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PERMANENT ESTABLISHMENT IN DIGITAL BUSINESS

Abstract

Background: As to the taxation of a permanent establishment (PE), current tax solutions based on the physical presence of an enterprise in the territory of another country have been developed for traditional enterprises that do not pursue their business digitally, especially on the Internet. However, electronic business is largely based on intangible property, such as algorithms and user data. The taxation of digital business is a global problem that is dealt with by the EU and the OECD, among others.

Research purpose: The paper is designed to introduce the relevance and the consequences of the new EU and the OECD proposals for taxation of income resulting from digitalising economy in light of the permanent establishment standards.

Methods: The paper analyses legal sources and working materials, in particular of EU Directives and OECD Reports or Statements before and after the BEPS Project. A comparative analysis of tax implications under the current and planned regulations regarding the permanent establishment in digital business has been performed.

Conclusions: The OECD Inclusive Framework decided to move away from the problem of digitization in favor of globalization, and away from taxation of the largest technology giants in favor of taxing the biggest and most profitable companies. The PE concept under the 2021 Compromise has taken a significantly simplified form compared to the traditional notion of PE requiring analysis of the physical presence.

Keywords: permanent establishment, digitalising economy, e-commerce, digital presence, significant economic presence.

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1. Introduction

Taxation of multinational companies has recently come under review in connection with the BEPS project. Base erosion and profit shifting (hereafter BEPS) refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or tax-free locations.¹ It should be also noted that representatives from over seventy jurisdictions² on 7 June 2017 signed a multilateral convention to implement tax treaty-related measures to prevent base erosion and profit shifting ('MLI'). The MLI does not override or amend existing bilateral tax treaties, but is applied alongside the relevant tax agreements, modifying their application in order to implement the BEPS measures.³

Non-residents pursuing a business activity are subject to taxation in the source state only if they have a permanent establishment (PE) there, i.e. a place of business through which the business of an enterprise is carried on. However, the place of business must not have only a preparatory or auxiliary function. An enterprise which has a PE abroad should have its tax revenues allocated to that PE in the country in which the PE is located, whereas in the country of residence a relevant double taxation avoidance method applies. Thus, taxation abroad can be reduced or eliminated by limiting the physical presence on foreign markets, i.e. by organising the business activity in such a way that the profits from the sale of goods or services are not connected with the place of the business located abroad.⁴ Business models can be structured to avoid the tax-presence criterion, e.g. by automated placement of orders via Internet websites, contacting the customers by remote means of communication (via telephone, e-mail, videoconferences), business fragmentation or by operating through formally independent foreign agents.⁵ In this vein, 'digitalisation is considered

¹ For BEPS project see <https://www.oecd.org/tax/beps/about/>; accessed 15.03.2022.

² See the list of signatories and parties to the MLI, <http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>; accessed 15.03.2022.

³ See the final BEPS package for reform of the international tax system to tackle tax avoidance, <https://www.oecd.org/tax/beps-2015-final-reports.htm>, including Action 15 Report: Developing a Multilateral Instrument to Modify Bilateral Tax Treaties.

⁴ **M. Jamroży, M. Janiszewska**, *Permanent establishment as a foreign direct investment in Poland: identification of tax barriers in the context of new tax development*, International Journal of Management and Economics 2021/2, pp. 177–193.

⁵ **S. Basu**, *Global perspectives on e-commerce taxation law*, Burlington 2007, p. 29.

the most important contributor since the industrial revolution and is one of the major elements in fostering growth and innovation'.⁶

It is often raised that the existing international tax system is unfit for the 21st century as it focuses on brick-and-mortar companies and fails to address crucial features of the modern bits-and-bytes business.⁷ One of the most common diagnoses states that the application of the current corporate tax rules to the digital economy has led to a misalignment between the place where the profits are taxed and the place where value is created. It is further claimed that the current rules no longer fit the present context where online trading across borders with no physical presence has been facilitated, where businesses largely rely on hard-to-evaluate intangible assets, where use-generated content and data collection have become core activities for the value creation of digital businesses.⁸ Not only can enterprises reach their client cross-borderly without a need to be present in the market jurisdiction, but also the contribution of the market jurisdiction is not reflected in current sharing taxing rights rules. As stressed by the European Commission, in the digital economy value is often created from a combination of algorithms, user data, sales functions and knowledge. For example, a user contributes to value creation by sharing his preferences (for example, 'liking' a page) on a social media forum. This data is later used and monetized for targeted advertising. Profits, for instance, are not necessarily taxed in the residence country of the user (or of the viewer of the advertisement), but rather in the country where the advertising algorithms are located and were developed. This means that the user's contribution to the profits is not taken into account when the company is taxed.⁹

In other words, the traditional permanent establishment (PE) definition, fully based on a physical taxable nexus, is evidently not prepared to cover the profits generated (i) in a country without any physical presence, and (ii) throughout value chains predominantly based on data generation and data processing, as well as stemming from brand new value creation schemes, such as the value

⁶ **M. Olbert, C. Spengel**, *International Taxation in the Digital Economy: Challenge Accepted?*, World Tax Journal 2017/1, p. 4.

⁷ **J. Becker, J. Englisch**, *EU Digital Services Tax: A Populist and Flawed Proposal*, Kluwer International Tax Blog, March 16, 2018, <http://kluwertaxblog.com/2018/03/16/eu-digital-services-tax-populist-flawed-proposal/>; accessed 15.03.2022.

⁸ **European Commission**, *Council Directive laying down rules relating to the corporate taxation of a significant digital presence*, Explanatory memorandum 2018, p. 1.

⁹ **European Commission**, https://ec.europa.eu/taxation_customs/fair-taxation-digital-economy-fi, 2018; accessed 15.03.2022.

co-creation model, involving the users/customers and, on the other hand, the service provider.¹⁰

That is why, there is a general agreement that reform is needed to ensure a more effective allocation of profits from electronic commerce to the source state. The rapid digitalisation of the economy and the ensuing development of business models have raised the old tax debate of how to allocate international taxation rights. While some argue that corporate taxation should be based on the market where companies sell their products, others support the current rules which stipulate that corporate taxation should be based on the residence principle. This resembles a similar discussion conducted one hundred years ago when the 1920s compromise governing division of tax base of enterprises active cross-borderly was forged.¹¹

Tax policymakers, at the global and the EU levels, are attempting to respond to challenges stemming from changes to the business models of taxpayers and propose solutions to adapt the currently applicable rules to the new reality. One of the contemplated solutions is to redefine a PE requirement. Such a legislative change would work as an extension of the current system of taxing cross-border income.¹²

This paper is designed to introduce the relevance and consequences of the new tax proposals for taxation of income resulting from digital business in light of the permanent establishment standard. The digital economy refers to a broad range of economic activities that use digitized information and knowledge as key factors of production. The Internet, cloud computing, big data, fintech, and other new digital technologies are used to collect, store, analyse, and share information digitally and transform social interactions.

The thesis is put forward here is that income from digital economy should not be taxed in complete separation from the rules governing taxation of permanent establishment. The objective of the article is to examine the proposal of a new EU Directive introducing rules relating to the corporate taxation of a significant digital presence and the OECD input on the same subject developed before and after the BEPS Project.

¹⁰ **A. Samari**, *Digital Economy and Profit Allocation: The Application of the Profit Split Method to the Value Created by a "Significant Digital Presence"*, *International Transfer Pricing Journal* 2019/1, p. 1.

¹¹ **K. Anderson**, *Should We Use Value Creation or Destination as a Basis for Taxing Digital Businesses? – Krister Andersson's Comments on the 2018 Klaus Vogel Lecture Given by Professor Michael Devereux*, *Bulletin for International Taxation* 2018/12, p. 684.

¹² **R. Lipniewicz**, *Jurysdykcja podatkowa w cyberprzestrzeni: model międzynarodowego opodatkowania dochodu*, Warszawa 2018, p. 360.

The methods used to prove the thesis formulated in the introduction is an analysis of sources of law and working materials, in particular:

- Council Directive laying down rules relating to the corporate taxation of a significant digital presence (Proposal as of 21 March 2018, 2018/0072);
- OECD, Are the Current Treaty Rules for Taxing Business Profits Appropriate for E-Commerce? (2005);
- OECD, Addressing the Tax Challenges of the Digital Economy Action 1: 2015 Final Report (5 October 2015);
- OECD, Tax Challenges Arising from Digitalisation – Interim Report 2018 (16 March 2018);
- OECD, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint (14 October 2020);
- OECD, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy (1 July 2021 and 8 October 2021).

A comparative analysis of tax implications under the current and panned regulations regarding the permanent establishment in digital business is presented below.

2. The current approach

One of the most debated issues in international tax law is the concept of permanent establishment. All model tax conventions apply PE as the main instrument to establish taxing jurisdiction over foreigner's business activities. The profits of an enterprise of one Contracting State are taxable in the other state, only if the enterprise maintains a PE in the latter state and only to the extent that profits are attributable to such PE. Thus, a legal concept of PE is a compromise between source state and residence state for purposes of taxation of business profits, where the object and purpose of the PE clause presents a structural connection with the requirement of physical presence. The concept of PE includes the existence of a substantial element of an enduring nature of a foreign enterprise in another, which can be attributed to a fixed place of business in the country of origin.

First, there must be a 'place of business'. Second, the place of business must be physically 'fixed' in terms of the place of business's location. A place of business could exist even if no employees are employed there, such as vending machines, which are installed and can function without the presence of any employee. The place of management, though considered a PE, requires

the existence of an office or similar facility in order to constitute a PE and the management activities should be conducted through such a fixed place. A fixed place of business in the other country should basically be linked to a specific geographical point in the source state.

The PE concept effectively acts as a threshold which, by measuring the level of economic presence of a foreign enterprise in a given State through objective criteria, determines the circumstances in which the foreign enterprise can be considered sufficiently integrated into the economy of a state to justify taxation in that state.¹³ A link can thus be reasonably made between the requirement of a sufficient level of economic presence under the existing PE threshold and the economic allegiance factors developed by the group of economists almost 100 years ago. In the existing OECD Commentaries it is stated that the PE threshold ‘has a long history and reflects the international consensus that, as a general rule, until an enterprise of one State has a permanent establishment in another State, it should not properly be regarded as participating in the economic life of that other State to such an extent that the other State should have taxing rights on its profits’. By requiring a sufficient level of economic presence, this threshold is also intended to ensure that a source country imposing taxes has enforcement jurisdiction, the administrative capability to enforce its substantive jurisdiction rights over the non-resident enterprise.¹⁴

The current definition of a PE in the context of digital activity is often associated with the equipment (server) location. An Internet website, which is a combination of software and electronic data stored on a server, does not constitute a tangible property, therefore, it does not have a location that can constitute a ‘place of business’.¹⁵ Since a website is not a ‘person’, it cannot be considered a dependent agent either.

Unlike a website, a server located in a country may constitute a PE for a foreign enterprise. A server which has a physical location may constitute a fixed place of business through which the business is carried on.¹⁶ The functions fulfilled by the server should account for a significant part of the enterprise’s business. The automatic conclusion of online transactions is obviously one of

¹³ **OECD**, *Addressing the Tax Challenges of the Digital Economy, Action 1: 2015 Final Report*, paragraph 35.

¹⁴ **W. Hellerstein**, *Jurisdiction to tax in the digital economy: permanent and Other establishments*, Bulletin for International Taxation 2014/6–7, p. 1.

¹⁵ **OECD**, *Commentaries on the Articles of the Model Tax Convention*, Article 5, item 42.1–42.10.

¹⁶ **J.-P. Chetcuti**, *The Challenge of E-commerce to the Definition of a Permanent Establishment: The OECD’s Response*, Inter Lawyer 2002, p. 3.

such functions. A server may constitute a PE also if no personnel is required on site for its proper operation.¹⁷ However, if the server is controlled by another entity, e.g. by a hosting service provider, this does not trigger a foreign permanent establishment for the enterprise carrying on e-Commerce operations. The hosting agreements between the Internet service providers (ISPs) and enterprises do not usually lead to taking over the control over the server. Generally, the ISP is not an independent agent, either.¹⁸

New tax solutions are being searched for because enterprises can exert impact on foreign markets and generate income from sources located abroad without being physically present there. Considering the simultaneous dependence of income taxation on a certain level of physical presence, the current system is unsuited for the digitalising economy. The present tax laws, developed with traditional business models in mind, do not reflect Internet-based business, for example in terms of how value is created in the digital and technologically automated reality. It is hard to apply the rules of taxation in international relations to cross-border trade on the Internet, which often does not require physical presence in another country. Such outcomes might in turn lead to unintended bias in favour of digital and remotely operating businesses, which would enjoy more favourable tax conditions compared to traditional business operators present in conventional manners in a given market.

3. New solutions

The European Commission articulated the need of new tax solutions in its communication ‘*A Fair and Efficient Tax System in the European Union for the Digital Single Market*’ issued on 21 September 2017, raising two key policy challenges that need to be addressed, i.e. (i) where to tax, relating to the nexues, and (ii) what to tax, relating to value creation.¹⁹ More broadly, the ‘where to tax’ question would deal with the question as how to establish and protect taxing rights of a country where businesses can provide services digitally with little or no physical presence despite having a commercial presence, while the ‘what to tax’ question would deal with the question as how to attribute profits in new

¹⁷ OECD, Commentaries on the Articles of the Model Tax Convention, Article 5, item 42.6.

¹⁸ M. Geurts, *Server as a permanent establishment?*, Intertax 2000/28/4, pp. 173–174.

¹⁹ Communication from the Commission to the European Parliament and the Council, *A Fair and Efficient Tax System in the European Union for the Digital Single Market*, COM/2017/0547 final.

digitalised business models driven by intangible assets, data and knowledge. As a consequence, in March 2018, the European Commission presented a Proposal for a Council directive (2018/0072) laying down rules relating to the corporate taxation of a significant digital presence (SDP). The proposal introduces, among other things, rules for establishing a taxable nexus for digital businesses operating across border in case of a non-physical commercial presence (a ‘significant digital presence’²⁰) and sets out principles for attributing profits to a digital business.

Interestingly, the Commission proposal is not presented as an anti-abuse legislation. It changes *expressis verbis* the allocation of tax revenues between countries. The proposals by the Commission constitute a fundamental change to the international corporate tax system. This proposal affects corporate taxpayers that are incorporated or established in the EU, as well as enterprises that are incorporated or established in a non-Union jurisdiction with which there is no double tax treaty with the Member State where a significant digital presence of the taxpayer is identified. The proposal does not affect enterprises that are incorporated or established in a non-Union jurisdiction with which there is a double taxation treaty in force with the Member State of the significant digital presence, so as to avoid causing any breaches of those double taxation treaties. This may be different if the applicable tax treaty with a non-Union jurisdiction includes a similar provision on a significant digital presence that creates similar rights and obligations in relation to that non-Union jurisdiction.

In line with the 1998 Ottawa declaration, the OECD has retained the requirement for a physical presence as a necessary condition for admitting the creation of a PE. However, many years after the challenges of digitalising the economy were identified as one of the main focus areas of the BEPS Project, leading to the BEPS Action 1 Final Report in 2015, the G20 leaders requested the OECD Task Force on the Digital Economy to deliver an interim report on the implications for taxing digitalisation. Because in 2018 the Interim Report did not propose any final solution, members of the Inclusive Framework agreed to continue the work towards a consensus-based solution with a goal of producing the final proposal in 2020–2021. Eventually the global community, comprising more than 130 countries worldwide, in 2021 agreed on the two-pillar solution to address the tax challenges arising from the digitalisation of

²⁰ **P. Hongle, P. Pistone**, *Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy*, WU International Taxation Research Paper Series 2015/15, pp. 2–3; **I. Krzemińska**, *Propozycje opodatkowania znaczącej obecności cyfrowej w Unii Europejskiej*, *Krytyka Prawa* 2019/11/2, p. 98.

the economy, assuming creation of new taxing right allocable to the market jurisdiction without the need on the part of the multinational enterprise to meet the traditional permanent establishment threshold therein.

3.1. The EU Proposal for a Directive on significant digital presence

Article 4 on the SDP definition and article 5 on the attribution of profits to that SDP constitute the core building elements of the directive proposal due to their key role in defining the nexus and quantum of the new version of the permanent establishment, while some relevant considerations are also derived from the other articles of the SDP proposal.²¹

According to Article 1 of the draft directive, the concept of a permanent establishment, as it applies for the purposes of corporate tax in each Member State, will cover a significant digital presence through which a business is wholly or partly carried on. Pursuant to Article 4 of the proposal, ‘a significant digital presence’ is considered to exist in a Member State in a tax period if the business carried on through it consists wholly or partly of the supply of digital services through a digital interface. Furthermore, such a digital footprint will arise if one or more of the following conditions are met with respect to the supply of those services by the entity carrying on that business, taken together with the supply of any such services through a digital interface by each of that entity’s associated enterprises in aggregate:

- the proportion of total revenues obtained in that tax period and resulting from the supply of those digital services to users located in that Member State exceeds EUR 7,000,000 (revenue-based factor) – the revenues are determined pro rata to the number uses of such a device in the tax period by users located in any country in the world to access the digital interface through which the digital services are supplied;
- the number of users of one or more of those digital services who are located in that Member State in that tax period exceeds 100,000 (user-based factor);
- the number of business contracts for the supply of any such digital service that are concluded in that tax period by users located in that Member State exceeds 3,000 (user-based factor).

It is essential that each threshold is set sufficiently high to safely exclude insignificant cases where profits attributable to a digital presence would not even

²¹ **R. Petruzzi, V. Koukouloti**, *The European Commission’s Proposal on Corporate Taxation and Significant Digital Presence: A Preliminary Assessment*, European Taxation 2018/9, p. 392.

cover the tax compliance cost for a permanent establishment, thus ensuring the proportionality of the measure.

Unlike the current regulation on separating the profits of the fixed place of business, the profits that are attributable to or in respect of a significant digital presence in a Member State are taxable within the corporate tax framework of that Member State only (Article 5 of the Significant Digital Presence proposal). Nonetheless, the fiction of the independence of a permanent establishment has been maintained. The proposal for a directive assumes profits that a significant digital presence would have earned if it had been a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, particularly its dealings with other parts of the enterprise, taking into account the assets used, functions performed and risks assumed. The authorised OECD approach (AOA) remains the underlying principle for attributing profits to a significant digital presence, which was rightly described as employnig double fiction, i.e. the deemed independend (first fiction) and the deemed PE (second fiction).²²

To determine the attributable profits, taxpayers should take into consideration so-called ‘economically significant activities’ carried on by the significant digital presence and generally apply the profit split method. However, the taxpayer can prove that an alternative method based on internationally accepted principles is more appropriate regarding the results of the functional analysis. The attribution of profits should take into account the development, enhancement, maintenance, protection and exploitation of intangible assets in the performance of the economically significant activities by the digital presence (even if these are not linked to people) functions in the same Member State. For example, in attracting new users to a social network, the set of intangible assets that would be attributable to the business of the social network plays a key part in guaranteeing the positive network externalities, i.e. that the users are able to connect to a large number of other users.

The profits are calculated on the basis of the functional analysis taking into consideration the economically significant activities performed by the significant digital presence through a digital interface that is relevant to the development, enhancement, maintenance, protection and exploitation of the enterprise’s intangible assets. The economically significant activities performed by the significant digital presence are activities related to data or users and they include without limitation:

²² **D. Blum**, *Permanent establishments and Action 1 on the digital economy of the OECD Base Erosion and Profit Shifting initiative – the nexus criterion redefined?*, Bulletin for International Taxation 2015/6–7, p. 322.

- the collection, storage, processing, analysis, deployment and sale of user-level data;
- the collection, storage, processing and display of user-generated content;
- the sale of online advertising space;
- making third-party created content on a digital marketplace available;
- the supply of any digital service not listed above.

From another angle, the European Commission's proposals assume applying additional criteria to allocate profits arising from digital services, such as user engagement or contribution to a platform, the collection of data from users in a Member State through the platform, the number of users or the amount of user-generated content. These new criteria depending on the specific digital business model could be qualified from a theoretical perspective as new origin-based criteria or as destination-based criteria, depending on the exact level of engagement of the users, e.g. along the division line of active *versus* passive. That would mark a departure from the past international consensus on how to factor into economic activity elements, comprising classical origin-based criteria, to determine where taxation should take place.

The proposal for the SDP directive has not been proceeded in the EU institutions as there was a will among Member States to wait for the outcome of work performed by the global community at the OECD.

3.2. The OECD 2005 Report

The OECD has worked for more than last 25 years analysing the impact of the electronic commerce on the current international tax legislation. In the late 1990s, the digital economy, at that time in its embryonic form referred to as electronic commerce, was considered by the OECD.²³ In years 1998–2001 the overarching principles that should guide the development of rules in international tax matters for the electronic commerce were established, since then referred to as the Ottawa Taxation Framework Conditions, comprising rules such as: neutrality, efficiency, certainty and simplicity, effectiveness and fairness, flexibility. The main conclusion of the framework was that the widely accepted general tax principles that guide taxation of conventional commerce should also guide taxation of electronic commerce.

²³ **Ch. Panayi**, *International Tax Law Following the OECD/G20 Base Erosion and Profit Shifting Project*, Bulletin for International Taxation 2016/11, p. 630.

In 2005, the OECD released the report titled ‘Are the Current Treaty Rules for Taxing Business Profits Appropriate for E-Commerce?’ (The 2005 Report). In the report, the ‘virtual PE’ theory was extensively studied as an alternative nexus that would apply to electronic commerce operations. According to the 2005 Report, the PE definition could be modified in three ways in order to extend the PE definition, encompassing:

- ‘virtual fixed place of business’ through which the enterprise carries on business (i.e. an electronic equivalent of the traditional permanent establishment). There would be a virtual fixed place of business when the enterprise maintains a web site on a server of another enterprise located in a jurisdiction and carries on business through that web site. The place of business is the web site, which is virtual. This alternative would effectively remove the need for the enterprise to have at its disposal tangible property or premises within its jurisdiction. It would nevertheless retain some or all of the other characteristics of a traditional PE, i.e. the need for a ‘place’ (whether physical or electronic) within a jurisdiction having the necessary degree of permanence through which the enterprise carries on business;
- ‘virtual agency’ (i.e. an electronic equivalent of the dependent agent permanent establishment). This concept would be an electronic equivalent of a dependent agent and, therefore, will cover situations where contracts are habitually concluded on behalf of the enterprise with persons located in the jurisdiction through technological means rather than through a person;
- ‘on-site business presence’, which would be defined to include ‘virtual’ presence. An enterprise providing on-site services or other business interface (which could be a computer or phone interaction) to users located in certain country may be deemed as ‘on-site business presence’. This new threshold for source taxation would not depend on the existence of a fixed place of business at the disposal of the enterprise or on the traditional view of a business activity taking place within a jurisdiction. Under this alternative, it would be necessary to specify a minimum threshold to ensure that source country taxation only applied where there is a significant level of economic activity. Possible thresholds might include a minimum time during which the enterprise regularly operates within the jurisdiction, or monetary thresholds, or limitations on the types of activities covered (e.g. exclusions for preparatory or auxiliary activities, or intermittent and occasional activities).

In the 2005 Report, the OECD indicated that the adoption of any of the above options would require reconsideration of the current rules regarding

the attribution of profits and a significant reinterpretation of the arm's length principle in order to introduce the notion of virtual functions, use of virtual asset and virtual risk assumption.²⁴ The reason for this is that under a conventional functional analysis, it is likely that no substantial profit could be attributed to a virtual PE. The report concluded however that it would not be appropriate to embark on any such changes at that time. Electronic commerce and other business models resulting from new communication technologies were not perceived to justify, by themselves, a dramatic departure from the current rules.²⁵ There did not seem to be actual evidence that the communicative efficiencies of the Internet had caused any significant decrease to the tax revenues of capital importing countries.

Importantly, with respect to the most crucial question on where business profits originate, the 2005 Report concluded that business profits should be viewed as originating from the location of the factors that allow the enterprise to realize business profits. The report therefore rejected the suggestion that the mere fact that a country provides the market where an enterprise's goods and services are supplied should allow that country to consider that a share of the profits of the enterprise is derived therefrom. In the report it could not be agreed on the related issue whether a supplier which is not physically present in a country may be considered to be using that country's legal and economic infrastructure. Furthermore, if that is the case, it is necessary to ask whether, and to what extent, such use of a country's legal and economic infrastructure should be considered to be one factor that would allow that country to claim source taxing rights on a share of the enterprise's profits. In addition, since the most 'traditional' of business enterprises continue to incorporate electronic commerce business models, it was found not to be appropriate, nor possible, to design one set of nexus rules for 'electronic commerce' companies, and another for non-electronic commerce companies.²⁶

3.3. The OECD 2015 Report

The Base Erosion and Profit Shifting (BEPS) Project was initiated to tackle base eroding and profit shifting activities. However, it did not aim to alter the existing international standards on the allocation of taxation rights on cross-border income between countries. Taxation of digital businesses was the topic

²⁴ OECD, The 2005 Report, paragraph 326.

²⁵ *Ibidem*, paragraph 350.

²⁶ *Ibidem*, paragraph 60.

for Action Point 1 in the BEPS Project and raised issues of reallocating taxation rights across countries, but eventually no consensus was reached.

The Final Report on Action Point 1 (the 2015 Report), revisited the key features of the ‘new’ business models in the digital economy, how these features could exacerbate the risk of base erosion and profit shifting and how these issues should be addressed.²⁷ It was noted that the concerns surrounding base erosion and profit shifting as a result of situations in which taxable income could be artificially segregated from the activities that generated it or an inappropriately low amount of tax, or no tax, was collected on remote digital supplies to exempt businesses or multi-location enterprises that are engaged in exempt activities. Although the nature of strategies used to realize base erosion and profit shifting in digital businesses were described as similar to those of traditional businesses, it was conceded that some of the key characteristics of the digital economy exacerbated risks of base erosion and profit shifting, in respect of which examples of structures were provided.²⁸ Simultaneously, it was stated that the amendments proposed in other Final Reports of the BEPS Project would be sufficient to address such concerns to large extent through change to article 5(4) and (5) of the OECD Model Tax Convention on Income and on Capital as proposed in Action Point 7, the revised guidance on transfer pricing as adjusted in Action Points 8-10 and the recommendations with respect to the controlled foreign corporations from Action Point 3.²⁹

The 2015 Report identified a number of broader tax challenges raised by digitalisation for both direct and indirect taxation. With respect to direct taxation, it was recognized that the main challenges relate to the allocation of taxing rights between source and residence jurisdictions. These challenges were grouped into three broad and overlapping categories, namely (1) nexus, (2) the role of data in value creation, and (3) the characterization of payments in the context of new business models (for example, cloud computing).³⁰

To tackle the direct tax issues raised by digitalisation through redefining the nexus, the 2015 Report analysed three alternative options that would either operate as a nexus or provide the ability to the source state to tax profits stemming from activities in the digital economy: (i) a new nexus rule in the form of a ‘significant economic presence’, (ii) a withholding tax that could be applied

²⁷ OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report*, 2015.

²⁸ Ch. Panayi, *International Tax Law...*, p. 631.

²⁹ OECD, *The 2015 Report*, p. 12.

³⁰ *Ibidem*, Report, paragraph 248.

to certain types of digital transactions; and (iii) an equalization levy. At this stage, the OECD did not recommend the adoption of any of these alternatives, but countries were to be free to adopt them in their domestic law if they wished to take further steps as additional safeguards against BEPS, provided they respect existing treaty obligations.³¹ It was agreed that developments in respect of the digital economy will continue to be analysed with a further interim and final report to be delivered between 2018–2020. Interestingly, although BEPS Action 1 was not considered as one of the minimum standards, it has become a major tax reform ‘standard’ for many countries.³²

The first proposal revisits the nexus approach, in suggesting a focus on an entity’s significant economic presence in a given jurisdiction. The underlying principle is that physical presence is not necessary for an entity to derive economic benefits from the jurisdiction. The rationale for the proposal is to permit the fair allocation of taxing rights among jurisdictions, taking into account the economy and/or economies that contribute to profits, irrespective of any material connections. Consequently, taxing power would be justified on the basis of a combination of indicators that provide evidence for a significant economic presence, comprising revenue arising within a country and digital activities. More specifically the concept would include the following criteria:

- the amount of profit derived from transactions within a jurisdiction, i.e. revenue-related indicators;
- possession of local domain name or local currency payment options, i.e. digital indicators; and
- consumer-related indicators, for example, monthly active users, contracts concluded within the jurisdiction or data collected (volume of digital content).

In other words, a presence is significant enough to qualify as PE where a set of limits in relation to these factors is satisfied. Such a concept of PE would be free from tangible and physical connections, independent of assets, personnel and risks. The above test departs from the assumption that the number of users of a platform or the volume of personal and commercial data that companies can extract from them constitutes an asset of technological enterprises. The idea

³¹ OECD, The 2015 Report, p. 13.

³² Non-exhaustive list of the measures include: Israel’s significant economic presence test, India’s new nexus based on a concept of significant economic presence, India’s equalization levy, Hungary’s advertisement tax, France’s tax on online and physical distribution of online content, the United Kingdom’s diverted profit tax, Australia’s Multinational Anti-Avoidance Law and diverted profit tax, the United States’ base erosion and anti-abuse tax (BEAT).

that the concept of PE should be able to reflect the value provided by the users by means of their data was originally advanced by the report presented by Pierre Collin and Nicolas Colin to the French Ministry of Finance in 2013.³³

It is interesting to note that the concept of significant economic presence, though economic in nature, bears some resemblance to the traditional PE concept, at least in requiring the existence of certain local elements, such as a local domain name, a local website and user-based factors taking into account contracts with local customers.

Crucially though, it should be stressed that the OECD acknowledged that it would be impossible to ring-fence the digital economy for the purposes of creating separate tax rules ‘because the digital economy is increasingly becoming the economy itself’.³⁴ Attempting to isolate the digital economy would inevitably require arbitrary lines to be drawn between what is digital and what is not.

3.4. The OECD 2018 Report

On 16 March 2018, the OECD presented an interim report of the tax challenges arising from digitalisation (The 2018 Report).³⁵ The report begins by describing the characteristics of highly digitalised businesses and the process of value creation, leading to identification of the three main features that are frequently observed in digital businesses: (i) scale without mass, i.e. the ability to be heavily involved in the economic life of a jurisdiction without any significant physical presence, (ii) heavy reliance on intangible assets, and (iii) the importance of data and user participation.

The existence of these three frequently observed characteristics of digitalised businesses is generally acknowledged by different countries but there is no consensus among them about their relevance and importance to the location of value creation and the identity of the value creator.³⁶ The views of the countries could generally be described as falling within one of three groups.³⁷

The first group of countries considered that reliance on data and user participation may lead to misalignments between the location where profits

³³ **E. Escribano**, *Is the OECD/G20 BEPS Initiative Heading in the Right Direction? Some Forgotten (and Uncomfortable) Questions*, Bulletin for International Taxation 2017/5, p. 256.

³⁴ **OECD**, The 2015 Report, paragraph 115.

³⁵ **OECD**, Tax Challenges Arising from Digitalisation – Interim Report 2018.

³⁶ **OECD**, The 2018 Report, paragraph 36.

³⁷ *Ibidem*, paragraph 388.

are taxed and where value is created. In their view, this misalignment is not produced by any specific BEPS arrangement or tax planning strategy but is the result of a new and unique feature observed in some highly digitalised business models that is not captured by the existing international tax framework: the active participation of users through an online platform, and the value that this participation creates for the business (i.e. user-generated value). However, this group believes that these misalignments do not undermine the principles of the existing international tax framework and therefore only targeted measures are needed to improve the international tax system. In particular, most of the countries in this group reject the idea that a country that provides the market where a foreign enterprise's goods and services are supplied on its own provides a sufficient link to create a nexus for tax purposes, regardless of the scale of these supplies.³⁸

The second group believes that digitalisation poses challenges to the existing tax framework, but these challenges are not exclusive or specific to highly digitalised business models. This group of countries take the view that the ongoing digital transformation of the economy, and more generally trends associated with globalisation, present challenges to the continued effectiveness of the existing international tax framework for business profits. Importantly, for this group of countries, these challenges are not exclusive or specific to highly digitalised business models. According to these countries, a changing global economy presents a challenge to the adequacy of the two basic concepts that underlie the current tax framework. First, it raises a profit allocation issue, as more and more profit is dependent on non-physical and mobile value drivers (e.g. various types of knowledge-based capital). Second, it raises a nexus issue, as the limited or lesser need for physical presence to carry on economic activities challenges the extent to which the existing PE definition (e.g. a 'fixed place of business') is still a relevant nexus for determining the jurisdiction in which to tax business income.³⁹

Finally, there is a third group of countries that consider that the BEPS package has largely addressed the concerns of double non-taxation, although these countries also highlight that it is still too early to fully assess the impact of all the BEPS measures. These countries are generally satisfied with the existing tax system and do not currently see the need for any significant reform of international tax rules. Some countries in this group do not agree that data and user participation

³⁸ *Ibidem*, paragraph 390.

³⁹ *Ibidem*, paragraph 392.

contribute to value creation in the user's jurisdiction, whereas some other countries in this group believe these issues require further consideration.⁴⁰

The main conclusion reached by the OECD is that there is no consensus among countries on whether and to what extent changes to the current tax regime are needed. While everyone believes that a coordinated reform is superior to a patchwork of uncoordinated measures, there are different views on how this coordinated action should look from theoretical and practical point of view.

3.5. The OECD 2020 Report

Further to the Policy Note issued on 23 January 2019, the OECD continued working on releasing a consensus-based approach.⁴¹ It had managed to agree to two prong solution to address the tax challenges arising from digitalisation of the economy, comprising of:

- Pillar One – providing market jurisdictions with new taxing rights over a portion of the business profits of non-resident multinational companies in the absence of a traditional physical presence (reallocation of tax base), being an answer to tax base cyberization phenomenon, and
- Pillar Two – providing jurisdictions with a right to 'tax back' in the event where other jurisdictions with taxing rights do not tax or apply a low effective tax rate (global minimum tax), constituting an answer to tax base shifting phenomenon.⁴²

On 14 October 2020, the OECD published detailed reports on both pillars, where particular attention should be paid to Pillar One Blueprint (The 2020 Report).⁴³ This report seeks the adoption of a new taxing right on a particular share of the deemed 'residual profit' of a multinational enterprise, called Amount A, which would be attributed to market jurisdictions even in the absence of physical taxable presence of the MNE in this jurisdiction. Market jurisdictions are those jurisdictions where an MNE provides automated digital services to users and collects data from users or distributes goods and services of a type commonly sold to consumers.

The guiding principle was to identify these MNEs which 'participate in a sustained and significant manner in the economic life of a market jurisdiction,

⁴⁰ *Ibidem*, paragraph 394.

⁴¹ **OECD**, *Addressing the Tax Challenges of the Digitalisation of the Economy – Policy Note*, 2019.

⁴² **J. Li**, *The Legal Challenges of Creating a Global Tax Regime with the OECD Pillar One Blueprint*, *Bulletin for International Taxation* 2021/2, p. 84.

⁴³ **OECD**, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint*, 2020.

without necessarily having a commensurate level of taxable presence in that market (as based on existing nexus rules)⁴⁴. It was established that Amount A should thus target businesses performing at least one of the following two types of activities: (i) automated digital services (ADS), such as but not limited to online advertising services, social media platforms and online intermediation platforms, or (ii) consumerfacing businesses (CFB), such as businesses that sell goods and services primarily targeted at consumers including those selling indirectly through intermediaries and by way of franchising and licensing. To be in the scope of Amount A, an MNE would need to have global consolidated revenues of the conglomerate as a whole of at least EUR 750 million, as established under international financial accounting standards. In addition, a significant part of that global revenue needs to be derived from foreign sources under the *de minimis* foreign source in-scope revenue test, i.e. outside its domestic market.

From the perspective of the interest of this article focused on the PE concept, the nexus construction plays vital role. The new nexus rules determine entitlement of a market jurisdiction to an allocation of Amount A only. They do not alter the nexus for other tax purposes, customs duties or for any other non-tax area. The new nexus rules shall be designed as a standalone provision to limit any unintended spill-over effects on other existing tax or non-tax rules.⁴⁵ The new nexus rules would apply differently for ADS and CFB.⁴⁶

For ADS, exceeding a market revenue threshold could be the only test to establish a nexus. According to the OECD, the nature of the ADS allows them to be provided remotely and such businesses generally have a significant and sustained engagement with the market even if there is not a physical presence, which is one of the key challenges in taxing the digitalising economy.⁴⁷

For CFB, the ability to participate remotely in a market jurisdiction is less pronounced in view of the OECD. The approach for satisfying this higher nexus standard is through a higher threshold and the presence of additional indicators in the form of ‘plus’ factors, which would evidence an active and sustained engagement in that jurisdiction beyond sales only. These plus factors could be physical test in the form of a company or traditional permanent establishment,

⁴⁴ OECD, *The 2020 Report*, paragraph 38.

⁴⁵ *Ibidem*, paragraph 189.

⁴⁶ M. Adda, F.S. Scandone, U. Lorenzi, *The New Taxing Right under Pillar One: Preliminary Thoughts on Potential Implications for MNEs*, *International Transfer Pricing Journal* 2021/1, p. 11.

⁴⁷ *Ibidem*, paragraph 190.

test based on a sustained presence of personnel in a market jurisdiction (e.g. 183 days in a year) or test of advertising and promotion expenditure.⁴⁸

3.6. The 2021 Compromise

Under the last-minute proposal by the US administration released in April 2021, the course of the international tax reform changed significantly in two ways.⁴⁹ First, the focus on companies in particular sectors, i.e. ADS and CFB, has been abandoned, where the scope of amount A has been narrowed to about 100 of the largest, most profitable multinational enterprises, using quantitative, rather than qualitative, factors.⁵⁰ Second, the revenue threshold was increased to EUR 20 billion.

On July 1, 2021, in a preliminary manner and on October 8, 2021 in a final way, the OECD's Inclusive Framework agreed on the conceptual outline of two fundamental reforms to the international tax system with details to be developed in the course of 2021–2022.⁵¹

As in the 2020 Report, Pillar 1 would continue to reallocate a share of global residual (non-routine) profits of the largest and most profitable multinational companies to market jurisdictions, in which the sales are made under Amount A. However, two entry thresholds will define such companies, namely global turnover above EUR 20 billion and a profit margin above 10%. The OECD Inclusive Framework has agreed that the share of profit margin above 10% reallocated to market countries should be in the range of 25% using a revenue-based allocation key. The 10% profit level will be calculated as the ratio of profit before tax to revenue. Profit amounts will be derived from financial accounts with a small number of tax adjustments.

Pillar One's Amount A proposal reallocates taxing rights in favour of market countries through the creation of a new taxing right. A share of a group's global residual profit will be reallocated to market countries using a formulaic approach. Businesses in the extractive and regulated financial services sectors are excluded

⁴⁸ *Ibidem*, paragraphs 191–204.

⁴⁹ **Steering Group of the Inclusive Framework Meeting**, *Presentation by the United States*, April 8, 2021.

⁵⁰ **N. Altenburg, K. Schlücke**, *The New World of Pillar One – Practical Thoughts on the New Scope*, *International Transfer Pricing Journal* 2022/1, p. 1.

⁵¹ **OECD**, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy*, July 1, 2021; **OECD**, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, October 8, 2021.

from Amount A. The global annual turnover threshold will be reduced to EUR 10 billion in the future, depending on a successful implementation of Amount A, including tax certainty mechanisms. A review to determine the success will be undertaken seven years after the rules enter into force. Segmentation rules will apply only in exceptional circumstances where a segment disclosed in financial statements meets the scope of the rules on a standalone basis.

No physical presence is required within market jurisdictions to create an Amount A taxable nexus.⁵² A market jurisdiction will be entitled to an allocation of Amount A if revenues of at least EUR 1 million are generated in that country. For countries with Gross Domestic Product (GDP) lower than EUR 40 billion, the threshold will be lowered to EUR 250,000. Revenues will be sourced to the end market jurisdiction where goods or services are used or consumed. Detailed sourcing rules shall be developed for specific categories of transactions. Such solution reveals how nexus of the fully-fledged virtual PE concept has been reconceptualized to value of sales into the jurisdiction only.

To eliminate double taxation, any Amount A liability will be allocated to entities that earn residual profit and relieved via exemption or credit. The administration of the new rules will be streamlined, and businesses will be able to manage their compliance through a single paying entity. Importantly, implementation of Pillar 1 will be coordinated with the removal of all unilateral digital taxes and other relevant similar measures on all companies.

4. Conclusions

The PE concept, when first developed, constituted a reliable proxy for a fair allocation of taxing powers on business income, as a stable physical presence was considered to be indispensable for the stable exercise of business in the territory of other country.⁵³ Yet the notion of a fixed place of business hardly ever applies in the digital economy.⁵⁴

With the emergence of modern technologies and business models, it became clear that what was invented almost 100 years ago may not fit into today's reality.

⁵² **G.S. Cooper**, *Building on the Rubble of Pillar One*, Bulletin for International Taxation 2021/11–12, p. 534.

⁵³ **Y. Brauner, P. Pistone**, *Adapting current international taxation to new business models: two proposals for the European Union*, Bulletin for International Taxation 2017/12, p. 683.

⁵⁴ **P. Collin, N. Colin**, *Task Force on Taxation of the Digital Economy* (Ministere de l'economie et des finances), 2013, p. 63.

Back then a similar tax debate regarding the allocation of international taxation rights took place. The outcome of that debate was that the residence country was attributed the primary right to tax business profits.

Currently, new taxing rights have been granted to the market jurisdictions. Treating users or customers as a genuine link between businesses and market jurisdictions seems to be the most direct reason explaining why more taxing rights should be accorded to market jurisdictions. Looking at the concept of significant economic presence featured in The 2015 Report we can observe a shift towards an economic or market-based nexus where economic activity is the basis for establishing taxing rights over non-resident companies. Although the OECD report does not provide a normative draft but barely specifies contents and scope of digital PEs concepts, two basic variants of the significant economic presence as regards the nexus have been asserted to create taxing rights of the countries in relation to the new digitalised business models.⁵⁵ The first approach, the qualitative economic presence test, takes into account all relevant facts and circumstances, for example whether the MNE has a local domain name or local payment options. The second approach, the quantitative economic presence test, implies using only quantitative factors such as value revenues, number of users or business contracts. The latter variant has been opted for by the European Commission in the SDP proposal (all three criteria) as well by the OECD in the 2021 Compromise (first criterion), despite the latter's initial view that an extensive functional analysis should be applied in order to allocate profits to a specific jurisdiction.

The main criticism of the digital PE concepts does not so much concern the establishment of the nexus as the establishment of the viable attribution mechanism of the profits to such a PE. The existing Authorized OECD Approach emphasizes the place where significant human functions are performed in order to allocate profits to particular jurisdiction. It would be highly challenging from a transfer pricing perspective to allocate profits to a jurisdiction where no classical functions are performed, no classical risks are assumed, and no classical assets are held. At the same time, developing the new profit attribution rules that would be in line with the value creation concept derived from the OECD Guidance on the Attribution of Profits to a Permanent Establishment

⁵⁵ **W. Neuvel, S. de Jong, A. Uceda**, *Profit Attribution Challenges in a Digital Economy – A Transfer Pricing Analysis of the EU Virtual Permanent Establishment Concept*, *International Transfer Pricing Journal* 2018/9–10, p. 345.

under BEPS Action 7⁵⁶ appeared to be problematic, if not impossible, at this point in time of transfer pricing rules development. It is not even possible to make generalized conclusions about key value drivers that would be common for all digital business models.

Interestingly, the notion of value creation has not been defined in the BEPS Project, neither in the BEPS Action 1 Final Report, nor in the BEPS Action 8–10 Final Report. On the other hand, the 2018 Report only provided a generic descriptive comments on this notion recognizing that there is a multitude of processes of value creation.⁵⁷ The OECD using a theoretical framework classified value creation process in the digital economy in three categories:⁵⁸

- The value chain approach with the objective of converting the inputs into outputs through discrete but related, sequential activities (each of which can be thought of as a production function). The final goods may be manufactured by the company itself or acquired. In general, the final goods are standardised. The value creation logic assumes that the value is created by transferring a product from the firm to its customers.
- The value network approach with the objective of serving as an intermediary, facilitating (i) bilateral interactions between itself and its customers, and/or (ii) multilateral interactions between its customers (e.g., buyers/sellers; passengers/drivers). Value creation may be in the formation of direct links between customers (e.g., a telephone call or a friend request) or of indirect links (e.g., a commercial bank can make a loan by virtue of the deposits that customers supply in aggregate). The value creation logic assumes that value is created by organising and facilitating exchange between (linking) customers.
- The value shop with the objective of solving a problem, thereby transforming an existing state to a more desired one. The problems are characterised by information asymmetry (i.e., the shop has more information than its customers). The process to arrive at a solution may be labour intensive with respect to professionals, specialists and may either be standardised or highly customised. The value creation logic assumes that the value is created by (re)solving a customer problem or demand.

It is rightly pointed out that the idea of value creation is open-ended, offering different factors that might affect the outcome, so that it could bend

⁵⁶ **OECD**, *Additional Guidance on the Attribution of Profits to a Permanent Establishment under BEPS Action 7*, 2018.

⁵⁷ **OECD**, *The 2018 Report*, paragraph 65.

⁵⁸ *Ibidem*, paragraph 99.

towards taxation on the basis of the destination sales, capital residence or global justice approach.⁵⁹ This could explain why the idea of value creation in the context of digital businesses has not been developed further on by the OECD and eventually the whole concept has been missing from The 2020 Report and The 2021 Compromise, though it remains as politically influential dogma.⁶⁰

With regard to the European Commission's proposal on attributing profits to the significant digital presence modifying the AOA approach through employing the concept of economically significant activities through a digital interface is no less problematic. It is a vague and unclear concept which raises many practical and theoretical challenges,⁶¹ with the key questions evolving around how to attribute value to users and data. The split profit method as envisaged by the European Commission is actually a euphemism for formulary apportionment.⁶² The 2021 Compromise heads directly in direction of the formulary apportionment.

Summarizing, in terms of nexus and allocation of profits method one can observe convergence between the proposal of directive on SPD and the 2021 Compromise, where quantitative factors and formulary apportionment have been chosen. Finally, it should be observed that in the 2021 Compromise, the OECD Inclusive Framework decided to move away from the problem of digitization in favor of globalization and away from taxation of the largest technology giants in favor of taxing the biggest and most profitable companies. This means that we are also moving away from the question of whether users and their data are value creation factors on the demand side at the expense of the former exclusive supply side factors and that the PE concept under the Amount A from the 2021 Compromise has taken a simplified form compared to traditional notion of the PE requiring analysis of the physical presence.

⁵⁹ **S. Morse**, *Value Creation: A Standard in Search of a Process*, Bulletin for International Taxation 2018/4–5, p. 198.

⁶⁰ **W. Schön**, *Ten questions about why and how to tax the digitalized economy*, Bulletin for International Taxation 2018/4–5, p. 280.

⁶¹ **A. Samari**, *Digital Economy and Profit Allocation...*, pp. 20–21.

⁶² **L. Sheppard**, *Digital Permanent Establishment and Digital Equalization Taxes*, Bulletin for International Taxation 2018/4a, p. 4.

References

Literature

- Adda M., Scandone F.S., Lorenzi U.**, *The New Taxing Right under Pillar One: Preliminary Thoughts on Potential Implications for MNEs*, *International Transfer Pricing Journal* 2021/1.
- Altenburg N., Schlücke K.**, *The New World of Pillar One – Practical Thoughts on the New Scope*, *International Transfer Pricing Journal* 2022/1.
- Anderson K.**, *Should We Use Value Creation or Destination as a Basis for Taxing Digital Businesses? – Krister Andersson’s Comments on the 2018 Klaus Vogel Lecture Given by Professor Michael Devereux*, *Bulletin for International Taxation* 2018/12.
- Azam R.**, *E-commerce Taxation and Cyberspace Law: Integrative Adaptation Model*, *Virginia Journal of Law & Technology Association* 2007/12/5.
- Basu S.**, *Global perspectives on e-commerce taxation law*, Burlington 2007.
- Blum D.**, *Permanent establishments and Action 1 on the digital economy of the OECD Base Erosion and Profit Shifting initiative – the nexus criterion redefined?*, *Bulletin for International Taxation* 2015/ 6–7.
- Brauner Y., Pistone P.**, *Adapting current international taxation to new business models: two proposals for the European Union*, *Bulletin for International Taxation* 2017/12.
- CFE Fiscal Committee**, *Opinion Statement FC 1/2018 on the European Commission proposal of 21 March 2018 for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services*, 2018, <http://taxadviserseurope.org/blog/portfolio-items/opinion-statement-eu-commission-digital-services-tax-proposal/>; accessed 15.03.2022.
- Chetcuti J.-P.**, *The Challenge of E-commerce to the Definition of a Permanent Establishment: The OECD’s Respons*, *Inter Lawyer* 2002.
- Collin P., Colin N.**, *Task Force on Taxation of the Digital Economy* (Ministere de l’conomie et des finances), 2013.
- Cooper G.S.**, *Building on the Rubble of Pillar One*, *Bulletin for International Taxation* 2021/11–12.
- Escribano E.**, *Is the OECD/G20 BEPS Initiative Heading in the Right Direction? Some Forgotten (and Uncomfortable) Questions*, *Bulletin for International Taxation* 2017/5.
- Geurts M.**, *Server as a permanent establishment?*, *Intertax* 2000/28/4.
- Hellerstein W.**, *Jurisdiction to tax in the digital economy: permanent and Other establishments*, *Bulletin for International Taxation* 2014/6–7.
- Hongler P., Pistone P.**, *Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy*, *WU International Taxation Research Paper Series* 2015/15.
- Jamroży M., Janiszewska M.**, *Permanent establishment as a foreign direct investment in Poland: identification of tax barriers in the context of new tax development*, *International Journal of Management and Economics* 2021/2.
- Krzemińska I.**, *Propozycje opodatkowania znaczącej obecności cyfrowej w Unii Europejskiej*, *Krytyka Prawa* 2019/11/2.
- Li J.**, *The Legal Challenges of Creating a Global Tax Regime with the OECD Pillar One Blueprint*, *Bulletin for International Taxation* 2021/2.

- Lipniewicz R.**, *Jurysdykcja podatkowa w cyberprzestrzeni: model międzynarodowego opodatkowania dochodu*, Warszawa 2018.
- Morse S.**, *Value Creation: A Standard in Search of a Process*, *Bulletin for International Taxation* 2018/4–5.
- Neuvel W., de Jong S., Uceda A.**, *Profit Attribution Challenges in a Digital Economy – A Transfer Pricing Analysis of the EU Virtual Permanent Establishment Concept*, *International Transfer Pricing Journal* 2018/9–10.
- Olbert M., Spengel C.**, *International Taxation in the Digital Economy: Challenge Accepted?*, *World Tax Journal* 2017/1.
- Panayi Ch.**, *International Tax Law Following the OECD/G20 Base Erosion and Profit Shifting Project*, *Bulletin for International Taxation* 2016/11.
- Petruzzi R., Koukouloti V.**, *The European Commission's Proposal on Corporate Taxation and Significant Digital Presence: A Preliminary Assessment*, *European Taxation* 2018/9.
- PwC**, *European Commission Proposals for Directives regarding fair taxation of the digital economy ("Digital Tax Package")*, 2018, <https://www.pwc.com/gx/en/about/assets/reponse-ec-proposals-digital-tax-package.pdf>; accessed 15.03.2022.
- Samari A.**, *Digital Economy and Profit Allocation: The Application of the Profit Split Method to the Value Created by a "Significant Digital Presence"*, *International Transfer Pricing Journal* 2019/1.
- Schön W.**, *Ten questions about why and how to tax the digitalized economy*, *Bulletin for International Taxation* 2018/ 4–5.
- Shepard L.**, *Digital Permanent Establishment and Digital Equalization Taxes*, *Bulletin for International Taxation* 2018/4a.

Websites

- Becker J., Englisch J.**, *EU Digital Services Tax: A Populist and Flawed Proposal*, *Kluwer International Tax Blog*, viewed 19 July 2018, <http://kluwertaxblog.com/2018/03/16/eu-digital-services-tax-populist-flawed-proposal/>; accessed 15.03.2022.
- https://ec.europa.eu/taxation_customs/fair-taxation-digital-economy_fi; accessed 15.03.2022.
- <https://www.oecd.org/tax/beps/about/>; accessed 15.03.2022.
- <https://www.oecd.org/tax/beps-2015-final-reports.htm>; accessed 15.03.2022.

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ZAKŁAD ZAGRANICZNY W DZIAŁALNOŚCI CYFROWEJ

Abstrakt

Przedmiot badań: Obecne rozwiązania podatkowe w zakresie opodatkowania zakładu zagranicznego, oparte na fizycznej obecności przedsiębiorstwa na terytorium innego państwa, zostały opracowane z myślą o tradycyjnych przedsiębiorstwach, które nie prowadzą działalności w formie cyfrowej, w szczególności w Internecie. Biznes elektroniczny w dużej mierze opiera się na dobrach niematerialnych, takich jak algorytmy i dane użytkowników. Opodatkowanie biznesu cyfrowego stanowi problem globalny, którym zajmują się m.in. UE i OECD.

Cel badawczy: Artykuł ma na celu przedstawienie znaczenia i konsekwencji nowych propozycji UE i OECD, dotyczących opodatkowania dochodów wynikających z cyfryzacji gospodarki w świetle standardów przyjętych dla zakładu zagranicznego.

Metoda badawcza: Analiza źródeł prawa lub materiałów roboczych, w szczególności dyrektyw UE oraz raportów lub oświadczeń OECD publikowanych przed i po projekcie BEPS. Analiza porównawcza konsekwencji podatkowych na gruncie obecnych i planowanych przepisów dotyczących zakładu zagranicznego w działalności cyfrowej.

Wyniki: OECD w formule Ram Inklusywnych (*Inclusive Framework*) odchodzi od problemu cyfryzacji na rzecz globalizacji i od opodatkowania największych gigantów technologicznych na rzecz opodatkowania największych i najbardziej dochodowych przedsiębiorstw. Koncepcja zakładu zagranicznego w ramach kompromisu z 2021 r. przybrała istotnie uproszczoną formę w porównaniu z tradycyjnym pojęciem zakładu, wymagającym analizy fizycznej obecności na terytorium danego państwa.

Słowa kluczowe: zakład zagraniczny, ekonomia cyfryzująca się, handel elektroniczny, obecność cyfrowa, istotna obecność w sensie ekonomicznym.