 29, 2019.

2.5 Evidence and analysis of combined effects of Pillar 1 & 2

The OECD estimates that the combined effect of Pillars 1 & 2 would generate global net revenue up to 4% global CIT (Corporate Income Tax) revenues, that is around USD 100 billion annually.[61]

Across country groupings divided in high, middle low-income economies, revenue gains are expected to be quite similar.
The Inclusive Framework collected data from a wide range of countries (more than 200 jurisdictions: 137 IF members + developing countries) and from more than 27000 MNE groups.

They try to rely as much as possible on firm-level data (taxes, profits and activities of multinationals) combined with aggregate data on a country-by-country reporting basis. The IF delegates are processing and studying these data with academics and countries' experts.
They have taken best data available since year 2016 and they are refining the dataset through the interactions with member countries. They aim to update the database as the process go along.

In determining the Amount A, under Pillar 1, they are considering MNE groups as a whole rather than entity-by-entity. First of all they asses the total profit of the MNE Group, then they fix a "Profitability threshold" (e.g. X% on Profit Before Tax to Turnover ratio) and profit above this threshold is considered "Non-Routine Profit". Then a share of this "Non-Routine Profit" is calculated thanks to a percentage Y% and allocated to market jurisdictions.

Well, up to now, the OECD IF has still to determine the key parameters X% and Y%. So the estimates will be definitively determined when an official consensus-based decision will be taken by the Inclusive Framework.
Under Pillar 2, the GloBE proposal offers countries the right to "tax back" profit that is currently taxed below the minimum rate abroad. The mechanism works as a "top-up" tax to reach the level of the minimum tax rate.
This rate needs still to be determined by the IF. What they have been doing is to model the effects of a range of possible minimum tax rates. Another relevant decision the OECD will take is concerning the way this minimum rate is applied: whether it will be done on global profit of multinationals or jurisdictions by jurisdictions.

[61] OECD, *OECD presents analysis showing significant impact of proposed international tax reforms*, February 13, 2020. These estimations have been broadly criticised as unreliable by commentators because they have been calculated starting from 2016 data, so before many tax reforms including the American TCJA of 2017.

They have tried to take into account some behavioural reactions of multinationals and governments in their analysis and they suppose that those reactions will be more pronounced for Pillar 2.

Figure 7. Combined effects of Pillar One and Pillar Two

Note: Pillar 1 (Amount A only) estimates are based on an illustrative scenario where residual profit is defined with a 10% threshold on profit-before-tax to turnover, assuming a 20% reallocation of residual profit to market jurisdictions, with commodities and financial sectors excluded from scope. Pillar 2 estimates are based on an illustrative scenario with jurisdiction blending and a 12.5% minimum tax rate.

Source: OECD, Webcast: Tax Challenges Arising from the Digitalisation of the Economy, Update on the Economic Analysis & Impact Assessment, February 13, 2020.

Figure 7 considers four scenarios:

Scenario 1, a static scenario with no behavioural reactions;

Scenario 2 which takes into account the simultaneous implementation of Pillar1 and Pillar 2 and their interactions;

Scenario 3 describes the situation in which multinationals, in reaction to Pillar 2, may change their profit shifting strategies, here Pillar 2 would reduce tax rates differentials between jurisdictions and it would reduce the incentives for multinationals to shift profits to low tax jurisdictions;

Scenario 4 is the most uncertain because it takes into account also the reactions of governments: it may be that some low-tax jurisdictions, where the tax rate is currently below the minimum tax rate, could increase their tax rates to collect part of the gain generated by the GloBE proposal.

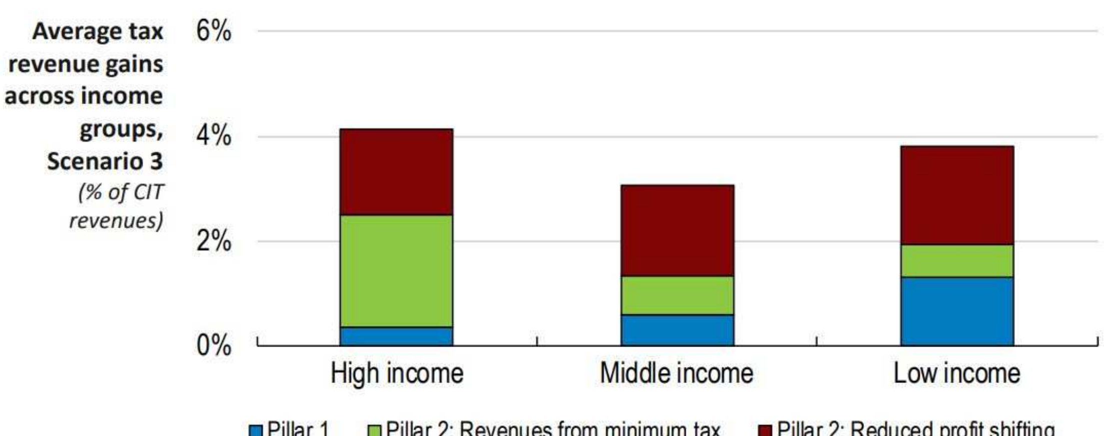
So according to the parameters used by the OECD, in **Scenarios 3** and **4** the overall tax revenue gain is close to **4% of global CIT** revenues that represents around **USD 100 billion per year**.

Pillar One generates about 0.5% of global CIT ($15 billion) and Pillar Two accounts for the remaining 3% (approximately $85 billion).[62]

Around 40% of multinational profits are shifted to tax heavens globally each year (more than $600 billion).[63] This practice reduces corporate income tax revenue by more than $200 billion that is equal to 10% of global corporate tax receipts[64].

According to Figure 8, taken by the OECD, the level of revenue gains would be almost homogeneous between low, middle income and developed countries.

Figure 8. The revenue gains across income groups



Note: Pillar 1 (Amount A only) estimates are based on an illustrative scenario where residual profit is defined with a 10% threshold on profit-before-tax to turnover, assuming a 20% reallocation of residual profit to market jurisdictions, with commodities and financial sectors excluded from scope. Pillar 2 estimates are based on an illustrative scenario with jurisdiction blending and a 12.5% minimum tax rate. High, middle and low income jurisdictions are defined based on the World Bank classification. Excludes investment hubs, which are jurisdictions with inward FDI above 150% of GDP.

Source: OECD, Webcast: Tax Challenges Arising from the Digitalisation of the Economy, Update on the Economic Analysis & Impact Assessment, February 13, 2020.

However this picture presents misleading results because low and middle income countries together form about two-thirds[65] of the total number of countries and they receive just over 25% of the total global revenue in terms of corporate income tax.

Additionally middle-income countries dispose of many natural resources attracting foreign investments and they are more likely to be affected by tax avoidance practices.[66]

[62] Lammers Jeroen, *Less is More - Can Developing Countries Gain Tax Revenue by Giving up Taxing Rights?*, Copenhagen Business School, CBS LAW Research Paper No. 20-16, page 16, August 7, 2020.

[63] Tørsløv T., Wier L. and Zucman G., *The missing Profits of Nations*, NBER Working Paper, University of Copenhagen, UC Berkeley and NBER, Page 22, June 2018, revised April 2020.

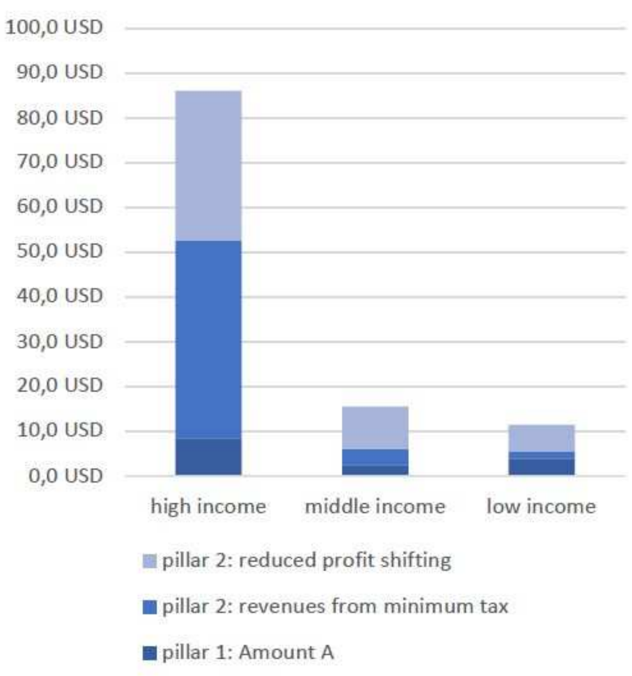
[64] *Supra* note 62, page 17 of the paper.

[65] See World Bank classifications, data available at: https://data.worldbank.org/?locations=XO-XD.

[66] *Supra* note 62.

Therefore, by looking at the same results taking in consideration "compensation" for tax revenue lost to avoidance, it becomes evident that the rewards for developing countries are quite small.[67] High income countries appears to be the winners of the OECD Unified Approach implementation.

Figure 9. Extra CIT revenue gains



Source: Lammers Jeroen, Less is More - Can Developing Countries Gain Tax Revenue by Giving up Taxing Rights?, *Copenhagen Business School, CBS LAW Research Paper No. 20-16, page 18, August 7, 2020*

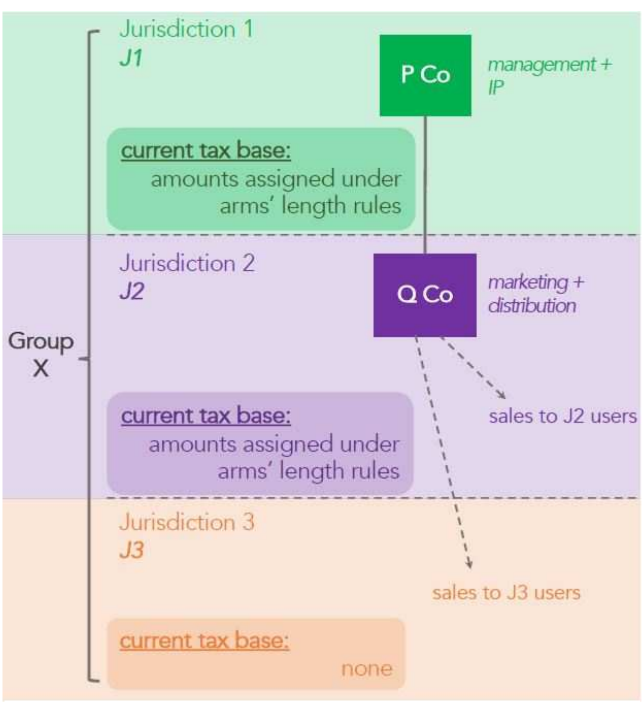
According to the OECD direct effects on investment costs is expected to be modest in most countries because many firms will be unaffected by the proposals which target firms with high level of profitability and low effective tax rates. The reform should reduce the influence of corporate tax rates on investment locations. Other factors like infrastructure, education level and labour cost may drive investment decisions allocating efficiently capital across jurisdictions. MNEs headquartered in investment hubs (tax havens like Ireland, Luxembourg, Mauritius, Netherlands, and Singapore with inward investment above 150% of GDP[68]) should be mostly affected by the introduction of Pillar One and Pillar Two.

[67] See: Lammers Jeroen, *Less is More - Can Developing Countries Gain Tax Revenue by Giving up Taxing Rights?*, Copenhagen Business School, CBS LAW Research Paper No. 20-16, page 18, August 7, 2020; and Lammers Jeroen, *Can developing countries do better than the Unified Approach?*, International Centre for Tax and Development, July 8, 2020.

[68] See: Martin Julie, *Global tax rewrite could cost multinationals USD 100 billion annually OECD says*, MNE Tax, February 13, 2020; and Galullo R., Mincuzzi A., *Olanda, Lussemburgo, Svizzera e UK I maggiori paradisi fiscali per le società*, Il Sole 24 Ore, July 9, 2020.

2.5.1 Understanding the reallocation of profit under Pillar 1

Figure 10. A case of reallocation of multinational profits



Source: Christians Allison, Taxation of the Digital Economy: Preliminary Analysis of OECD Pillar 1 Impact Assessment, (Presentation Slides), March 8, 2020.

Professor Allison Christians has studied the OECD Unified Approach tax base redistribution mechanisms describing a scenario (Figure 8) in which a profitable multinational Group X is conducting activities which are affecting three jurisdictions: Jurisdiction 1 (J1), Jurisdiction 2 (J2), and Jurisdiction 3 (J3).

Normally, under current rules, I could argue that Group X is present only in J1 and in J2. Group X is incorporated in J1, where there is the parent company P Co with headquarters, management and the IP.

In J2 there is a subsidiary (PE) of Group X, Q Co, which claims about what its income is based on its functions (returns on sales marketing and distribution activities). The rest of the profit belongs to P Co (all the remaining returns including profits associated with high value IP and intangibles). So J1 and J2 share the profits of Group X and the way they allocate it between them is arms' length rules.

In J3, there is no allocation of Group X's earnings under the arms' length rules, there are only sales to J3 users or advertising to buyers in J3 for example. In J3 there is no PE. No traditional nexus.

The OECD Pillar 1 aims to find a consensus based solution to allocate more tax base to J2 and J3. J2 has a bit of Group X's profits related to marketing and distribution functions but it wants more because it is providing valuable market and users. The last thesis is sustained by J3 even if there is no PE. So in this scenario is J1 (U.S. and China for example) that is asked to renounce to a part of its tax base in favour of J2 (Canada and EU countries) and J3 (India and developing countries).

Allison Christians, tax law professor at McGill University in Montreal, elaborated some calculations[69]on the basis of a recent KPMG transfer pricing study commissioned by

[69] Christians Allison, calculations available at: https://tinyurl.com/DigEconImpact.

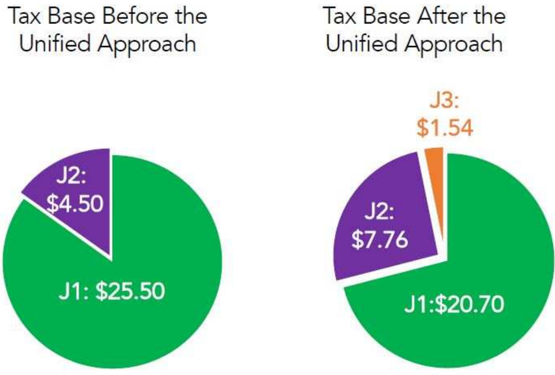
Microsoft[70] and the OECD economic analysis and impact assessment[71], both of them published on February 2020.

In brief, the author considered:

- the made up case of Group X with a consolidate profit of $30 on $125 in worldwide sales (profit margin 24%);[72]
- J1 sales revenues = $0, J2 sales revenues = $85, J3 sales revenues = $40;
- the impact of Amount A using OECD's deemed routine profit threshold of 20% (X), yielding a reminder of 80% nonroutine profit (Y);[73]
- 20% of nonroutine profit (Y) redistributed among market countries (W);[74]
- KPMG value-added return to marketing and distribution (Amount C) 3,6% of operating margin and limited risk return to marketing and distribution 2,5% of operating margin (Amount B).[75]

Here are, in Figure 9, the interesting results founded which help to understand clearly how the tax base of J1, J2 and J3 are affected by the Unified Approach:

Figure 11. Profit reallocation results



Source: Christians Allison, Taxation of the Digital Economy: Preliminary Analysis of OECD Pillar 1 Impact Assessment + KPMG Transfer Pricing Study of Amounts B & C, (Presentation Slides), March 8, 2020.

---

[70] KPMG, *Transfer Pricing Analysis of Arm's Length Returns to Sales, Marketing & Distribution Activities*, February 2020.

[71] OECD, *OECD presents analysis showing significant impact of proposed international tax reforms*, February 13, 2020.

[72] Christians Allison, *Taxation of the Digital Economy: Preliminary Analysis of OECD Pillar 1 Impact Assessment + KPMG Transfer Pricing Study of Amounts B & C*, (Presentation Slides), March 8, 2020.

[73] *Supra* note 63.

[74] *Supra* note 63.

[75] *Supra* note 62.

Without taking in consideration the Unified Approach, J1 is being assigned most of the Group's profits, J2 where sales and marketing take place is being assigned some of the profit and J3 is buying the products (goods / services) and it is getting none of the profit. In J3 tax administrators can tax goods and services with the VAT but they are not getting a tax on the profit of the multinational.

The result of the Unified Approach Pillar 1 is to take a little bit out of J1 and assign it to J2 and J3. But it is going to be a modest reallocation for J3 (developing countries).[76] Professor Allison Christians sustains that, in plugging in the numbers and data that the OECD and the KPMG study proposed, the amount distributed in J3 is miniscule, it's almost non existing. Applying assumptions and percentages utilized by OECD and KPMG there is not too much redistribution effect for developing countries.[77]

According to this study there is an enforcement problem with the slice of Amount A ($1.54) in J3. There is Group X, neither resident nor physically present in J3, that is selling goods and services to customers in J3.

There is no nexus (PE) in J3 according to current international taxation system. The only way for J3 to catch $1,54 Amount A is a withholding tax. Probably the taxpayer of the withholding tax is Q Co (subsidiary in J2) and not P Co (parent in J1).

European Unilateral digital taxes are dealing with this problem: to collect digital taxes, national tax administrations are trying to designate an European withholder which is actually selling goods and services in their territory. European subsidiaries would be paying these taxes not their American parent companies. Where there is no subsidiary they are creating new laws to comply with but this is also creating issues.

Quebec for example made a contract with non-residents companies like Airbnb and Netflix forcing them to withhold a tax which is a VAT on users in Quebec. These companies agreed because it isn't a tax on their profits as they directly passed on this tax to their consumers.

In the mentioned cases there is no tax treaty, all of them are unilateral domestic decisions that will probably trigger discrimination claims and litigations.

[76] To study the effects of the reallocation from one jurisdiction to another see: Cobham Alex, Faccio Tommaso, and FitzGerald Valpy, *Global Inequalities in Taxing Rights: An Early Evaluation of the OECD Tax Reform Proposals: Preliminary Draft*, October 2019. According to the authors little tax base would be shifted in favour of developing countries of the G24 and G77.

[77] See also: Lammers Jeroen, *Less is More - Can Developing Countries Gain Tax Revenue by Giving up Taxing Rights?*, Copenhagen Business School, CBS LAW Research Paper No. 20-16, August 7, 2020; and Lammers Jeroen, *Can developing countries do better than the Unified Approach?*, International Centre for Tax and Development, July 8, 2020.

2.6 A critical analysis of the OECD Digital Taxation

The OECD Unified Approach is proposing the allocation of taxing rights to Market States through new nexus alternatives: user participation, marketing intangibles, significant economic presence. The new nexus rules would coexist with current taxing rights and transfer pricing rules applicable to supply-side States and permanent establishments.

A slice of income will be distributed by formula to most or all of the countries where the taxpayer has customers or make sales. The tax will be imposed on a taxpayer's consolidated global operations.

Everyone is welcoming changes to the century-old rules of the international tax systems, but at the same time, tax practitioners recognize that adjustments has to be performed with a clear understanding of why the long-standing tax principles are what they are.

OECD Unified Approach represents a shock for international taxation principles relating to both nexus and income allocation. In fact, it is trying to solve structural problems in domestic and international tax law. The proposed new standards are completely unrelated to the permanent establishment concept or to the arm's length principle. So it will be very difficult to implement "simplicity, stabilization of the tax system and increased tax certainty" for a long period.[78]

There is one big problem in the method used by the OECD: determining the "right" amount of income to allocate to a particular jurisdiction is very difficult. Prof. David H. Rosenbloom sustains that a formulaic allocation of income will inevitably lead to inappropriate results and almost endless disputes.
Pricing policies, for example Netflix subscription prices, may vary by country and a formulaic method for allocating and apportioning a company's global profits ignores those variations in pricing models.[79]

Under Pillar 1 is presenting three Amounts: A (pure formulaic reallocation), B (which is meant to approximate to arm's length but is actually formulaic) and C (full transfer pricing). Well it's perfectly possible that a company physically present in a country can be subject to amounts A,

---

[78] Simontacchi, Adda, Scandone, *INSIGHT: Possible Double Taxation Behind the Italian Digital Services Tax*, Bloomberg Tax, Daily Tax Report: International, February 3, 2020. The authors sustain that by introducing new international standards unrelated to PE concept and to ALP, complexities and extra compliance costs will last for a long time.

[79] Barnes P.A., Rosenbloom H.D., *Digital Services Taxes: How Did We Get Into This Mess?*, 97 Tax Notes Int'l, p. 1255, Mars 23, 2020.

B, and C at the same time. A company could be taxed on the same profits at least twice. There is a problem of potential overlapping that needs to be solved. But how that gets done is very unclear at the moment. All these complex interactions are coming together and there must be an international agreement on them.

According to Michael Devereux the profit allocated to the destination countries should be deducted from taxable profit in some other countries to avoid double taxation problems. This would require determining the routine and residual profit in every country in which every multinational operates.[80]

Another potential conceptual mistake could be considering the place where customers are located as a key indicator to assess where the value is created. It is not necessarily true and this idea has been rejected in the past by the policymakers.

There are two unresolved questions the OECD is still debating:

- the **definition of digital services companies** and their specificities/similarities that make them fall in the scope of the tax. Today all companies are becoming digital with a stable website and they engage with their customers through internet.
  There is low sensibility in applying an income tax on digital business models that are not relevantly different from many other business models. Most of the companies track customer preferences and their marketing accordingly. Pharmaceutical companies closely monitor their treatment results and IP is fundamental in that industry.[81] So countries should know exactly how far the scope of the tax is going. At the moment seems that extractive industries, agricultural and industrial products will be exempted.

- The **determination** of whether a business is **consumer facing** or not. There is no specified procedure to determine the nature of a company's activities (segmentation by line of business or by region?). There are many companies wondering if they can be considered consumer facing or not. What about businesses that sell to both other businesses and to consumers? For example there could be a problem with an auto company which on one hand sells its cars to independent dealers which in turns sell to

[80] Devereux Michael, *The OECD Pillar One Proposal*, Oxford University Centre for Business Taxation, October 22, 2019. The author, once again in this article, claims to be against the concept of "value creation" sustained by the OECD: an "arbitrary adjustment" linking value to intangible assets belonging to a given jurisdiction.

[81] Barnes P.A., Rosenbloom H.D., Digital Services Taxes: How Did We Get Into This Mess?, 97 Tax Notes Int'l, p. 1255, Mars 23, 2020. For Barnes and Rosenbloom most companies are turning to be digital companies, and it seems impossible to mark exactly the border between digital and non-digital companies. Imposing a new income tax trying to ringfence predefined digitalised business models would not be a sensible measure for them.

consumers (this is consumer facing) and on the other it could sell its cars to leasing companies which provide fleet services for businesses (this is not consumer facing). So it could perfectly be that the same business must be segmented. The rationale at the moment is unknown.

- whether it would be better to adopt a **gross basis tax** for digital companies rather than **net-basis income tax**.
  A tax on net income should include at the same time possible deductions, and for digital intangible companies, it will be not possible to have those deductions in market jurisdictions. The OECD hasn't given instructions to deal with the administration of a net income tax on foreign taxpayers. Peter Barnes and David Rosenbloom believe that OECD justifications to introduce a new income tax are not strong enough to dismiss long-standing principles of international income tax administration. They argue that the better approach is to use gross-basis taxes such as those that have been adopted by countries imposing unilateral interim measures.[82]

The OECD is presenting a proposal with untested complexities that may crate administrative challenges. Commentators are waiting for complete details[83] regarding the economic impact analysis of the Two-Pillar Approach and they would like an holistic set of policy recommendations to reform corporate tax system without ring-fencing the digital economy.[84]

The problem in considering the OECD DST is the big picture. First of all, taxation requires policies and ideas but also rules and rules require details. At the moment many commentators believe that there is chaos in the formulation of the OECD proposal. If there is a lack of clarity on basic principles amongst countries and businesses, then it will be very difficult to come out with detailed rules. There are very few specifications and indications on how the OECD Pillar 1 has to be understood how much revenue digital taxes are collecting and how readily they can be administered.

---

[82] Barnes P.A., Rosenbloom H.D., *Digital Services Taxes: How Did We Get Into This Mess?*, 97 Tax Notes Int'l, p. 1255, Mars 23, 2020. The authors are wondering whether is better a net or a gross-basis tax for digital services companies. They believe that the OECD should try to harmonize the interim measures proposed by several countries rather than "throw them out in favour of an entirely new income tax regime".

[83] Christians Allison, OECD Digital Economy Designers: Share Your Work!, Tax Notes International, March 20, 2020. The author accuses the OECD of asymmetry of information to the detriment of the stakeholders involved. Asymmetry on the choice and combination of data sources (a mix of confidential, fee-based and public information sources), on assumptions made.

[84] Tax Notes Federal, *A Seat at the Table: Thought Leaders Discuss OECD's Plans on Digital Economy Taxation*, 98Tax Notes Int'l, p. 1273, June 15, 2020.

As far as I have understood, in the OECD proposal, the problem is not identifying the companies falling under the scope of digital taxes, but identifying the tax due.

Pillar 1 is reallocating income between countries and it is not cost free for them. It seems a comprehensive agreement could be found through a carefully articulated set of principles that covers classes of activity and income streams of the whole digitalizing economy rather than a limited and static selection of named sectors.[85]

The OECD recently disclosed an Economic Analysis and an Impact Assessment to estimate the combined effect of Pillar One and Pillar Two. Commentators are challenging the reliability of these estimates which are relying on data of 2016 prior a lot of policy changes, including the U.S. TCJA.

The United States are defending national companies from European countries willing to tax their digital giants. In June the U.S. withdrawal from OECD negotiations has created a big problem that could slow down the race towards a consensus based solution.

Under Pillar One and Pillar Two there is still a lot of technical work to be done. But unfortunately technical work in this case is not really separated by political sustain and policy. Technical work at the OECD in fact needs regular direction from each member states' politicians and institutions.[86]

There is a basilar concerns regarding what is the minimum level of tax under Pillar Two. An open debate is going on because there could eventually be no consensus among European countries on the minimum level of taxation. EU has to operate under the fundamental freedoms rules and a minimum tax rate which is higher than the lowest rate in the EU (Hungary 9%[87]) could lead to tension in the system.

[85] Will Morris, *INSIGHT: OECD Digital Tax Project: Profit Reallocation—How Do We Get 'There' From 'Here'?*, Bloomberg Tax, Transfer Pricing Report, July 28, 2020. According to the author, in the U.S., both Obama and Trump Administrations have opposed a solution "ringfencing the U.S. tech sector" and it will not be sustained by legislators from both parties in the future. This article is suggesting that the OECD should focus its attention on classes of activities or income streams originated by "digitalizing activities".

[86] For example, the definition of a "consumer facing business" might appear a technical issue, but because it has many implications to different countries and industries, it becomes a problem to be solved with political consensus. And what about whether Amount B is treated on a regional or industry basis?
Then there are pure political issues such as the agreed formula for Amount A, the decision whether developing countries will prevail in their desire to have a subject to tax rule that has precedence in Pillar Two.

[87] Elke Asen, *Corporate Income Tax Rates in Europe*, Tax Foundation, April 16, 2020. "France has the highest statutory corporate income tax rate among European OECD countries, at 32 percent. Portugal and Germany follow, at 31.5 percent and 29.9 percent, respectively. Hungary (9 percent), Ireland (12.5 percent), and Lithuania (15 percent) have the lowest corporate income tax rates".

So technical players at the International Framework are encountering problems with consensus and with an extraordinary ambitious timetable. This context has obviously been further complicated by the outbreak of the Covid-19 pandemic.

2.7 The European Commission (EC) Digital Services Tax Proposal

At Union level the challenges addressed by OECD BEPS Project were treated in the Communication of the Commission "A Fair and Efficient Tax System in the European Union for the Digital Single Market".[88]

The Commission identified two problems. First, that current corporate tax rules do not capture properly profits generated by new digital companies' business models. And second, that laws do not recognize value generated by users. In this way there is disconnection between where value is created and where taxes are paid.

On 21 March 2018, the European Commission presented two legislative proposals to establish a new common system of a digital services tax:

- a long term solution to reform corporate tax rules on nexus criteria;
- a short term solution was an interim digital tax on turnover related to particular types of digital services provided.

The long-term solution aimed to establish the concept of significant digital presence in a country, expanding the definition of the tax-treaty nexus rule: the permanent establishment requirement. This measure would have enabled member countries to tax non-resident companies with significant business activities in the state, regardless whether there is a physical presence or a dependent agent.

The aim of the proposal was that of ensuring that online digital companies contribute to public finances at the same level of traditional "brick-and-mortar" companies.[89] This was probably integrating the Commission's proposal for a Common Consolidated Corporate Tax Base (CCCTB), which is aiming to build a single corporate tax system across the EU for digital companies, reducing compliance costs and making it harder to shift profits arbitrarily to low-tax jurisdictions.[90]

---

[88] European Commission, *A fair and efficient tax system in the European Union for the digital single market*, COM, 547 September 21, 2017. This Communication has been of vital importance because the EU for the first time took a clear and strong position on taxing the digital economy. The EU had the great interest to continue to actively participate to global discussions on digital taxation with G20 and OECD countries. But, in absence of significant progress at the OECD level, a European Commission legislative proposal would have been ready to be implemented.

[89] European Commission, *Digital Taxation: Commission proposes new measures to ensure that all companies pay fair tax in the EU*, COM., March 21, 2018.

[90] Jessop J., Trovato M., Marques N., Santacruz J., *The Case against Tech Taxes*, EPICENTER, June, 2019.

The European Commission used proxies for determining the 'digital footprint' of a business in a jurisdiction based on certain indicators of economic activity.[91]

A digital company would have a taxable significant digital presence or a virtual permanent establishment in a Member State if it meets one of the following thresholds:

- the amount of digital services to users in a jurisdiction exceed € 7 million ($ 784 million) in a taxable year;
- the number of users of a digital service in a Member State exceeds 100,000 in a tax period;
- the number of business contracts for digital services exceeds 3 000.[92]

The short term solution instead is about the introduction of an interim digital services tax that would generate immediate revenues for Member States. This tax would apply to revenues generated by companies: selling online advertising space, offering online marketplace connecting users, collecting-storing-processing-monetizing users' information and data.

The European Commission interim DST consists of a 3% turnover tax that would apply to companies with total annual worldwide revenues above €750 million (US $840 million) and EU annual taxable revenues above €50 million.
The European Commission calculated that on average digital companies generate a profit margin around 15% and that the EU's average corporate income tax rate is 21.3%, thus the proposed tax rate of 3% (3/15 = 20%).[93]
There is no distinction between companies operating independently or part of a consolidated group.
Of course, the first turnover threshold is so high that the tax would apply only to a small number of large companies.

The approvement of this tax proposal needed the support of all 28 EU countries, including low-tax country like Ireland. It was intended to be a "quick fix", an interim measure until a broader

[91] European Commission, *Proposal laying down rules relating to the corporate taxation of a significant digital presence*, COM (2018) 147 final, March 21, 2018. Indicators of economic activity should reflect the link of digital business models with different level of user engagement, user's contributions and reliance of these businesses on value created by users.

[92] *Supra* note 82, page 8.

[93] Papotti R., Cazeiro M., *Analysing the Italian Digital Services Tax Through European Glasses*, Tax Notes International, November 20, 2019. The rationale of the tax rate at 3% is related to European Commission's aim to close the gap between the corporate taxation of digital and traditional firms.

solution would have been found by OECD member states. Ireland and some other Nordic countries opposed and criticized it and therefore European Union finance ministers failed to agree on tax on digital revenues.[94]

The EU is fully committed to provide full assistance in negotiations with the OECD to reach a consensus-based solution, but if no solution is found by the end of 2020, it will again make a proposal for its own digital tax.[95]

At the moment it seems very difficult to find an immediate solution at both OECD and EU level, coordination requires time. So many Member States started introducing and designing their own digital taxes.

I will now describe how the OECD is working and the nature of negotiations going on in the last public consultations of the IF member states.

2.8 How the European Countries are moving on Digital Services Taxes

European governments are aiming to tax American tech giants that supply internet search, online shopping and social media to their citizens. This can be interpreted as one of the largest economic battle of 2020 and for the upcoming years.

Changing international rules on digital taxation it's extremely difficult because attributing value to a user that accesses a free service is economically challenging as there is no price signal connected and treating a network of users as a value-creating asset raises many measurement and calculation difficulties.[96]

Recently our economic activities have shifted even more to the virtual world: social distances and stay-at-home orders under Covid-19 led to a real business booming for tech companies like Amazon, Netflix and Zoom.

Crash-crunched states are looking for new revenue sources: some European countries have already proposed or enacted digital taxes (even before the pandemic crisis), many others will

---

[94] Leigh Thomas, *EU ministers fail to break digital tax deadlock*, REUTERS, December 3, 2018. The author states that Ireland, like many other countries, has gained many benefits by letting multinationals to book, in their jurisdiction, profits on digital sales to customers located elsewhere in the European Union.

[95] See Marcin Szczepanski, *Digital Taxation: State of play and way forward*, European Parliament Think Tank, March 19, 2020; and Romano Beda, *La Ue prova ad accelerare su web tax e tasse per la società*, Il Sole 24 Ore, September 13, 2020.

[96] Bunn D., Asen E., Enache C., *Digital Taxation Around the World*, TAX FOUNDATION, May 27, 2020.

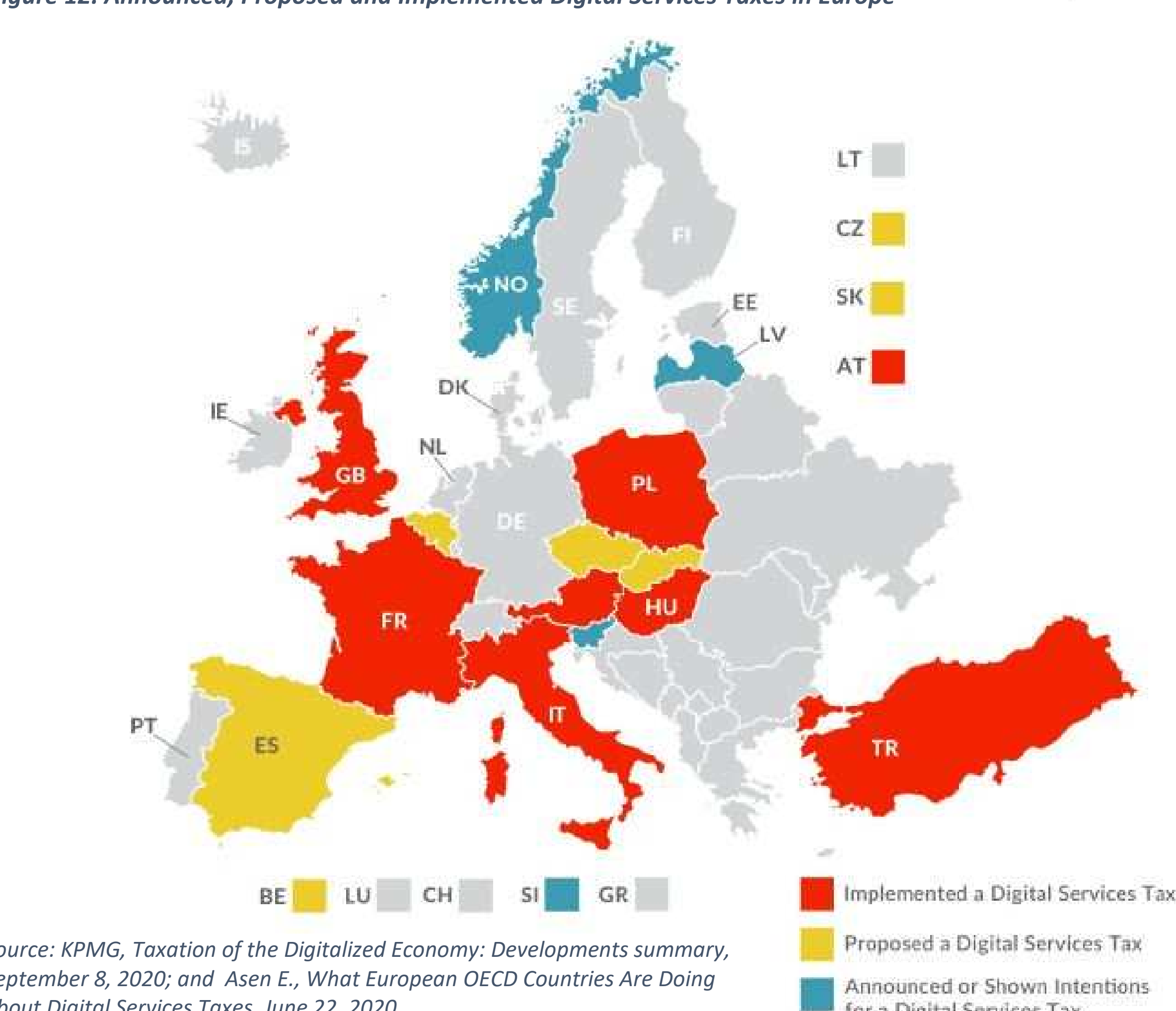
catch up. Social and welfare service cuts would deepen the recession and ideally digital taxes could help mitigate States' revenue shortages.[97]

Despite a constructive atmosphere at a OECD level, several European countries have decided to introduce their DSTs unilaterally after the failure to find a common solution by the European Commission and by the OECD.

By issuing turnover taxes, they basically aim to reallocate to themselves income over which they ceded power jurisdiction in their tax treaties.

Ireland and the Nordic countries are said to be against a common EU position because tax is a national competence. Larger member states (Germany, France, Italy and the United Kingdom) declared they want to take advantage of the existing momentum and conclude negotiations as soon as possible.

Figure 12. Announced, Proposed and Implemented Digital Services Taxes in Europe



Source: KPMG, Taxation of the Digitalized Economy: Developments summary, September 8, 2020; and Asen E., What European OECD Countries Are Doing about Digital Services Taxes, June 22, 2020.

[97] Ruth Mason, Darien Shanske, *INSIGHT: The Time Has Come for State Digital Taxes*, Bloomberg Tax, Daily Tax Report: State, May 29, 2020. The author is underlying how digital taxes are becoming attractive for countries especially during this pandemic. Even the Maryland legislature recently adopted a digital advertising tax proposal.

Up to now Austria, France, Hungary, Italy, Poland, Turkey and the UK have implemented their own national DSTs.

Belgium, the Czech Republic, Slovakia and Spain instead have published formal proposals to enact a DST. Latvia. Norway and Slovenia have showed intentions to implement such taxes.[98]

European countries are required to offer detailed justifications for their DSTs. In fact, many non-digital companies are also expert in reducing their tax bill. They have to explain why digital firms like Google, Apple, Facebook and Amazon are fundamentally different from non-digital firms like Goldman Sachs, Nike and Nestlé. Additionally turnover thresholds maybe should take into account the fact that the EU market has been reduced because of Brexit and that the United Kingdom has formulated its own version of DST. Probably they will have to expand the number of digital activities reducing the discriminatory aspects of the tax.[99]

As of May 2020, also other twenty-two countries around the world have either enacted or proposed some form of DSTs: India, Indonesia, Nigeria, Kenya and Tunisia are part of this list.[100]

2.8.1 USA vs Europe

Before 2008 crisis, countries' attitude towards corporate avoidance was one of indulgence. The United States has always been the biggest resident countries and before the 2017 tax reform the American corporate tax rate was very high 35%. This tax rate was applied to profits earned in the U.S. and to profits realized abroad remitted back in America as dividends. Foreign source income was exempted.

American companies used to establish subsidiaries abroad (in Europe) and to transfer to those subsidiaries Intellectual Property (IP). At that time, under U.S. law, income generated by

[98] Elke Asen, *What European OECD Countries Are Doing about Digital Services Taxes*, TAX FOUNDATION, June 22, 2020. All these DSTs have different structures in term of tax base and tax rate and although they have been presented as interim measures it is not clear when they will be deactivated if an agreement is found at the OECD.

[99] Goulder Robert, *After the Break Up: Can Europe Build a Better DST?*, 98 Tax Notes Int'l, p. 1557, June 30, 2020. The cited expectation might be the most important step. At the moment subscription fees (Spotify), video game developer in-app purchases (Supercell), digital platforms that facilitate financial trades or payments, European banks and payment services (Skrill), revenue from data obtained by sensors, connected cars (BMV, Volvo).

[100] Bird & Bird, *Digital Services Tax: Overview of the progress of implementation by EU Member States*, July 16, 2020.

foreign subsidiaries was deferred from U.S. tax until the subsidiary was distributing it in the form of dividends. Apple for example, could have deferred taxes as long as it wanted, potentially indefinitely. So corporate tax directors' job was: shifting the IP out of America and then getting the income out of all other relatively high tax states into lowest tax subsidiaries (base erosion).[101]

Additionally international coordination was missing with many gaps existing between different national tax system. For example the U.S. residence rule is place of incorporation, while the Irish tax residence rule is where a company id managed and controlled.
So first of all, Apple incorporated companies in Ireland transferring IP abroad but these companies were managed and controlled from the U.S., thereby not having tax liability in either country.[102]

Secondly Apple's German subsidiaries (with high tax rates) were buying, for very high prices (enhancing deduction, avoiding to pay high taxes in Germany), phones from its Irish subsidiaries, because that has the effect of shifting income into Ireland (12,5% tax rate).
So every country was focused on its own tax system and on its own taxpayers without considering the global overview of the situation.
U.S. tax avoidance was a foreign tax avoidance (Apple was avoiding German taxes) and this dynamic actually made U.S. companies more competitive and U.S. shareholders richer. At the same time European countries welcomed investments, productive factors and jobs, tolerating a certain amount of income erosion.[103]

After the 2008 crisis, countries started addressing tax planning problems because they were facing budgetary shortfalls. Politicians could no longer take this indulgent attitude towards corporate tax avoidance. They were looking for more tax. And ordinary people were feeling the pain of the crisis and they started to pretend corporations to pay their fair share of tax within countries where they were creating value and profit. And today it's still the same. But what Apple was doing was perfectly legal and many other multinationals were taking advantages on international tax law gaps.

---

[101] See University of Virginia School of Law's podcast "*Taxing Big Tech and the Future of International Tax*", speaker Ruth Mason March 26, 2019. Available at: https://www.youtube.com/watch?v=FYAiOy9CovE.

[102] Ruth Mason, *The Transformation of International Tax*, American Journal of International Law, Virginia Public Law and Legal Theory Research Paper No. 2020-36, Virginia Law and Economics Research Paper No. 2020-08, April 15, 2020.

[103] *Supra* note 92.

The solution was proposed by the G20, tasking the OECD with the mandate of finding the gaps, closing them and reforming international tax system. Thanks to multilateral cooperation and the OECD work, many things have changed to stop BEPS.
For example, Ireland was forced to change its tax residence rule and U.S., in 2017, implemented a minimum tax on U.S. companies foreign source income stopping deferral practices.
Negotiations are going on at the OECD level with the International Framework discussing new nexus rules, how to grow the "revenue pie" by closing loopholes. Countries are disputing about where economic activity in the digital age is generated, where it should be taxed and who should collect that revenue. The United States are defending national companies from European countries willing to tax their digital giants.

U.S. is supporting the change in the nexus rules enlarging the tax scope but they don't want to have sectorial discrimination.
These new rules should not apply only to particular kinds of companies (social media and digital companies), they should be collected also from a broader range of businesses.
In this case, France has to collect tax from Facebook but U.S. should also get to collect tax from Gucci, that is marketing intangibles, trademarks, people's good feelings about brands. These intangibles asset generate value for firms and they do really exist in the states where the consumers or user are.

So in BEPS Project, Action 1, the United States could only loose because more tax is going to be assigned to market jurisdictions.[104] The OECD is struggling to find a common solution under the Unified Approach because every country has its necessities and interests.
Economic leaders are worried because if a resolution on digital tax or the global minimum tax is not reached this year, an international tax fight between the United States and Europe could represent a threat to the global economy.
U.S. have the interest to prevent a proliferation of new digital taxes around the world and are pushing for a global tax regime.

2.9 Key issues regarding the legality of Digital Taxes in Europe

The short term solution, the Digital Services Tax (DST), to tax our modern digital economy is widely criticized. Legal experts and researchers sustain that digital taxes are bringing some

[104] See: Christians Allison, *Taxation of the Digital Economy: Preliminary Analysis of OECD Pillar 1 Impact Assessment + KPMG Transfer Pricing Study of Amounts B & C*, (Presentation Slides), March 8, 2020.

problem like: discrimination against particular sectors and countries, tariff consequences, double taxation, retaliation and additional costs for consumers.

In fact, the DST represents an interim measure until the OECD can find a better solution to the challenges of taxing an increasingly digitalized economy. Many think that this temporary stopgap could be dangerous because it contains no end date and could potentially last indefinitely.

From a legal point of view, EU taxpayers could argue that digital services taxes, as they are formulated today, may lead to violations of EU law.
Both EU proposal and unilateral digital taxes may violate European laws prohibiting nationality discrimination and unilateral measures could implicate violations is state aid rules.[105]

High revenues thresholds grant that only very large companies are subject to digital taxes, and therefore this means that almost only foreign companies would pay digital taxes in Europe. Additionally their narrow scope impose taxation only for specific disfavoured sectors.

In their legal argumentation, R. Mason and L. Parada consider the proper role discriminatory intent should play in fundamental freedoms cases, describing the evidence that EU Member States enacted digital taxes to discriminate against big, foreign companies, and especially against U.S.-headquartered digital giants.[106]

2.9.1 Potential discrimination claims

Revenue triggers are very high and they apparently seem to be neutral when in reality they guarantee that digital taxes will fall almost entirely on U.S.-headquartered companies. This fact could be interpreted as nationality discrimination.
Under the EU law, the fundamental freedoms ensure that goods, services, capital and persons can move without restrictions.

[105] Ruth Mason & Leopoldo Parada, *Digital Battlefront in the Tax Wars*, Tax Notes International, December 17, 2018. In this article, the authors explain how revenue thresholds in proposed DSTs (EU and national) are exposed to nationality discrimination claims (only non-resident companies would be affected), state aid violations (ring-fencing big tech companies).

[106] Ruth Mason & Leopoldo Parada, *The Legality of Digital Taxes in Europe*, University of Virginia School of Law, April 2020. In some cases the legislative discriminatory intent is explicit and evident, in some other (the most difficult cases) it is covered.

In Europe, U.S. companies get protection under the freedom of movement of capital and not under the freedom of establishment.
Only a EU plaintiff could bring a claim under the fundamental freedoms against a unilateral DST. This fact does not represent a problem because, in most cases, American companies operate in Europe through subsidiaries. They would argue that the state discriminates against them by virtue of their foreign parentage.[107]
The point here is understanding whether this argumentation can be sustained also against the EU directive. For sure a taxpayer is more likely to be successful challenging national digital taxes.

There are <u>three main potential discrimination argumentations</u>:

1) **Group membership**: digital taxes can discriminate against groups in comparison with standalone companies because, for example, both UK and the French DTSs determine the entity's liability for the tax on the entire group's global revenue rather than in-state revenue. Therefore multinationals are more likely to be taxed because for stand-alone companies only its own revenue counts toward the revenue trigger. Additionally they will be much more involved in cross-border provision of services, an activity protected by fundamental freedoms.[108]

2) **Foreign Parentage**: Member States can discriminate applying their unilateral digital taxes excessively against domestic companies with parents in other member states. There is no discrimination issue for non-EU-parents.

3) **Size**: applying so high revenue thresholds member states will discriminate because they will have few or no domestic companies that would meet these thresholds. Usually taxes that exclusively hit non-resident companies while exempting domestic companies represent the case for covert nationality discrimination.[109]

[107] Ruth Mason & Leopoldo Parada, *Digital Battlefront in the Tax Wars*, Tax Notes International, December 17, 2018. *Supra* note 65. "For example, while U.S.-incorporated Apple Inc. would lack standing to bring a claim against, say, France for discrimination, one of its Irish subsidiaries with activities in France that are taxable under a unilateral French digital tax would have standing to bring a nationality discrimination claim against France".

[108] Ruth Mason & Leopoldo Parada, *The Legality of Digital Taxes in Europe*, University of Virginia School of Law, April 2020.

[109] See: Ruth Mason & Leopoldo Parada, *Company Size Matters*, British Tax Review, Issue 5, 610, 615-618, 2019; and European Court Reports, *Humblot v. Directeur des services fiscaux*, C-112/84, CJEU 1985: an interesting case of facially neutral classification on imported cars.

With such high DST's revenues triggers, most of the liable companies would be foreign and almost all of them would be foreign-parented. But if those foreign taxpayers (or their parents) are located in EU states, then their disproportionate taxation may violate the fundamental freedoms. The Court of Justice of the European Union (CJEU) could favour the pursuit of the public policy goal related to taxation based on the ability to pay and progressivity. But in this case, this goal could be reached by taking in consideration companies' net income, which would tend to correlate with size. The problem is that current unilateral digital taxes are setting their thresholds on corporate turnover. For sure both net income and turnover could discriminate by size but at least the former measures ability to pay fare better.

Additionally DST's thresholds do not directly or indirectly measures a company's network effects, exploitation of big data, or amount of user input.[110] They have no proportionality justifications and, at the moment, they are really poorly supported by the Commission or any member state.

Even if the EU digital tax proposal wasn't approved with a unanimous vote, its thresholds were taken in consideration in determining the taxable base of many unilateral DTSs.

2.9.2 State Aid Violations

Unilateral digital taxes could face state aid challenges because they select on the basis of size, nationality and sector. They could be conceived as sectoral state aid to smaller, domestic competitors of foreign large multinationals. Taxpayers could challenge the European member state protectionist aim in drafting the structure of its unilateral digital tax.

As regard the state aid granted by a member state through digital taxes, there is one relevant thing that every European taxpayer should keep in mind: state aid investigation can be performed only by the Commission and it is unclear whether the commission would do so. Probably, it will be very difficult that the European Commission will challenge unilateral member state rules shaped an designed on the Commission's own DTS proposal.[111]

---

[110] Ruth Mason & Leopoldo Parada, *Digital Battlefront in the Tax Wars*, Tax Notes International, December 17, 2018. The European Commission is supporting thresholds that could be offered as justifications for disproportionate effects on non-resident companies.

[111] Ruth Mason & Leopoldo Parada, *Digital Battlefront in the Tax Wars*, Tax Notes International, December 17, 2018. According to the authors, the CJEU grant the respect of community directives, and therefore a taxpayer "is more likely to be successful when challenging national digital taxes then when challenging EU directives".

2.9.3 The Legal Relevance of Intent

Being involved facially neutral rules, the CJEU should take into account legislators and government officials intent to discriminate (indirect discrimination).

In the case *Vodafone Magyarország*[112] (Vodafone Hungary) EU Advocate General Julian Kokott expresses a novel reference to the use of legislative intent in determining the existence of indirect discrimination.

In July 2019, Leopoldo Parada studied this case and the Advocate General's opinions underlying the EU principle of prohibition of abuse of rights applied to European member states. The author mentioned how each member state has the obligation to comply and respect EU law and if it *intentionally* chooses to introduce a turnover-based tax to disadvantage foreign companies (therefore restricting the freedom of establishment), for example, this decision would amount to an abuse of rights.[113]

Discriminatory intent is not wholly irrelevant in fundamental-freedoms cases but sometimes it is really difficult to prove legislative intent. No government, in fact, would explicitly declare within the law that its intention is to disadvantage a group of foreign taxable persons.

The intention must be legally relevant and must have been accordingly proven. Most of the time is almost impossible to provide with clear evidence of the legislator's primary purpose to disadvantage foreign companies.

To this end the statements of the political representatives of the government should be considered insufficient to establish intent? Or must there be an official document written and signed by a member state containing evidence that the primary objective is that of discriminating against foreign-parented companies?

If legislative intent will be taken in consideration in future State-aid cases, as in Gibraltar case[114], then the CJEU might consider digital services taxes as State aid.[115]

---

[112] See Parada Leopoldo, *How the Vodafone Magyarország Opinion Affects EU Debate on Turnover-Based Digital Taxes*, 95 Tax Notes Int'l 5, July 29, 2019.

[113] Parada Leopoldo, *How the Vodafone Magyarország Opinion Affects EU Debate on Turnover-Based Digital Taxes*, 95 Tax Notes Int'l 5, July 29, 2019. It cannot be a mere coincidence that digital services tax proposed by European countries discriminate against U.S. companies. The problem with discriminating American companies is that it also bring within-EU discrimination because the EU subsidiaries of those American companies are located in tech-friendly, lower-tax European states.

[114] See: *Commission v. Gibraltar and United Kingdom*, joined cases C-106/09 P and C-107/09 P, CJEU 2011.

[115] Parada Leopoldo, *EU loss in Polish State aid case may be a win for digital services tax*, MNE Tax, May 17, 2019.

2.9.4 Proportionality analysis

The amount of the digital tax, its gross basis, the revenue thresholds, and the highly selective revenue streams to which it applies, would all face close scrutiny under proportionality analysis.[116]

To accept a new tax, it must be no more discriminatory than necessary to realize the government's legitimate goal. If less discriminatory approaches could be applied to achieve state's ability to pay goals (public policy reasons justification), then that discrimination is not justified because the rule is not proportional.

[116] See: Ruth Mason & Leopoldo Parada, *The Legality of Digital Taxes in Europe*, University of Virginia School of Law, April 2020; and Ruth Mason & Leopoldo Parada, *Digital Battlefront in the Tax Wars*, Tax Notes International, December 17, 2018. Here the definition of proportionality clarified by the authors: "Proportionality is about the fit between the degree of discrimination and the public policy reason that justifies the discrimination".

2.10 The relevance of recent decisions by the Court of Justice of the European Union on Digital Taxes

In early March 2020, The Court of Justice of the European Union (CJEU) rendered its judgement in two cases that may influence challenges to unilateral digital taxes.[117]

In these cases, two different UK-headquartered companies, Vodafone[118] and Tesco[119], brought nationality discrimination claims against the Hungarian "special tax" on net turnover from retail and telecommunications activities.
Business in the lowest bracket were Hungarian-owned, while all (or nearly all) the companies in the highest bracket were foreign-owned. It was a net turnover tax and higher net turnover companies tended to be foreign.

Tesco and Vodafone's subsidiaries made the same claim in the same Hungarian national courts. In their opinion the Hungarian "special tax" was disproportionately hitting foreign owned companies and therefore it illegally discriminated against them.

The two subsidiaries in question were claiming that although Hungary was not overtly discriminating on the basis of nationality, Hungarian national "special tax" was structured using proxy classification that highly correlated with nationality (disproportionate impact case). In this case, Hungary used a facially neutral law to effectuate intentional discrimination against foreign owned companies.

In a precedent case, Hervis[120], and Australian-parented company, challenged Hungary's rationale to determine the graduated-rate that would apply under a special tax.
Under the law, a Hungarian company had to consolidate its own turnover at a corporate level with those of other members (also foreign members) of the group to determine its tax rate. As a consequence, group members were subject to higher tax rates than non-group members.

[117] See: Ruth Mason, *What the CJEU's Hungarian Cases Mean for Digital Taxes*, Tax Notes International, p. 161, April 13, 2020; and KPMG, *CJEU decisions on progressive tax on turnover and fines related to advertising tax*, Euro Tax Flash homepage, March 3, 2020.

[118] For an in-depth analysis see: Judgement of the Court, *Vodafone Magyarország Mobil Távközlési Zrt. V Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, C-75/18 (CJEU 2020).

[119] For an in-depth analysis see: Judgement of the Court, *Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, C-323/18 (CJEU 2020).

[120] See: Ruth Mason, *What the CJEU's Hungarian Cases Mean for Digital Taxes*, Tax Notes International, p. 161, April 13, 2020 and Judgement of the Court, *Hervis Sport- és v. Hungary*, C-385/12 (CJEU 2014).

In this case, the Court established a simple majority rule: if most of the tax payers subject to disproportionate tax treatment were resident in other EU state or were linked to other EU companies, then the challenged specific national tax would have been considered illegally discriminatory under the fundamental freedoms.

This judgement was extremely positive for taxpayers challenging the Hungarian special tax.

Although,

- fundamental freedoms (movement of capital, services, establishment, workers) doctrine;
- the majority rule expressed and sustained in Hervis case;
- article 110 on the Treaty on the Functioning of the European Union prohibiting the member state imposition of protectionist taxes on goods to preserve internal market (for example in Humblot case[121]);
- state aid doctrine showing what does it mean for a state to discriminate against cross-border commerce relative to domestic commerce;[122]
- Advocate General Juliane Kokott's opinions analysing the possibility that Hungary enacted the tax with discriminatory intent but at the same time extensively briefing the Court on related DST issues;[123]

the CJEU didn't refer to its relevant precedent doctrine (Hervis, Humblot, Gibraltar [124]…) nor it performed a proportionality analysis in Tesco and Vodafone cases.

It considered the main question to be related to progressive taxation without taking in consideration covert discrimination (proxies facially neutral) or Hungary's discriminatory intent in formulating the "special tax".

---

[121] See: European Court Reports, *Humblot v. Directeur des services fiscaux*, C-112/84, CJEU 1985.

[122] Ruth Mason, *What the CJEU's Hungarian Cases Mean for Digital Taxes*, Tax Notes International, p. 161, April 13, 2020.

[123] Parada Leopoldo, *On turnover-based taxes and digital taxes: the EU Advocate General's opinion in Vodafone*, MNE Tax, June 17, 2019. AG Kokott sustains that "if the correlation between turnover and the location of companies is chosen intentionally to disadvantage foreign taxable persons, indirect discrimination may rise". The problem is that proof of intent is subject to strict conditions from a juridical point of view.

[124] See: *Commission v. Gibraltar and United Kingdom*, joined cases C-106/09 P and C-107/09 P, CJEU 2011.

The Court declared, unsurprisingly, that progressive tax rates are not, by themselves, illegal.[125]

By looking at these cases, one can reasonably assume that CJEU will not sustain future digital tax challenges raised by taxpayers. These cases in fact, present taxes whose nature, object of dispute, presents many similarities with the digital tax.

Obviously, Digital Services Taxes are different from the Hungarian "special tax" challenged by Vodafone and Tesco, for example. DSTs hit specific sectors combining non-suspect classification (gross turnover) with some suspect classification (narrow streams of income). They tax gross, rather than net, income and their rate are determined by worldwide income.

But for certain aspects, their extremely high turnover, exempting domestic competitors, make digital taxes even more discriminatory.

Tesco and Vodafone sentences introduced legal uncertainty[126] into fundamental freedoms doctrine and they may have strengthened the ability of EU to discriminate against U.S. companies. But at the same time, they also enhanced member's ability to discriminate against companies resident in other EU states: a bad consequence for the European single market.

Probably the CJEU will reject challenges to digital taxes ignoring the possible intentional discrimination against out-of-state companies undermining the European solidarity.[127]

For the moment only assumptions can be made because there are simply not enough cases to sustain confident conclusions and the CJEU's reasoning demonstrated to be inconsistent in the cases that I have mentioned.

[125] Ruth Mason, *What the CJEU's Hungarian Cases Mean for Digital Taxes*, Tax Notes International, p. 161, April 13, 2020. In Mason's opinions, the Court's omission to certify covert discrimination situations in the Hungarian cases must be understood as deliberate. "The Hungarian cases missed the core questions that any challenge to digital taxes would rise: whether states may, consistently with EU law, deliberately formulate their tax laws to target foreign taxpayers".

[126] Ruth Mason, *What the CJEU's Hungarian Cases Mean for Digital Taxes*, Tax Notes International, p. 161, April 13, 2020.

[127] *Supra* note 117.

Chapter III

The implementation of the Italian Digital Tax

3.1 The long course of the Italian Digital Tax implementation

Italy has always been looking for solutions to reduce a dramatic public debt and indeed Italy was one of the first countries to think about taxing the digital economy with sector-specific tax. Up to now, is almost seven years that Italian politicians are trying to introduce a digital tax which, through the years, was repeatedly named by Italian press as "Google Tax" or "Web Tax".

Aggressive, systematic and comprehensive tax audits have been initiated, amongst others, against Apple, Google and Amazon; all three led to expensive settlement agreements with the Italian tax authorities.[128]In 2015, for example, Google has agreed to pay € 306 million to settle a tax dispute with Italy for its operations in the country from 2002 to 2015; in the same year Apple paid Italy € 314 million in back taxes.[129]

3.1.1 Italy's 2013 Web Tax

In 2013, under the Letta's Government, Italy developed a study to address this problem and proposed the possible introduction of a "Web Tax" through an amendment to the Italian Budget Law for 2014.[130] It was approved unanimously by the Budget Committee and published in the Official Gazette.

In this law the Italian legislator introduced some rules about advertisement services taxation under VAT legislation and some specifications on direct taxation and transfer pricing related issues.[131]

---

[128] Valente, Piergiorgio, *Italy/International - The Italian Web Tax from a National and International Perspective*, European taxation, 58.5: 186-190, 2018.

[129] See: Scott Mark, *Google agrees to Pay Italy $334 Million in Back Taxes*, The New York Times, Mary 4, 2017; and Goodley Simon and Scammell Rosie, *Apple agrees to pay £234m to settle Italian tax dispute*, The Guardian, December 30, 2015.

[130] See: *Law 27 December 2013 n.147, art. 177.*

[131] Braccioni P., *Italian Finance Law 2018: Focus on the New Tax on Digital Transactions ("Web Tax") and on the New Features of the Italian Permanent Establishment*, Paul Hastings LLP, January 2018.

The “Web Tax” amendment was containing two provisions: one looking to expanding the concept of “permanent establishment” to the transmission of data along Italy’s network infrastructures; and one studying how to calculate corporate income for online advertising market players whose transactions were taking place with related companies based in Italy.

Mainly it was forcing non-Italian digital companies offering online advertising to get an Italian VAT number to sell their services to Italian-based clients (B2B).[132]

At that time, this proposal was the first of its kind in Europe and it was sustained by deputy Francesco Boccia, who was then chairman of the House Budget Committee and an influential lawmaker form the main centre-left Democratic Party: Partito Democratico.
In his opinion, this “Web Tax” would have brought between 100 million and 150 million euros a year. This “Google Tax” immediately triggered numerous debates on its capacity to effectively fight taxable profits erosion strategies.

There was no issue regarding VAT avoidance in the digital economy. The VAT registration was just a mechanism to push multinational tech giants to register in Italy. In this way, “Web Tax” supporters were hoping to capture a much larger share of their taxable income.

Forbes defined the approach of the Italian “Google Tax” simply illegal inside the European Union because of the Single Market fundamental freedoms (free movement of goods, services, people and capital and also the freedom of establishment).
Two fierce Forbes articles judged Italian politicians as ignorant or opportunists seeking immediate political gains through illegal ideas.[133]

Also the European Commission expressed serious doubt about the measure, potentially dangerous for the European taxation system and in contrast with EU fundamental freedoms and non-discrimination principles, because it was preventing Italian companies from acquiring services from companies registered in other European countries.[134] Even if it wasn’t forcing

---

[132] Jessop J., Trovato M., Marques N., Santacruz J., *The Case against Tech Taxes*, EPICENTER, June, 2019. According to this measure, all business that were willing to provide to Italian business customers would have to be registered in Italy for tax purposes.

[133] Worstall Tim, *Italy Proposes An Entirely Illegal Google Tax*, Forbes, November 5, 2013 and the same author wrote a second article on Forbes in December 2013: *Italy Passes The Illegal Google Tax*. According to the author “EU law states, unequivocally, that it is charged in the state of sale, not delivery. Italy cannot demand that electronic goods be sold only through an organisation registered for Italian VAT. EU law says differently and that's the end of that matter”. “One company, based anywhere inside the EU, can then sell to all 27 other countries in the EU without needing to have a permanent establishment in each of those 27”.

[134] Jessop J., Trovato M., Marques N., Santacruz J., *The Case against Tech Taxes*, EPICENTER, June, 2019.

foreign-based online service providers to register in Italy, it was discouraging Italian companies to do business with foreigners.

Italian Prime Minister Enrico Letta, justified the proposal by saying that a coordination with the European norms was needed and that the project was still at the beginning, setting this "issue" as an absolute priority for Europe.

This law would have entered into force by the 1st January 2014, but at first it was postponed to 1st July 2014 and then it was definitively abrogated by the Decree Law 6 March 2014, n. 16 wanted by the then Prime Minister Matteo Renzi.

3.1.2 The 2015 Web Tax

In 2015, few months after, a new version of the Italian Web Tax was re-proposed and formulated by Enrico Zanetti, the Economy and Finance undersecretary of Renzi's Government.

This time, the tax would have hit both Italian and foreign companies on the basis of two requirements:

- having a continued online presence in the Italy of at least six months (this was another proposal to extend the concept of permanent establishment in comparison to that expressed by international tax law);
- realizing at least EUR 5 000 000 million from Italian customers.

A tax rate of 25% was fixed on these revenues.[135]

Since the beginning also this web tax proposal seemed to have the aim of putting pressure on EU institutions to address the tax elusion by the main digital players. When Renzi's Government came to an end in 2016, this proposal died with it.

3.1.3 The "Transitional" 2017 Web Tax

However the idea about the introduction of a "Google Tax" didn't die in Italian lawmakers' mind. In fact, towards the end of 2017 a new version of the Web Tax was introduced through a new amendment in the Budget Law 2018.[136]

---

[135] Il Sole24 Ore, *Fisco, Zanetti: 3 miliardi da web tax con ritenuta 25%*, May 6, 2015.

[136] See: *Law no. 205 of 27 December 2017.*

This new proposal would have been defined the "Transitional Web Tax" because it introduced a voluntary disclosure regime, aiming to define targeted procedures instead of new taxes.[137]

This version of the Web Tax targeted digital transactions with the following three characteristics:

- an online electronic delivery of services;
- any company regardless of their nationality: Italian residents or Italian Pes of non-residents with business income; and
- a volume above 3,000 transactions for a specific service provider/taxpayer within a given calendar year.[138]

The first condition was targeting the automated supply of services via electronic means. The second one was imposing the tax only to B2B transactions (e-commerce supply of goods / B2C transactions were excluded) and the last threshold of 3,000 transactions was delimiting the scope of the tax only to big companies realizing significant income from digital business activities and exempting start-ups and small companies.

If these three requirements were met, the Web Tax would have applied at a 3% on the service fee charged. This tax was withhold by the recipient of the service at the time of the payment and.

Additional legislations was needed to detail the application of these provisions as regard the nature of services falling within the scope of the web tax and obligations in relation to a tax declaration and payment of the tax.

This version of the web tax was restricted to the automated supply of services and didn't apply to e-commerce. Furthermore the web tax burdens non-residents and residents equally, including persons taxable in Italy on their worldwide income.[139]
Further issuance of legislation was needed to better clarify services falling within the scope, obligations related to tax declarations and tax payments.

---

[137] OECD, *Tax Challenge of Digitalisation – Comments Received on the Request for Input – Part I*, OECD Publishing, October 25, 2017. Corporations could have activated a reinforced cooperation procedure with a view to identifying jointly with the Italian tax authorities any debts of potential Italian permanent establishment.

[138] See: *Law no. 205 of 27 December 2017*.

[139] Valente, Piergiorgio, *Italy/International - The Italian Web Tax from a National and International Perspective*, European taxation, 58.5: 186-190, 2018.

In the end the Ministry of Economy and Finance failed to publish the implementing law and so this proposal was never actually applied.

3.1.4 The Italian Digital Services Tax (DST)

The Italian Budget Law for 2019 introduced on 1 January 2019 the Digital Services Tax (DTS) in Italy.[140]
This time, this proposal mirrored the EU Commission guidelines on the common system of digital services tax expressed in March 2018 and formed the basis of the current Italian DST.

This umpteenth edition of the tax on digital economy, so desired by Italy, replaced the previous measures presented by the Budget Law 2018 regarding the "Web Tax", never entered into force due to the lack of enactment of the implementing decree.[141]

The 2019 Budget Law imposed a 3% Italian DST on taxable persons carrying on business-to-business or business-to-consumer commerce and meeting, individually or jointly as part of an international group, both of the following conditions in the same taxable year:

- total worldwide revenues exceeding € 750 million (same threshold expressed by the EU Commission);
- total "digital" revenues generated in the Italian territory above € 5.5 million.

In line with the European proposal, this tax was hitting taxable revenues generated by companies:

- selling online advertising space on digital platforms (**Digital Advertising**);
- offering a multi-sided digital interface / online marketplace connecting users and facilitating their market exchanges (**Sharing Economy**);
- collecting-storing-processing-monetizing users' information and data (**Data Transmission**).[142]

[140] See: *Low no. 145, Article 1, para 35-50, of 30 December 2018*.

[141] EY Global, *Italy introduces new digital services tax*, Tax Alert, January 14, 2019.

[142] European Commission, *Digital Taxation: Commission proposes new measures to ensure that all companies pay fair tax in the EU*, COM., March 21, 2018.

Even in this case, the 2019 Law defined general principles of application and needed a Ministerial Decree to be issued within May 2019. The Decree was never adopted by the Government and the tax never came into force.

However the Italian Budget Law for 2020[143] aims at reshaping once more the Italian DST including additional amendments.
This proposal should enter into force starting from 1 January 2020 without the need for any ministerial implementing decree and it should be repealed once the OECD implements an agreed long-term solution – "sunset clause".[144]

The Budget Law for 2020 is using the same criteria and thresholds of Budget Law for 2019 to define the scope and taxable persons.
Intragroup digital services exchanges and dealings are not relevant for DST purposes if one company is the controller of the other or if they have the same controlling entity.

Additionally the new Italian proposal is introducing a number of exclusions to align the Italian DST to the European DST, even if the Italian list of exemptions, contained in Article 37-bis, is longer and more detailed than the European list.
The following digital services are excluded from the scope of Italian DST:

- supply of goods or services directly between users through an interface offering a digital intermediation service;
- supply of goods and services that are acquired online through the website of the supplier and where the supplier does not act as an intermediary;
- provision of a digital interface whose exclusive or primary purpose is providing the users of the interface with digital content, communication services or payment services;[145]
- the management of digitalized interfaces and platforms delivering banking and financial services, exchange of electric energy, gas, environmental certificates and fuel as well as the transmission of the related collected data.[146]

---

[143] See: *Law no. 160 of December 27, 2019*.

[144] Simontacchi, Adda, Scandone, *INSIGHT: Possible Double Taxation Behind the Italian Digital Services Tax*, Bloomberg Tax, Daily Tax Report: International, February 3, 2020. However, considering the complexities around the Italian DST proposal, some implementing regulations will be needed to clarify operative aspects relating to the DST application and to establish certainty amongst taxpayers.

[145] Merola Antonio, *Italian web tax: the Digital Service Tax*, ITAXA Blog, March 2, 2020.

[146] Ruggiero P., Cardone F., *INSIGHT: Italy Taxes the Digital Economy*, Bloomberg Tax, International Tax News, January 28, 2020.

All these categories are exempted because they generally have a minor contribution of the users to the process of value creation. DSTs are intended to tax business that are largely reliant on user value creation.

User interaction is the value creator. Italian DST targets total gross revenues realized by provision of digital service to users located in Italy, net of value-added tax (VAT) or other indirect taxes. The geographical scope of taxable digital services is determined in the same manner by both the Italian and the European proposals.

Users are deemed to be located in the Italian territory by reference to the internet protocol (IP) address of their device or any other method of geolocation, in compliance with data privacy regulations, at the time of their access to a digital interface or finalization of underlying transactions on that platform or opening of an account.
So taxable persons have to know and monitor the location of their users for Italian DST purposes.

Italian DST should be paid by February 16 of the taxable year following the one in which taxable revenues are realized (2021, for taxable revenues realized in year 2020) and the related tax return shall be filed by March 31 of the same year (2020). At the moment the effects of the Italian DST are still quite uncertain.

The Italian Government is expecting to collect around € 708 million per year from the DST. These forecasts appear to be too much optimistic as the French Government which is relying on a more developed national digital infrastructure is prospecting to rise only € 500 million from French DST.

Non-residents taxable persons with no permanent establishment inside the Italian territory and without a VAT identification number should request to Italian tax authorities an identification number for DST purposes.
Non-UE subjects without a PE, which are resident in a State that has not concluded with Italy a convention on tax cooperation, must appoint also a tax representative in charge of carrying out the necessary tax reporting and related payment obligations to the Italian digital tax.[147]

[147] Hogan Lovells, *The new Digital Service Tax has entered into force in Italy*, January 10, 2020.

3.2 A critical analysis of the Italian DST

There are several question marks in relation to the services included and the calculation of the Italian Digital Services Tax.

First of all, I need to underline the fact that the Italian DST will apply on revenues realized by certain digital business only. The OECD's approach instead in dealing with the allocation of profits/losses and is targeting a larger number of businesses.

The Italian DST is based on the concept expressed by the EU Proposal of "value creation" and it has the aim to solve the "misalignment between the place where profits are taxed and the place where the value is created, notably in the case of business models heavily reliant on user participation". The point is that the value for digital firms arises from the combination of users data and many other factors like capital, labour, technology. Usually a state's tax base is over inclusive, reflecting large part of the chain of value that might not be linked to its territory. It is very hard to assess what is the real value generated only by customers and users.[148]

The application of the Italian DST is rising some issues regarding the tax's economic and legal implications. From an economic point pf view, applying DST to gross revenues means that a taxable person have to pay the Italian DST regardless of its marginal profits or whether it has made any profits. But digital companies are not necessarily profit-making. Additionally, the settlement of very high revenues thresholds does not grant that the tax complies with the ability-to-pay principle laid out in the Italian Constitution.[149]

Turnover taxes do not consider expenses. European VAT is a turnover tax but it compensate for that by granting the right of deduction. The Italian DST instead does not. The digital tax is not structured to be borne by final consumers, it should be paid by service providers only. It is not a consumption tax or an income tax.

Italian DST can be seen as a non-deductible cost that may generate the cascading effect: this tax is applied many times along a supply chain, and since it is not deductible from the tax due,

[148] Stevanato D., *Italy/European Union/OECD – A Critical Review of Italy's Digital Services Tax*, IBFD, Bulletin for International Taxation, (Volume 74), No. 7, July 3, 2020.
There is no question that users con be considered as "sources of value" but the taxable base should not be determined through gross revenues obtained for services to the production of which other factors (intangible, capital investments, skilled engineers, etc.) have contributed.

[149] Papotti R., Cazeiro M., *Analysing the Italian Digital Services Tax Through European Glasses*, Tax Notes International, November 20, 2019.

the DST will become a business cost and therefore will shift the burden to final consumers. The mechanism could potentially generate distortive effects.

Italian DST could trigger also possible cases of double taxation where profits deriving from revenues subject to Italian DST are also subject to corporate income tax. At the moment the Italian DST seems to be not creditable against corporate income tax. In this case a resident taxpayer selling digital services in Italy will be taxed twice on the same business (DST + corporate income tax). The DST is likely not a "tax covered" by the most relevant tax treaties and it can be challenged under non-discrimination clauses. The unique solution could be represented by a multilateral OECD solution.

Terms "group" and "digital interface" should be clearly define by Italian tax authorities.

The Italian DST may violate the EU fundamental freedoms because they may constitute de fact / covert nationality discrimination under Article 107 of the TFEU. In fact, because of its high revenue triggers, it would apply only to very large foreign companies exempting domestic ones. EU states can discriminate against U.S. companies in many circumstances, but they are not allowed to discriminate against EU subsidiaries of U.S. companies.[150]

Italian DST could also face state aid (illegal subsidy) challenges, because it is selective on the basis of size, nationality and sector, including that they target certain kinds of digital revenue for taxation and not all of them.

Another relevant aspect is concerning the subject that will actually pay digital taxes, bearing the economic incidence: if companies react to digital taxes as they do with sales taxes, then some part of the tax likely will be passed on to consumers in the form of higher prices. In this way online subscriptions and advertised products will become more expensive.[151]

The Italian DST is defining in Article 37 mainly three types of taxable digital services (digital advertising – sharing economy – data transmission) and at the same time it is providing, in Article 37-bis, a list of several exemptions. At the moment there is no guidance on how to deal

[150] Ruth Mason, *The Digital-Tax Proxy War*, MEDIUM, December 3, 2018.
Size thresholds can be justified by the Italian legislator, even if Italia DST disproportionately hit foreigners, but the justification standards under EU law are very stringent. Imposing high revenue triggers and protecting domestic digital start-ups may not count as legitimate justifications under EU law.

[151] Ruth Mason, Darien Shanske, *INSIGHT: The Time Has Come for State Digital Taxes*, Bloomberg Tax, Daily Tax Report: State, May 29, 2020.

with bundled services that contains some service described in Article 37 and at the same time some features contained in Article 37-bis. The EU proposal is also silent on this point.[152]

Multi-sided digital interfaces users' identification and localization can rise some problems in terms of double taxation. In this context, "user" could be both the buyer and the seller of the goods and services exchanged on the digital interface.
It's not clear what is happening when the supplier and the recipient of the goods and services are located in two different states each of them with their own DST rules. And if the provider and the recipient are located in Italy, the underlying transaction would be included twice in the calculations??
Also on this aspect is missing a clear definition of "user" and this uncertainty is clearly bringing double taxation issues to be discussed.

There is another distinction between the European DST Proposal and the Italian DST in determining the total amount of revenues related to advertising displayed on user's device. The first one is taking as reference the number of times the advert has been displayed on user's device in the fiscal year. The second one instead is counting how many times adverts are browsed on the digital interface when the use is located in Italy.[153]

If users are consumers, then users' jurisdiction are market jurisdictions. The idea that the market jurisdictions have the right to tax revenues of services providers just because they offer a sales market is not justified by the benefit principle. The value production that exploit the infrastructure of a given country occurs where the income-producing activities are performed and not where users are located.

The supply of digital services through digital platforms may be understood as an activity carried out through a virtual PE with users' contributions playing a critical role in value creation. In this case the users' jurisdictions can be seen as traditional source countries and customers can become "unconscious providers of significant assets for a business rather than merely consuming its products.[154]

[152] Bellavite L., Morabito D., Tognettini R., *Italy/European Union – The Digital Service Tax in Italy: Main Characteristics and Practical Issues*, IBFD, European Taxation, (Volume 60), No. 8, July 8, 2020.

[153] Stevanato D., *Italy/European Union/OECD – A Critical Review of Italy's Digital Services Tax*, IBFD, Bulletin for International Taxation, (Volume 74), No. 7, July 3, 2020.

[154] Brauner Y., Pistone P., *Some Comments on the Attribution of Profits to the Digital Permanent Establishment*, Tax Notes International, April 1, 2018.

Petruzzi and Buriak sustain that data are real valuable assets especially for highly digitalized businesses that transfer, purchase, sell, process and transform data.[155] I am referring to business models that offer customized products following the information acquired form big data for example.

Digital companies would have the responsibility to geo-localise their Italian users and to disclaim whether revenues from digital services are generated from transactions with local users. This enforcement of data collection could trigger privacy-related issues in cases where users do not want to be tracked.

Italian DST runs the risk of jeopardizing international trade agreements and triggering retaliatory measures. Additionally it is considered a temporary measure until a global and structured international agreement is not found. There is a "sunset clause" included in the enacting provision that would repeal the Italian unilateral measure once a comprehensive solution to the taxation of the digital economy is internationally reached. This "repealing clause" is vaguely determined and can be considered as a political commitment rather than a juridical norm.[156] On this aspect the Italian law rises significant doubts because in the future a political commitment might be disregarded especially in a historical period of great governmental instability.

---

[155] Petruzzi R. & Buriak S., *Addressing the Tax Challenges of the Digitalization of the Economy – A Possible Answer in the Proper Application of the Transfer Pricing Rules?*, 72 Bull. Intl. Taxn. 4a (2018), Journals IBFD, 2018.

[156] Stevanato D., Italy/European Union/OECD – A Critical Review of Italy's Digital Services Tax, IBFD, Bulletin for International Taxation, (Volume 74), No. 7, July 3, 2020.

3.3 A comparison between the Italian DST version and the OECD's proposals

Even if the OECD two-pillar proposal and Italian DST are differently addressing the digital taxation, they present some commonalities.
Both of the discussed proposals would lead to a dramatic change in international tax architecture fundamentals, both of them are trying to provide solutions that go beyond the arm's length principle and beyond actual limitations on taxing rights determined by reference to a physical presence.

Those proposals are representing a clear shift away from traditional transfer pricing rules based on facts, circumstances and physical assets to a much simpler use of proxies for allocating profits. They are also struggling to increase transparency around the amount of taxes that big digital multinationals are paying.

They both share a key problem in responses to the following questions: "are you trying to change rules for just a few digital companies or should you make broad structural changes that affect all companies that have digitalized business models?"

The answer is that they are taking two different approaches (multilateral vs unilateral) to structure proposals sharing the same fundamental problem: they target just large businesses and only certain type of activities. This is a big issue because tax policy should not be designed on an industry by industry basis or with special rules for big versus small players.
Well, the Italian DST (as well as other DSTs in Europe) takes the narrower approach. It is a tax on gross revenues of specifically defined digital services: companies providing digital interface or advertising services based on users data.
The OECD Pillar One approach would change where businesses pay taxes but only for large highly profitable companies operating in the following sectors: automated digital services and consumer facing businesses.

As I said before the OECD two-pillars approach is radically different from that of Italian DST. The OECD is trying to find a consensus based long term solution with at least 137 countries around the globe, whereas Italy is adopting a unilateral interim measure that will expire when a global agreement will be reached at an international level.

The OECD is focused on changing tax rules to allow countries to tax the income of digital companies by fairly reallocating multinationals' taxable profits to market jurisdictions and by

ensuring a minimum level of corporate taxation. The DST is unilaterally ensuring that tech giants will be paying their fair share of taxes where value is created to national tax administrations.

OECD is playing at an international level addressing Action 1 of the BEPS Project, while DST would be a domestic provision. Therefore the OECD's uniform approach needs a political sustain because in a later moment its decisions have to be enacted into domestic law by each country. Unilateral digital taxes are immediately implemented into the domestic law, this is the reason why there is the high risk of a potential trade war among states.

The reality is that policymakers are radically change how businesses are taxed. Under the current regime, companies can choose which jurisdiction they are going to locate in, and taxing rights follow these decisions. Big multinationals operating in the digital sector are against the implementation of DSTs targeting mainly non-resident taxpayers.
Tech giants defend themselves by sustaining that, if any country can reach outside its borders and tax a company that hasn't chosen to locate there with plants, properties and something physical, there is the potential risk of creating a system in which businesses could be theoretically liable for taxes in every single country because a user for example has access to a website.

In the following table I will try to compare at my best the international OECD proposals and the domestic Italian version of digital taxation.

	OECD	
Institution	OECD – Inclusive Framework	EU Commission - Italy
Project	G20/OECD BEPS Project, Action 1 *Tax Challenges Arising from Digitalisation*	Italian Budget Law for 2020
Level	International	Domestic
Approach	Multilateral	Unilateral
Proposals	Pillar 1 – Unified Approach Pillar 2 – GloBE Proposal	Italian Digital Services Tax (DST)
Objectives	Consensus-based solutions on: - new profit allocation and nexus rules; - minimum level of tax worldwide	Force digital companies to pay their fair share of taxes due to Italy

Schedule	Common agreement by the end of 2020 15-16 October 2020 (G20 Finance Ministers meeting) 21-22 November 2020 (G20 Leaders' summit)	It will enter into force in 2021 if an international agreement will not be reached in 2020
Tax Gains Expectations	OECD Assessment: $ 100 billion per year	Italian Government Assessment: € 708 million per year
Problems & Risks	- Complexity (Amounts A,B,C) - Double taxation - It is ring-fencing the digital economy - Lack of data, details, political sustain and coordination - Unclear definitions of: digital service companies, consumer facing businesses, thresholds to be used - Huge technical work in limited time - International pressure to build consensus on a new international tax order without an adequate level of collaboration	- DST design: EU law violations (nationality discrimination – fundamental freedoms principles, state aid doctrine) - Double taxation - Turnover tax: no regard to profitability, customers' economic incidence - Privacy related issues - Unclear "sunset clause" - Unilateral provision triggering a trade war

Italian politicians increasingly frustrated at being unable to legally tax digital multinationals, through their DST deliberately decided to put pressure on the OECD work to find a solution as soon as possible. Covid-19 has increased the interest for DSTs even more because taxing digital companies is a great way to raise additional revenues from businesses outside our country to fund national post-pandemic economic recovery.
Italy is hoping to reach a solution at the OECD level by the end of 2020. But without a general agreement Italy will collect digital taxes in 2021.

Changing international tax rules is not an easy task and in my opinion it will require much time. Several other countries, in the meantime, have decided to move quickly ahead with unilateral measures to tax the digital economy postponing the effects of their taxes to the 2021.

On 12 June 2020, in response to these trends, U.S. Treasury Secretary Steven Mnuchin sent a letter to the finance ministers in the United Kingdom, France, Italy and Spain sustaining that the work of the OECD Inclusive Framework had reached an "impasse", and that the U.S. was withdrawing from collaborative negotiations on the international tax system reform.[157]

[157] Lamer Elodie, Paez Sarah, *U.S. Withdrawal From Digital Talks Marks "Collective Failure"*, 98 Tax Notes Int'l, p. 1342, June 22, 2020.

United States are not accepting the OECD approach that is leading to the introduction of unilateral and interim measures that probably will hit U.S. technology companies. Mnuchin's letter is expressing the American's willingness to postpone or hinder the digital taxation issue, in these days, "a time when governments around the world should focus their attention on dealing with the economic issues resulting from COVID-19".[158]

This U.S. decision could potentially generate an escalating trade war and provide multinationals with vast new uncertainty over their future tax bills.
In fact, it is well known that the United States has threatened to impose tariffs on European imports in response to European DSTs that they interpreted to work as tariffs on American products.
The U.S. opened a 301 investigation (a precursor to tariff threats) into digital services tax policies proposed by: Austria, Brazil, the Czech Republic, the EU, France, India, Indonesia, Italy, Spain, Turkey and the UK. In December 2019 they released a report sustaining that those taxes discriminate against U.S. companies. The U.S. then for example, publicly threatened France with tariffs of up to 100% on some French exports.[159]

A conflict with Europe appear inevitable as the finance ministers of France, Italy, Spain and the United Kingdom wrote a joint letter reacting to the U.S. "provocation" on June 17.[160] They sustained that digital giants will emerge from the current crisis more powerful and more profitable, that reaching a consensus-based solution is more crucial than ever now and that postponing and not addressing these challenges would constitute a collective failure.[161] They confirmed that either they will reach an international agreement also with U.S. by the end of 2020 or they will apply their national tax.

[158] Lamer Elodie, Paez Sarah, U.S. *Withdrawal From Digital Talks Marks "Collective Failure"*, 98 Tax Notes Int'l, p. 1342, June 22, 2020.

[159] Soong Johnston Stephanie, *United States to Hit Back at French Digital Tax With New Tariffs in 2021*, 99 Tax Notes Int'l, p. 407, July 20, 2020.

[160] Rappeport A., Swanson A., Tankersley J., Alderman L., *U.S. Withdraws From Global Digital Tax Talks*, The New York Times, June 17, 2020.

[161] Tax Notes International, *EU Finance Ministers Respond to Mnuchin on Digital Services Tax*, DOC 2020-24747, June 17, 2020.

3.4 RPA-I: an interesting proposal for the future

OCED Pillar One has the aim of quantifying the return attributable to marketing intangibles / distribution functions and of reallocating taxing rights on that profit to market countries.
The issue here, is whether or not consider the market countries as source country. An additional step therefore would be identifying the user himself as a source of profit. Under this perspective consumers would be a nice point of reference as they are relatively immobile in a territory. They could represent a new nexus criteria and this view could offer an interesting opportunity to tax profits generated by any companies in any territory in which they have no physical presence but a huge market.

The Oxford International Tax Group, founded by Michael Devereux, developed the *Residual Profit Allocation by Income (RPA-I)*[162], a proposal dealing with the taxation of profit in the location of consumers. It is representing a radical shift form the past because it consider users of digital services as a source of profit. However, it was my concern to ask myself how to respond to the great changes of the last twenty years and this proposal from the UK seems to me very interesting and the best way to pursue a long-term tax reform.

RPA-I distinguishes between *routine profits* that are attached, under the existing tax rules (Transfer Pricing), to countries where functions and activities take place and *residual profit* that get allocated on a destination basis where sales are made to third parties (new nexus rule).

The residual profit of a multinational can be calculated in two ways:

- by calculating the residual gross income (RGI) realized in each destination country (bottom-up approach);
- by subtracting the total routine profit from the Group's total profit, the residual profit obtained is then attributed directly by RGI.

It essentially would "brings significant advantages; it would not affect the location of economic activity, it would remove tax competition, it could be considerably less complex and much less prone to profit shifting".[163]

---

[162] Devereux M. P., Auerbach A. J., Oosterhuis Paul, Schön W. and Vella J., *Residual Profit Allocation by Income*, Oxford International Tax Group, March 2019. The RPA-I is belonging to the family of Residual Profit Allocation (RPA) models that separate international business profits in: *routine profits* ("R&D activities, manufacturing, general and administrative activities, sales and marketing activities and others") and the remaining part as non-*routine profits*.

[163] Devereux Michael, *A Reform Option for the OECD: Residual Profit Allocation by Income*, Oxford University Centre for Business Taxation, March 27, 2019.

I sustain this proposal because: it is in line with the OECD Pillar One profit split approach ; it is respecting concepts and mechanisms employed by the existing system; it also pursue a simple solution that would be applicable to the entire international tax system.

Conclusion

It is well understandable and reasonable that gaps and problems related to international taxation law are no longer bearable from a political point of view.

In particular, tax definition of PE together with the notion of what constitutes a taxable presence in a country did not keep up with rapid changes in the world.

One significant result has turned out to be that digital companies are not paying their fair share of taxes by taking advantage of their digitalised business models.

Large digital multinationals like Google, Amazon, Facebook and Apple represent the emblem of companies not paying significant amount of tax in jurisdictions where they nevertheless hold a sizable market name and many customers. But also many other sectors' processes and activities are fully digitalised.

However, a tax ring-fencing companies exclusively operating in the digital sector does not seem to be eventually viable.

A radical reform of the entire international tax system is therefore needed.

* * * * *

The tax community should concentrate on general principles rather than on sector-specific taxes.

Such an ambitious challenge deserves multilateral approach, the sole capable to render an actionable, practical and consistent tax reform. Moreover, broad and convinced international consensus is required.

The OECD and the Inclusive Framework look like to be the appropriate places to discuss solutions and projects as well as to promote agreement on the same. So far tax experts and different broader stakeholders groups working together have produced relevant results.

To the contrary, unilateral measures (like the Italian DST) are to prove inappropriate for at least three reasons:

- first, almost all taxpayers shall legally oppose such measures claiming that they fall outside the scope of existing bilateral tax treaties, involve numerous EU law violations (nationality discrimination, fundamental freedoms principles, state aid doctrine) and lead to potential double taxation;

- second, it is simplistic and short-sighted adopting unilateral measures while most people in many countries are now definitively convinced about the necessity to stabilize the entire international tax system according to the new 21st century ways of doing business;
- third, unilateral digital taxes would impose trade barriers to cross-border digital trade and a tariffs war has to be expected, mainly if the U.S. put in practice their threats for retaliation.

* * * * *

It has also to be considered that Covid-19 health crisis has determined a very bad year for global economy. In July, the EU's 27 governments empowered the European Commission to rise €750 billion of debt. The plan is to start repaying the money from 2027. The European Commission is proposing to create a new recovery instrument, the Next Generation EU. Cooperation in the field of taxation is needed to support this programme.

A potential disrupting commercial clash between Europe and the U.S. (the former adopting unilateral digital taxes and the latter overreacting) would only undermine economic recovery if not worsening it.

Such foolish international rush towards erecting barriers to trade in response to supposed harmful tax policy should be abandoned in favour of on long term growth shared policies.

It would be good if OECD gathered a "minimal consensus" on Pillar One by the end of 2020 in order to avoid other unilateral actions, while Pillar Two goes improving.

The challenge is getting countries to agree on how much profit should be reallocated to market jurisdictions and under what principles.

To such extent, the OECD is inclining versus shifting profit from one jurisdiction to another based on clear and reasonable principles that are still under discussion. On profit allocation rules, researchers and data analysts are showing how the compensation for tax revenue lost to avoidance is quite small for developing countries.

Let's say that a "minimal consensus" on the Unified Approach would represents a successful outcome considered the difficult political environment and the complexities involved.

Consensus on Pillar Two is instead much harder to be obtained because the OECD GloBE Proposal is suggesting both source-based (*undertaxed payments rule*) and residence-based (*income inclusion rule*) taxation but it still lacks international agreement on which states and in which cases have priority in taxing low taxed or untaxed foreign profits. This Pillar would have

a larger effect on tax revenues. For developing countries the adoption of the *undertaxed payments rule* would be preferable as they have more inbound than outbound investments.

Additionally, it should be agreed upon the appropriate minimum corporate tax rate and be understood how the GloBE Proposal will coexist with "GILTI" (Global Intangible Low-Taxed Income) regime and the "BEAT" (Base Erosion and Anti-Abuse Tax) introduced by the U.S. in December 2017.

Globally each year, multinationals are shifting 40% of corporate profits to tax heaves for more than $600 billion. This practice reduces corporate income tax revenues by more than $200 billion annually.
The combined effect of both OECD's pillars would generate around $100 billion per year, 4% of global Corporate Income Tax. MNEs headquartered in investment hubs (tax havens like Ireland, Luxembourg, Mauritius, Netherlands, and Singapore with inward investment above 150% of GDP) should be mostly affected under this proposal.
Italy, instead, through its Digital Services Tax, is expecting to gain €708 million each year.
All these numbers are part of preliminary economic analyses and impact assessments and they have been largely criticized.

It should also be recalled that the OECD is presenting a proposal with untested complexities that may create administrative challenges and an inevitable increase in compliance costs. Countries will have to free up enough resources to develop capacities to deal with these new rules. That will be problematic especially for developing countries.

* * * * *

OECD is strongly determined in achieving a solution, because it staked an enormous amount of its institutional reputation on being the only body that can deliver a consensus based solution.

Nevertheless present contingency remains extremely delicate under the following respects:

- the pressure of time suffers from the lack of a shared "Plan B";
- lots of technical articulated guiding principles still have to be procured in order to finally prevent worldwide proliferation of digital taxes;
- countries' attitudes diverge and business lobbies are not giving enough support to the OECD's efforts;

- additionally, the U.S. will no more accept any kind of sectorial discrimination against their national companies and they will not sit at the OECD negotiating table if the Inclusive Framework will not discuss wider scope solutions.
- meanwhile taxpayers are worried and ask for more certainty and details on a project that will hit their profits and that since now has been really unstable;
- countries are suffering budgetary shortfalls due to Covid-19 crisis, so that they are fully concentrated on their own economic recovery and they are ready to collect taxes in 2021 through the already implemented DSTs.

It exists an high risk that the OCED November 2020 proposal will not meet stakeholders' needs and expectations for technical details on significant choices, definitions, compromises and assumptions.

OECD has promised clarification and is now undergoing public scrutiny.

* * * * *

In the near term the OECD Pillar infrastructure should better be worked on, even if it seems to be already moving towards the right direction. Notwithstanding, in the long term more incisive changes should be introduced in response to the radical transformation of the economy due to the digital revolution.

In other words, in the future the good work brought on by OECD under Pillar One could be well integrated with proposals involving the allocation of all residual profit on a destination basis.

The Residual Profit Allocation by Income (RPA-I) might represent a practical solution and a privileged option in order to re-write and update international taxation law.

References

Literature

Aslam A. and Shah A., *Tec(h)tonic Shifts: Taxing the "Digital Ecnomy"*, IMF Working Paper, May 2020.

Bares F., Devereux M., Güçeri İ., *The Impact of Pillar II on Incentives: a trade-off between revenue and investment*, Oxford University Centre for Business Taxation, March 3, 2020.

Barnes P.A., Rosenbloom H.D., *Digital Services Taxes: How Did We Get Into This Mess?*, 97 Tax Notes Int'l, p. 1255, Mars 23, 2020.

Bellavite L., Morabito D., Tognettini R., *Italy/European Union – The Digital Service Tax in Italy: Main Characteristics and Practical Issues*, IBFD, European Taxation, (Volume 60), No. 8, July 8, 2020.

Brauner Y., Pistone P., *Some Comments on the Attribution of Profits to the Digital Permanent Establishment*, Tax Notes International, April 1, 2018.

Bukht R. and Heeks R., *Defining, Conceptualising and Measuring the Digital Economy*, Manchester Centre for Development Informatics, Paper No. 68, R. Bukht & R. Heeks, 2017.

Byrnes W., *Byrnes' Comments son the OECD's "Unified Approach" to Allocation of Profits of Digital Business*, Texas A&M University of law, Kluwer International Tax Blog, October 10, 2019.

Carpentieri L., Micossi S. and Parascandolo P., *Overhauling corporate taxation in the digital economy*, CEPS Policy Insight, 2019.

Chadwick F., *Driving to Certainty Under Pillar 1*, 167 Tax Notes Federal, p. 1379, May 25, 2020.

Chand V., *International Tax Competition in light of Pillar II of the OECD project on Digitalization*, Kluwer International Tax Blog, May 14, 2020.

Christians A. and Diniz Magalhaes T., *A New Global Tax Deal for the Digital Age*, Canadian Tax Journal 67.4 (2019): 1153-1178.

Christians A., *OECD Digital Economy Designers: Share Your Work!*, Tax Notes International, March 20, 2020.

Christians A., *Taxation of the Digital Economy: Preliminary Analysis of OECD Pillar 1 Impact Assessment + KPMG Transfer Pricing Study of Amounts B & C*, McGill University, (Presentation Slides), March 8, 2020.

Clifford S., Devereux M., Simmler M., *The GLOBE Proposal: Revenue Consequences of a Minimum Tax on Foreign Profits of Multinationals*, Oxford University Centre for Business Taxation, February 7, 2020.

Cobham A., Faccio T., and FitzGerald V., *Global Inequalities in Taxing Rights: An Early Evaluation of the OECD Tax Reform Proposals: Preliminary Draft*, October 2019.

Cui W., *The digital services tax: a conceptual defense*, Tax Law Review, Forthcoming, April 22, 2019.

De Broe L., Danon R. J. and Chand V., *Comments to Public Consultation Document: Global Anti-Base Erosion Proposal ("GloBE") – Pillar Two*, UNIL-Tax Policy Center & KU Leuven (Institute for Tax Law), December 2, 2019.

De Wilde M., *European Union/International-On the Future of Business Income Taxation in Europe*, World Tax Journal: WTJ, 12(1), 179-236, January 28, 2020.

De Wilde, M. F., *'Sharing the Pie': Taxing Multinationals in a Global Market*, 43 Intertax 438, at 438-446, May 1, 2015.

Dechsakulthorn S., Glenn K., Law S. B., Myszka J., *Treatment of Losses Under OECD Pillars 1 and 2*, 99 Tax Notes Int'l, p. 323, August 5, 2020.

Devereux M., *A Reform Option for the OECD: Residual Profit Allocation by Income*, Oxford University Centre for Business Taxation, March 27, 2019.

Devereux M., Auerbach A. J., Oosterhuis P., Schön W. and Vella J., *Residual Profit Allocation by Income*, Oxford International Tax Group, March 2019.

Devereux M., *The Digital Services "Sutton" Tax*, Oxford University Centre for Business Taxation, October 23, 2018.

Devereux M., *The OECD Pillar One Proposal*, Oxford University Centre for Business Taxation, October 22, 2019.

Devereux M., *What problems might the GloBE solve?*, Oxford University Centre for Business Taxation, February 18, 2020.

Finley R., *Critics Understate BEPS Project's Legacy, Professor Argues*, 98 Tax Notes Int'l, p. 458, April 27, 2020.

Finley R., *OECD's Technical Work on Formulary Pillar 1 Approach on Schedule*, 99 Tax Notes Int'l, p. 531, July 27, 2020.

Finley R., Soong Johnston S., *New Detail on OECD's Pillar 1 Proposal Emerges in Draft Report*, 99 Tax Notes Int'l, p. 718, August 10, 2020.

Goulder R., *After the Break Up: Can Europe Build a Better DST?*, 98 Tax Notes Int'l, p. 1557, June 30, 2020.

Greggi, M., *Rise and Decline of the Westphalian Principle in Taxation: The Web Tax Case*, EC Tax Review, 29(1), 2020.

Grinberg I., *Design of Scope Limitations for OECD Pillar 1 Work*, 98 Tax Notes Int'l, p. 1221, June 15, 2020.

Hadzhieva E., *Impact of Digitalisation on International Tax Matters*, Study for the Committee on Financial Crimes, Tax Evasion and Tax Avoidance, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2019.

Herzfeld M., *New Analysis: Fair Digital Taxation: In the Eye of the Beholder*, 99 Tax Notes Int'l, p. 311, July 20, 2020.

International Monetary Fund, *Measuring the Digital Economy*, Staff Report, February 28, 2018.

Jessop J., Trovato M., Marques N., Santacruz J., *The Case against Tech Taxes*, European Policy Information Center, June, 2019.

Lamer E., *EU to Discuss Digital Taxation on Regular Basis*, Tax Notes Today International, January 21, 2020.

Lamer E., *EU to Give Scattered Response to Digital Tax*, 97 Tax Notes Int'l, p. 436, January 27, 2020.

Lamer E., Paez S., *U.S. Withdrawal From Digital Talks Marks "Collective Failure"*, 98 Tax Notes Int'l, p. 1342, June 22, 2020.

Lammers J., *Can developing countries do better than the Unified Approach?*, International Centre for Tax and Development, July 8, 2020.

Lammers J., *Less is More - Can Developing Countries Gain Tax Revenue by Giving up Taxing Rights?*, Copenhagen Business School, CBS LAW Research Paper No. 20-16, August 7, 2020.

Larking B., *What the World Thinks of Pillar 2*, 98 Tax Notes Int'l, p. 185, April 13, 2020.

Leigh T., *EU ministers fail to break digital tax deadlock*, REUTERS, December 3, 2018.

Mason R. and Parada L., *Company Size Matters*, British Tax Review, Issue 5, 610, 615-618, 2019.

Mason R. and Parada L., *Digital Battlefront in the Tax Wars*, Tax Notes International, December 17, 2018.

Mason R. and Parada L., *The Legality of Digital Taxes in Europe*, University of Virginia School of Law, April 2020.

Mason R., *The Transformation of International Tax*, American Journal of International Law, Virginia Public Law and Legal Theory Research Paper No. 2020-36, Virginia Law and Economics Research Paper No. 2020-08, April 15, 2020.

Mason R., *What the CJEU's Hungarian Cases Mean for Digital Taxes*, Tax Notes International, p. 161, April 13, 2020.

Papotti R., Cazeiro M., *Analysing the Italian Digital Services Tax Through European Glasses*, Tax Notes International, November 20, 2019.

Parada L., *How the Vodafone Magyarország Opinion Affects EU Debate on Turnover-Based Digital Taxes*, 95 Tax Notes Int'l 5, July 29, 2019.

Parada L., *The Unified Approach Under Pillar 1: An Early Analysis*, 96.11 Tax Notes Int'l, p. 983, December 16, 2019.

Petruzzi R. and Buriak S., *Addressing the Tax Challenges of the Digitalization of the Economy – A Possible Answer in the Proper Application of the Transfer Pricing Rules?*, 72 Bull. Intl. Taxn. 4a (2018), Journals IBFD, 2018.

Riccardi Sacchi A., *Implementing a (Global?) Minimum Corporate Income Tax: An Assessment from the Perspective of Developing Countries*, Copenhagen Business School, CBS LAW Research Paper No. 20-15, August 6, 2020.

Sarfo N. A., *How the OECD Became the World's Tax Leader*, Tax Notes Today International, August 11, 2020.

Schön W., *Ten questions about why and how to tax the digitalized economy*, Max Planck Institute for Tax Law and Public Finance, Working Paper 2017 – 11, December 2017.

Schreiber U., *Remarks on the OECD/G20 Program of Work: Profit Allocation and Minimum Taxation*, University of Mannheim, January, 2020.

Soong Johnston S. and Finley R., *OECD Pillar 2 Draft Further Maps Out BLOBE Minimum tax Proposal*, Tax Notes Today International, August 18, 2020.

Soong Johnston S., *OECD Aims to Have Global Tax Deal Blueprint Ready in October*, 99 Tax Notes Int'l, p. 399, July 20, 2020.

Soong Johnston S., *OECD Draft Blueprint Mulls New Pillar 1 Multilateral Convention*, 99 Tax Notes Int'l, p. 799, August 10, 2020.

Soong Johnston S., *United States to Hit Back at French Digital Tax With New Tariffs in 2021*, 99 Tax Notes Int'l, p. 407, July 20, 2020.

Stevanato D., *Italy/European Union/OECD – A Critical Review of Italy's Digital Services Tax*, IBFD, Bulletin for International Taxation, (Volume 74), No. 7, July 3, 2020.

Tax Notes Federal, *A Seat at the Table: Thought Leaders Discuss OECD's Plans on Digital Economy Taxation*, 98Tax Notes Int'l, p. 1273, June 15, 2020.

Tax Notes International, *EU Finance Ministers Respond to Mnuchin on Digital Services Tax*, DOC 2020-24747, June 17, 2020.

Tørsløv T., Wier L. and Zucman G., *The missing Profits of Nations*, NBER Working Paper, University of Copenhagen, UC Berkeley and NBER, Page 22, June 2018, revised April 2020.

Valente P., *Italy/International - The Italian Web Tax from a National and International Perspective*, IBFD, European taxation, 58.5: 186-190, April 6, 2018.

European Institutional Documentation

European Commission, *A fair and efficient tax system in the European Union for the digital single market*, COM, 547 September 21, 2017.

European Commission, *Digital Taxation: Commission proposes new measures to ensure that all companies pay fair tax in the EU*, COM., March 21, 2018.

European Commission, *Fair Taxation of the Digital Economy*, March 21, 2018.

European Commission, *Keynote Speech by Commissioner Moscovici at the "Master of Digital" event*, Brussels, 20 February 2018.

European Commission, *Proposal laying down rules relating to the corporate taxation of a significant digital presence*, COM (2018) 147 final, March 21, 2018.

European Court Reports, *Humblot v. Directeur des services fiscaux*, C-112/84, CJEU 1985.

European Parliament, *Impact of Digitalisation on International Tax Matters*, February 2019.

European Parliament, *Impact of Digitalization on International Tax Matters*, Luxembourg, February 2019.

Judgement of the Court, *Hervis Sport- és v. Hungary*, C-385/12 (CJEU 2014).

Judgement of the Court, *Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, C-323/18 (CJEU 2020).

Judgement of the Court, *Vodafone Magyarország Mobil Távközlési Zrt. V Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, C-75/18 (CJEU 2020).

International Institutional Documentation

OECD (2015), *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241046-en (Accessed June 20, 2020).

OECD (2019), *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Inclusive Framework on BEPS, Paris, May 29, 2019. www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.htm (Accessed August 23, 2020).

OECD (2020), *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*,

OECD/G20 Inclusive Framework, Paris, January 30, 2020. www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf (Accessed 5, 2020).

OECD, *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, 2013.

OECD, *Addressing Base Erosion and Profit Shifting*, OECD Publishing, February 12, 2013.

OECD, *Addressing the Tax Challenges of the Digitalisation of the Economy - Policy Note, the Inclusive Framework on BEPS*, January 23,2019. https://www.oecd.org/tax/beps/policy-note-beps-inclusive-framework-addressing-tax-challenges-digitalisation.pdf (Accessed August 28, 2020).

OECD, *Corporate Tax Statistics Database – Second Edition*, OECD Publications and reports, July, 2020.

OECD, *Interim Report on Tax Challenges Arising from Digitalisation*, September 2017.

OECD, *OECD presents analysis showing significant impact of proposed international tax reforms*, February 13, 2020.

OECD, *OECD/G20 Inclusive Framework on BEPS: Progress Report July 2017-June 2018*, 2018.

OECD, *OECD/G20 Inclusive Framework on BEPS: Progress Report July 2019-July 2020*, 2020.

OECD, *Public Consultation Document - "Secretariat Proposal for a 'Unified Approach' under Pillar One"*, OECD Publishing, November, 2019. https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf (Accessed August 3, 2020).

OECD, *Public Discussion Draft – BEPS Action 1: Address the Tax Challenges of the Digital Economy, 24 Marche 2014 – 14 April 2014*, 2014.

OECD, *Tax Challenge of Digitalisation – Comments Received on the Request for Input – Part I*, OECD Publishing, October 25, 2017.

OECD, *Tax Challenges Arising from the Digitalisation of the Economy - Update on Economic Analysis and Impact Assessment*, Webcast, February 13, 2020. http://www.oecd.org/tax/beps/webcast-economic-analysis-impact-assessment-february-2020.htm (Accessed May 28, 2020).

OECD, *Webcast: Tax Challenges Arising from the Digitalisation of the Economy, Update on the Economic Analysis & Impact Assessment*, February 13, 2020. Available at https://www.oecd.org/tax/beps/webcast-economic-analysis-impact-assessment-february-2020.htm (Accessed August 19, 2020).

OECD/G20 BEPS, *Addressing the Tax Challenges of the Digitalisation of the Economy*, Public Consultation Document, 13 February – 6 March 2019.

World Economic Forum, *Expanding Participation and Boosting Growth: The Infrastructure Needs of the Digital Economy*, March 2015.

Other References

Bird & Bird, *Digital Services Tax: Overview of the progress of implementation by EU Member States*, July 16, 2020.

Bonichi F., Cesetti E., *INSIGHT: New Italian Web Tax and the EU Directive*, Bloomberg Tax, Daily Tax Report: International, January 31, 2019.

Braccioni P., *Italian Finance Law 2018: Focus on the New Tax on Digital Transactions ("Web Tax") and on the New Features of the Italian Permanent Establishment*, Paul Hastings LLP, January 2018.

Briolini E., *Italian Digital Services Tax to be introduced from 1 January 2020*, BDO World Wide Tax News Issue 53, Italy, December 2019.

Bun D., *A Summary of Criticisms of the EU Digital Tax*, Tax Foundation, October 22, 2018.

Bun D., *US Calls for a Pause in Global Digital Tax Talks - A Blow to Pillar 1*, Tax Foundation, June 17, 2020.

Bunn D., Asen E., Enache C., *Digital Taxation Around the World*, Tax Foundation, May 27, 2020.

Elke A., *Corporate Income Tax Rates in Europe*, Tax Foundation, April 16, 2020.

Elke A., *What European OECD Countries Are Doing about Digital Services Taxes*, Tax Foundation, June 22, 2020.

EY Global, *Italy introduces new digital services tax*, Tax Alert, January 14, 2019.

EY Global, *Italy's unilateral Digital Services Tax advances*, Tax Alert, November 8, 2019.

Flignor P., Geelen P., De Rosa M., *OECD statement of Digital Tax Initiative highlights progress, sets timeline for consensus – key points on Pillar One and Pillar Two*, DLA Piper, 3 February 2020.

Galullo R., Mincuzzi A., *Olanda, Lussemburgo, Svizzera e UK I maggiori paradisi fiscali per le società*, Il Sole 24 Ore, July 9, 2020.

Goodley S. and Scammell R., *Apple agrees to pay £234m to settle Italian tax dispute*, The Guardian, December 30, 2015.

Hearson M., *The OECD's Digital Tax Proposal: Untangling the Impact of 'Pillar One' on Developing Countries*, International Centre for Tax and Development Blog, 10 October, 2019.

Hirt M., *If You're Not Building an Ecosystem, Chances Are Your Competitors Are*, McKinsey & Company, 12 June 2018.

Hogan Lovells Publications, *The new Digital Service Tax has entered into force in Italy*, January 10, 2020.

Ikawa T., Oswick D. and Shah M., *OECD update on its Two-Pillar Approach to taxing the digital economy*, Simmons & Simmons, February 7, 2020.

Il Sole24 Ore, *Fisco, Zanetti: 3 miliardi da web tax con ritenuta 25%*, May 6, 2015.

Kleinbard E. D., *Apple's Ireland tax avoidance spur major reforms*, TheHill, 09 June 2016.

KPMG, *CJEU decisions on progressive tax on turnover and fines related to advertising tax*, Euro Tax Flash homepage, March 3, 2020.

KPMG, *Insights on OECD's revised "Unified Approach" to tax challenges of digitalisation*, February 13, 2020.

KPMG, *Interim measures for taxing the digital economy allow time for global consensus*, July 2018.

KPMG, *Taxation of the Digitalized Economy: Developments summary*, September 8, 2020.

KPMG, *Transfer Pricing Analysis of Arm's Length Returns to Sales, Marketing & Distribution Activities*, February 2020. Available at: https://tinyurl.com/KPMG-TPreport (Accessed August 25, 2020).

Martin J., *Global tax rewrite could cost multinationals USD 100 billion annually OECD says*, MNE Tax, February 13, 2020.

Mason R. and Shanske D., *INSIGHT: The Time Has Come for State Digital Taxes*, Bloomberg Tax, Daily Tax Report: State, May 29, 2020.

Mason R., *The Digital-Tax Proxy War*, MEDIUM, December 3, 2018.

Mason R., *Will Coronavirus Accelerate Digital Tax Adoption?*, BRINK, May 10, 2020.

Merola A., *Italian web tax: the Digital Service Tax*, ITAXA Blog, March 2, 2020.

Montinari C., Sandalo A., *Italian digital tax under reshaping to come into force in 2020*, IPSOA Quotidiano, December 2, 2019.

Morris W., *INSIGHT: OECD Digital Tax Project: Profit Reallocation—How Do We Get 'There' From 'Here'?*, Bloomberg Tax, Transfer Pricing Report, July 28, 2020.

Parada L., *EU loss in Polish State aid case may be a win for digital services tax*, MNE Tax, May 17, 2019.

Parada L., *On turnover-based taxes and digital taxes: the EU Advocate General's opinion in Vodafone*, MNE Tax, June 17, 2019.

Pomerleau K., *What's up with Being GILTI?*, Tax Foundation, March 14, 2019.

Rappeport A., Swanson A., Tankersley J., Alderman L., *U.S. Withdraws From Global Digital Tax Talks*, The New York Times, June 17, 2020.

ReportLinker, *Global Digital Content Market 2020-2024*, June 2020.

Romano B., *La Ue prova ad accelerare su web tax e tasse per la società*, Il Sole 24 Ore, September 13, 2020.

Ruggiero P., Cardone F., *INSIGHT: Italy Taxes the Digital Economy*, Bloomberg Tax, International Tax News, January 28, 2020.

Sanger, C., and Thomas, R., *New Digital Tax Policies: What, When, Where, How and by Whom?*, Ernst & Young Global Tax Policy and Controversy Briefing, (22), 2018.

Scott M., *Google agrees to Pay Italy $334 Million in Back Taxes*, The New York Times, Mary 4, 2017.

Simontacchi S., Adda M. and Scandone F. S., *INSIGHT: Possible Double Taxation Behind the Italian Digital Services Tax*, Bloomberg Tax, Daily Tax Report: International, February 3, 2020.

Stiglitz J. E., *No more half-measures on corporate taxes*, Columbia Business School, Project Syndicate, 7 October 2019.

Szczepanski M., *Digital Taxation: State of play and way forward*, European Parliament Think Tank, March 19, 2020.

Tankersley J., *How Tech Taxes Became the World's Hottest Economic Debate*, The New York Times, January 23, 2020.

Tax Policy Centre, *What is global intangible low-taxed income and how is it taxed under TCJA*?, May 2020.

Taylor H., *How Apple managed to pay a 0.005 percent tax rate in 2014*, CNBC, August 30, 2016.

VanderWolk J., *INSIGHT: Tax and Digitalization-Policy Should Not Be Based on Myths*, Bloomberg Tax, Transfer Pricing Report, August 11, 2020.

Warren E., *Here's how we can break up Big Tech*, Team Warren, March 8, 2019.

Worstall T., *Italy Passes The Illegal Google Tax*, Forbes, December 14, 2013.

Worstall T., *Italy Proposes An Entirely Illegal Google Tax*, Forbes, November 5, 2013.