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The Future of Income Taxation of the Digital Economy

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Despite rapid technological change, international principles of profit allocation have remained unchanged for almost a century. The principle that the allocation of profits is linked to the location of the permanent establishment derives from international corporate taxation law and is linked to the so-called permanent establishment principle (*permanent establishment*), which seeks to attribute a company's income to the country in which it actually does business. In this article, the author outlines what changes in international tax law are possible with regard to profit allocation in the digital economy.

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Introduction

The purpose of this article is to examine the extent to which international income tax law regulates the taxation of companies operating in the digital economy and the direction in which changes concerning these rules are heading. Assuming that international tax law constitutes an autonomous legal system, the source of which is essentially international treaties containing directly effective legal norms, it is important to be aware that these norms may not only be the basis for the determination made by the tax administration but may create rights that can be invoked by taxpayers in tax matters. In this context, it is worth looking at whether international tax law has kept pace with developments in the most modern forms of business.

In 1996 an attempt to define the digital economy was made by Tapscott, who cited its specific characteristics including the power of digital technology, the turn to virtual reality, novelty, working online, and the correlation of different areas of the economy (1998, pp. 52–85). The concept of the digital economy is very broad and is constantly evolving as a result of advancing technology that creates new business opportunities. In the literature such forms of doing business are associated with the activities of major big tech companies: 1) e-commerce (H&M, Walmart, eBay), 2) providers of payment services (PayPal), 3) sellers of mobile applications (Google, Apple), 4) providers of online advertising services (Facebook, Google), 5) providers of cloud services (Microsoft Azure), 6) high frequency traders (Two Sigma Securities,

Virtu Financial), 7) social media platforms (Facebook, Instagram) (Morawska, 2022, pp. 88–89).

Digital activities make it possible to do business and earn profits outside the country in which an entity is established. This causes countries where consumers purchase goods or services from digital entities to arise a desire to benefit from the profits of these businesses that are established in other countries. They believe that rules granting states the right to tax the profits of taxpayers can no longer be based solely on the physical presence of the taxpayer in the source state.

The view has been expressed in the literature that the digital economy cannot be treated as a separate part of the economy requiring tax regulations independent of the current (implemented) ones (Gajewski, 2018, p. 118; Wieśniak-Wiśniewska, Czerwiński 2016, pp. 22–31). However, in sharing this view, it should be borne in mind that the world of the digital economy is constantly evolving and will be the main vehicle for global trade in the future. The transfer of transactions to the Internet requires appropriate tax regulations that would prevent tax fraud and abuse on the one hand and facilitate e-commerce by removing tax obstacles on the other.

Currently, on income tax grounds, taxation is based on the concept of permanent establishment. Due to globalisation and the digitalisation of the economy, the traditional concept of permanent establishment does not correspond to business needs at the present time. The current rules governing international taxation are designed for companies with a physical presence in a country. It is not difficult to imagine that with the digitalisation of the economy tax challenges arise, such as the reduction of tax revenues due to abusive tax avoidance and tax fraud.

Thanks to new technologies and business models, many digital companies have users and customers in countries where they have no physical presence, generating profits by interacting with users and customers, using data and content from them. Now, as a result of digitalisation, multinational companies generate profits in which they have little or no physical presence, creating a mismatch between where profits are taxed and where value is created. Digital companies can often provide a wide range of services with either no physical location or very limited infrastructure in the customer's country. The goals of digital companies can be achieved at a scale unheard of in traditional business models, quickly reaching foreign markets with minimal physical infrastructure. A distinguishing feature of digital companies is the circumstance that users of digital platforms play an unprecedented role in the companies' value creation process. Digital companies use the value generated by users to varying degrees, and user data shapes sales and marketing strategies. Users can contribute passively (e.g. by browsing) or actively (e.g. by uploading content), By providing data and content in return, users are seen to play a special value *(Balancing the two pillars*, 2024).

In the wake of the aftermath of the 2010 financial crisis and the media sensationalism around the taxes paid by companies in the digital economy, various countries have taken a keener interest in taxing this sector by introducing a digital services tax (DST). This trend was started by more developed countries such as the UK, but has also reached developing countries (Mirembe, p. 50). Debates on the taxation of the digital economy have been ongoing for several years, with discussions taking place within the OECD-mainstream, the European Union (EU), and locally. Initial work on digital economy issues at the OECD level culminated in the OECD's October 2015 BEPS countermeasure plan, specifically set out in *BEPS* Action 1 (*BEPS Action 1, 2015*). The OECD divided its work on the future state of digital taxation into two pillars. In March 2018, the document titled *Tax Challenges Arising from Digitalisation – Interim Report 2018* was released, outlining the agreed direction of work on digitalisation and international tax rules until 2020. On 9 October 2019 the OECD Secretariat published a paper on the assumptions of the so-called *Unified Approach* under Pillar One, and the document on Pillar Two on 8 November 2019.

Pillar One includes the development of a new nexus and new rules for the distribution of profits between states that go beyond the current arm's

length principle. In addition, Pillar One proposed the implementation of a new effective tax dispute resolution mechanism. Pillar Two covers other BEPS issues, in particular the risk of under-taxation of income from digital services.

A specific model for the first pillar was presented in January 2020 under the name *Unified Approach* (OECD/G20 Base Erosion and Profit Shifting Project, 2020). This model distinguishes between three income allocation mechanisms:

- Amount A: introduces new tax rights to tax part of the deemed residual profit of a multinational enterprise (MNE). Residual profit is the profit remaining after allocating what would be considered routine profit from an activity to the countries in which the activity is carried out.
- Amount B: means the profit subject to taxation under the same market rules as at present [OECD Model Tax Convention: Article 7].
- Amount C: introduces a new dispute resolution mechanism.

Reaching multilateral agreement on the first pillar measures is also important for DST (Sábo, 2020).

At this point, it is worth signalling that on 21 March 2018. The European Commission presented two draft directives that were to introduce the possibility of taxing the digital economy within the European Union. The first directive provided for the taxation of legal persons with a significant presence in the digital market (Proposal DIRECTIVE OF THE COUNCIL). The second directive concerned a common system of tax on digital services, levied on revenues arising from the provision of certain digital services (COUNCIL DIRECTIVE proposal). However, the above initiatives were concluded at the meeting of the Economic and Financial Affairs Council (ECOFIN) on 12 March 2019, where it proved impossible to reach a Community agreement due to the opposition of some Member States. However, this work was abandoned in favour of common international solutions (Mozgiel-Wiecha, 2021, p. 175).

Pillar One objectives in relation to the digital economy

Pillar One concerns a new, fairer distribution of taxing rights through new profit attribution rules and new tax presence rules. Indeed, the main idea behind Pillar One is to reallocate profit from the home country of the multinational enterprise (MNE), to the countries/markets where the MNE sells its goods and services through digitally run businesses. In doing so, the system covers not only *automated digital services* (ADS), but also *consumer-facing businesses* (CFB).

Pillar One aims to reallocate tax rights to market jurisdictions in such a way as to ensure that digital multinationals pay taxes in the jurisdictions where their users and customers are located. Part of the Pillar One agreement is the abolition of DST (Digital Services Tax) in certain countries. Other countries that retain or introduce DST will not receive their share of the A-quota. DST, although not an income tax, was a response to the problems of imposing income taxes on digital companies.

Under Pillar One, tax laws on approximately $200 billion of profits are expected to be reallocated to market jurisdictions each year. This is expected to lead to annual global tax gains of between $17 billion and $32 billion, based on 2021 data. Based on the analysis prepared by the OECD, it is assumed that low- and middle-income countries are likely to gain the most as a share of existing corporate tax revenues, highlighting the importance of rapid and widespread implementation of reforms (O'Reilly, 2023).

In particular, fluctuations in corporate profitability margins from year to year and limited public data on corporate revenues in individual EU Member States make it complicated to estimate the exact impact of Pillar One on EU Member States' revenues. One study estimates a net revenue increase of around €2.6 billion in the EU. A similar level of tax revenue is expected to be achieved by countries that withdraw their existing DST in exchange for Pillar One (*Balancing the two pillars*, 2024)

Implementation of Pillar One

On 8 October 2021, the OECD/G20 Inclusive Framework on BEPS reached agreement on key aspects of this reform (*Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, 2021). More than 135 jurisdictions have joined the landmark plan – *the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* – to update key elements of the international tax system. A key element of this plan is the MLC Model Convention to Implement Amount A of Pillar One OECD, n.d.). This convention updates the international tax framework to coordinate the reallocation of tax rights to market jurisdictions, improve tax certainty, and remove taxes on digital services (OECD, n.d.).

Following the agreement reached in October 2021, Spain, France, Italy, Austria, and the UK have assured that they will withdraw their national DSTs once the first pillar comes into force. In return, the US pledged to halt planned trade actions against these countries. As a result of this agreement, the five DST-imposing countries could continue to impose the tax, but agreed that any DST tax liability arising in their jurisdictions would be credited against future tax liabilities arising from the implementation of Pillar One. This agreement between the US and the DST-imposing countries was to remain in force until 30 June 2024 (*Statement on a Two-Pillar Solution*, 2021).

There is growing concern in the European Union about the situation regarding the delay in the implementation of Pillar One. In particular, attention is being drawn to the polarisation in the United States prior to the presidential election. It is proposed that the United States be given a specific deadline after which the digital tax should be implemented.[1]

In the author's view, the non-participation of the United States in the implementation of a global digital tax will end in fiscal chaos, with individual countries seeking individual solutions within their own fiscal autonomy.[2] The participation of the United States in this endeavour is crucial, as US participation will allow the ‚critical mass' necessary for a multilateral convention to be effective in the digital economy first measure. The majority of corporations covered under Pillar One are US corporations. Moreover, it is estimated that almost 70% of the total reallocated profit comes precisely from US companies (*Balancing the two pillars,* 2024). Therefore, it is worth taking all the necessary steps to achieve the Pillar One digital economy target.

There can be no doubt that, without the ratification of Pillar One by the US Congress, the required threshold of effectiveness for the principles therein as currently envisaged will not be met.

The OECD is not laying down its arms and It argues that "*OECD/G-20 countries continue to implement 15 BEPS actions to tackle tax avoidance, improve the consistency of international tax rules, ensure a more transparent tax environment and address the tax challenges posed by the digitalisation of the economy*".[3]

The status of Pillar One, however, still remains uncertain. Despite the extended deadline of 30 June 2024, the OECD has not reached a consensus on Pillar One.

Main reasons for delays in the implementation of Pillar One

Geopolitical and economic disagreements between OECD/G20 Inclusive Framework Member States should be identified as the main reasons

[1] Paul Tang suggests that the EU should set a deadline for the US, indicating that the US would have to agree to Pillar One in 2025 (Majdowski, 2024, pp. 62–63).

[2] According to the Chairman of the European Parliament's Subcommittee on Taxation, Paul Tang, political polarisation in the US ahead of the November elections threatens to 'derail' the two-pillar solution, the *Financial Times* reported after discussions on the issue at the G20 summit (Majdowski, 2024, pp. 62–63).

[3] In defence of the OECD's record on international tax reform, the OECD Secretary-General submitted a report to the G20 Summit in Brazil (Majdowski, 2024, pp. 62–63).

for delays in the implementation of Pillar One. The reallocation of tax rights remains contentious. Countries differ on how much tax revenue should be reallocated from the parent jurisdictions of multinational companies to the jurisdictions of those countries where the consumers of these companies reside.

Another point of contention was the scope of the new rules, in particular which companies should be subject to the new tax laws and whether the rules might be discriminatory towards a particular group of (US) companies. In addition, disagreements have arisen over the technical details of profit allocation and nexus rules, making it difficult to reach a unified agreement. A key problem, however, is the uncertain US participation in the Pillar One multilateral convention – a country several members of the US Congress, mainly Republicans – have repeatedly criticised Pillar One. Pillar One similarly sees an unfavourable focus on US companies. This is related to the general shift of corporate tax revenues from the US to other jurisdictions, mainly large, affluent consumer markets such as the EU (*Balancing the Two Pillars*, 2024).

The US refers to studies showing that both Pillar One and DST fall disproportionately on US companies, which are responsible for between half and two-thirds of the A amount, while accounting for 37% of the profits of the top 500 global companies. An analysis by the US Trade Representative (USTR), for example, found that 75% of France's DST tax on advertising would be paid by two US companies, Alphabet (formerly Google) and Meta (formerly Facebook), while in the UK, 90% of the tax was paid by five companies that are likely to be largely or entirely US companies (Congressional Research Service, n.d.). A 2021 survey of the world's 500 largest companies found that Pillar One would affect some 78 companies, including 37 from Europe. The total amount allocated would be USD 87.5 billion, 45% of which would come from technology companies (Devereux, Simmler, 2021).

Against the introduction of a tax on the digital economy, as stipulated by Pillar One, there are also arguments in polemic with the rationale behind it. There were two justifications for Pillar One. The first was that multinational companies were not paying their fair share of international taxes. The second rationale was that users of digital products create value, which justifies allocating a share of profits to market countries. The first argument justifying the introduction of Pillar One can now be considered outdated, as the problem is essentially solved by Pillar Two, which introduces a minimum tax of 15 per cent. The argumentation that it is the users who create the value of the profit and therefore their countries should have the right to allocate the profit is disputed. It is difficult to disagree with the argument that the reference to users does not only apply to digital companies but can also be applied to other entities such as pharmaceutical companies. While digital companies can transfer profits more easily due to their focus on intangible assets, a similar effect can also be achieved by companies in other industries, e.g. pharmaceuticals and companies that profit from brand identity (e.g. Coca-Cola, Starbucks, Nike, and McDonald's). One can also point to companies such as Apple that, although they sell physical products, benefit from brand loyalty as well as from their digital assets (Congressional Research Service, n.d.).

Attention is also drawn to the fact that in some cases, e.g. a digital company that makes money from advertisers, it will be difficult to identify definitively the entities that remain at the bottom of the chain benefiting from such companies (Congressional Research Service, n.d.).

Resistance to Pillar One may also stem from the complexity of the system envisaged by this agreement. The level of complexity of Pillar One may present a difficult task of ensuring compliance, which may negate the potential benefits for both taxpayers and developing countries (Mirembe, pp. 53–54). In addition, not all countries may benefit from the reallocation of funds under Pillar One due to a lack of compliance with nexus requirements. There is a possibility of a mutual benefit only for countries that meet the nexus requirements. Countries on the brink of poverty may not meet such requirements, and so for them the agreement may not be beneficial, even if they join

Pillar One. This is because there is a risk of an increase in the tax burden if income is reallocated from a low-taxing jurisdiction to one that imposes high taxes (Mirembe, pp. 53–54).

Impact of delays in the implementation of Pillar One on taxation of the digital economy

The extended deadline of 30 June for the OECD to reach agreement on the Pillar One A quota passed without agreement. According to the OECD, progress has been made and negotiations are still ongoing. While this may be true, as long as the US does not advocate Pillar One, it cannot be enforced. This could mean a return to the DST tax. It is already in place in many countries. These taxes vary, but can be levied on advertising revenue from digital companies, sales on online marketplaces, data sales, and digital product sales.

Taxes on digital services have spread. The United States Trade Representative (USTR) investigated DSTs in France and then Austria, India, Italy, Spain, Turkey, and the UK and found that they discriminated against US companies. Retaliatory duties were imposed on these countries, but suspended while Pillar One was considered (Congressional Research Service, n.d.). India adopted a tax on online advertising by non-residents in 2016, and extended it to a general e-commerce tax in 2020 (RSM, 2023). Canada approved the implementation of DST from 28 June 2024 retroactive to 1 January 2022. In Canada, the DST is 3% and is levied on revenue generated from certain digital services that rely on engagement, data, and content contributed by Canadian users and also the sale or licensing of Canadian user data (The Government of Canada, n.d.).

In the absence of a global consensus, countries are considering maintaining existing temporary digital services taxes (DSTs) or implementing DSTs.

The rationale for the introduction of DST taxes in different countries is very similar and is based on the same argument initially made for Pillar One, i.e. that digital companies were not paying enough income tax, while the greatest value is in the users (Congressional Research Service, n.d.).

In order to understand the economic impact, it should be noted that DSTs are taxes levied on *revenue* rather than on *profits* (income). Thus, they are very similar to sales and excise taxes in terms of their economic impact. On the other hand, although DSTs are similar, sales taxes are in addition to sales taxes and value-added taxes. Digital retailers act as entities obliged to collect state sales taxes in the United States. The European Union has also made digital platforms obliged to collect value-added tax. In the European Union, the scope of value-added tax to be collected is being expanded all the time.

For taxpayers, there is a risk of an increased tax burden if income is reallocated from a low-taxing jurisdiction to one that imposes high taxes. However, in the end, the result may be more favourable than paying digital services taxes (DST) in numerous countries.

Alternative options for taxing the digital economy with income taxes

Various alternative possibilities have been put forward in the doctrine to replace the Pillar One regulations. In particular, the concept of non-rejection of the international tax law institution of permanent establishment has been pointed out. Instead, Morawska proposed supplementing this definition with the concept of substantial presence (or with another paradigm not based on the physical presence of the taxpayer) (Morawska, 2022, pp. 103–105). In the author's opinion, the new definition of permanent establishment should specifically take into account the following factors, which will be a kind of preconditions for the establishment of a significant economic presence: 1) carrying out activities related to the provision of digital services, 2) reaching a threshold of the number of users, and 3) reaching a minimum revenue threshold. Another author identified two alternatives to the

Pillar One solutions. The first alternative to implement one of these new nexus rules is to amend Articles 5 and 7 of the OECD Model Tax Convention to recognise a permanent establishment as existing in the case of a remote but sustained and significant involvement of the taxpayer in the economy. In addition, Articles 10–13, 15, 21, 22, and 24 of the OECD Model Tax Convention would have an impact. The second alternative is to introduce a new stand-alone provision giving the market jurisdiction the right to tax (Sábo, 2020).

Other authors also propose to base solutions on the definition of permanent establishment by proposing, however, that an undertaking should be deemed to have an establishment in one Contracting State if an undertaking established in one Contracting State provides (or offers) access to an electronic application, database, online trading platform, or magazine, or offers advertising services on a website or electronic application used by more than 1,000 individual users per month who are resident in the other Contracting State (Hongler, Pistone, 2015, pp. 22–36).

Conclusion

Current international corporate tax rules are not adapted to the realities of the modern global economy and do not take into account business models that can profit from digital services in a country without a physical presence. Current tax rules also fail to take into account new ways of generating profits in the digital world. This is due not only to the opposition of some countries in its implementation but also to the circumstance that it is very difficult to develop solutions that are comprehensive. This difficulty is also related to the circumstances of regional differences, the complexity of the matter and the rapidly changing reality in the digital economy. The opposition of the United States in this initiative may have its consequences for a long time.

Pillar One has been designed in a way that can address contemporary challenges, such as taxation in the absence of the physical presence of an entity. Of particular consequence is the failure to ensure consensus under Pillar One. This state of affairs not only leaves a gap in the regulation of digital taxation, but also creates uncertainty for MNEs operating in multiple jurisdictions. This manifests itself, inter alia, in the fact that many countries have chosen to unilaterally implement DST at their own discretion.

Both sides present their arguments, for and against the introduction of Pillar One. In the author's opinion, the full implementation of Pillar One would avoid chaos on the ground of taxation issues for multinational companies. Continued implementation of the DST tax on a country-by-country basis will lead to a trade war, which the US technology giants certainly also want to avoid. In the opinion of the article's author, although the digital economy regulations contained in Pillar One should be regarded as insufficient, it should be advocated that these solutions be adopted and work towards a further fairer and less controversial distribution. The inconsistent implementation of Pillar One makes the taxation of digital platforms in particular a still elusive tool for the implementation of states' intentions regarding the distribution of taxation from the digital economy.

The formulaic approach to determining the allocation of corporate profits under Pillar One makes it a profound change to long-standing international tax law regulations, and its consequences may shape future rules of international corporate taxation policy, particularly in the digital world. It should therefore be seen as a first, albeit small, step towards a full new profit allocation regime at the global level.

If a Pillar One agreement is reached, it will be important to monitor how countries amend or repeal their DSTs. Indeed, DSTs are considered interim measures until an agreement is reached at the OECD level.

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