The Inward Investment and International Taxation Review

Twelfth Edition

Editor
Tim Sanders

The LawReviews

© 2022 Law Business Research Ltd

THE Inward Investment and International Taxation Review

Twelfth Edition

Reproduced with permission from Law Business Research Ltd
This article was first published in February 2022
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Tim Sanders

THE LAWREVIEWS

© 2022 Law Business Research Ltd

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADERS
Joel Woods, Jack Bagnall

BUSINESS DEVELOPMENT MANAGERS
Rebecca Mogridge, Katie Hodgetts, Joey Kwok

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Leke Williams

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Louise Robb

SUBEDITOR
Orla Cura

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
© 2022 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at January 2022, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed
to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-83862-532-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ABOU JAOUDE & ASSOCIATES LAW FIRM

ADVOKATFIRMAET GRETTE AS

ÆLEX

AFRIDI & ANGELL

ALLENDE BASCUÑÁN & CÍA

ANDERSON MŌRI & TOMOTSUNE

BAE, KIM & LEE LLC

BAKER MCKENZIE

BIRD & BIRD ADVOKAT KB

CETINKAYA

CUVAL ABOGADOS

DAVIES WARD PHILLIPS & VINEBERG LLP

DELOITTE IMPUESTOS Y SERVICIOS LEGALES, SC (DELOITTE MEXICO)

DLA PIPER NEDERLAND NV

FOGLIA & PARTNERS

GAIA SILVA GAEDE ADVOGADOS

GORRISSEN FEDERSPIEL

HERBERT SMITH FREEHILLS CIS LLP

LOYENS & LOEFF

MOCHTAR KARUWIN KOMAR

PATRIKIOS PAVLOU & ASSOCIATES LLC

PHH TAX

© 2022 Law Business Research Ltd

QUEVEDO & PONCE

ROCA JUNYENT

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

WOLF THEISS

© 2022 Law Business Research Ltd

CONTENTS

PREFACE.......... vii
Tim Sanders

Chapter 1 THE CONTINUING CHALLENGES OF TAXING THE DIGITALISED ECONOMY: AN INTRODUCTION.......... 1
Alex Jupp, Joshua Atkinson and Alex Rigby

Chapter 2 AUSTRIA.......... 17
Andreas Baumann and Karin Spindler-Simader

Chapter 3 BELGIUM.......... 28
Christian Chéruy and Marc Dhaene

Chapter 4 BRAZIL.......... 54
Heitor Cesar Ribeiro

Chapter 5 CANADA.......... 67
Julie Colden

Chapter 6 CHILE.......... 83
Francisco Javier Allende D and Mauricio Carloza C

Chapter 7 COLOMBIA.......... 96
Benjamin Cubides

Chapter 8 CYPRUS.......... 109
Stella Strati

Chapter 9 DENMARK.......... 121
Jakob Skaadstrup Andersen

Chapter 10 ECUADOR.......... 136
Alejandro Ponce Martínez

© 2022 Law Business Research Ltd

Chapter 11 HONG KONG 151
Steven Sieker and Wenwen Chai

Chapter 12 HUNGARY..166
János Pásztor, Alexandra Tóth and Bence Kálmán

Chapter 13 INDONESIA..178
Mulyana, Sumanti Disca Ferli, Bobby Christianto Manurung, Ratna Mariana and Astrid Emmeline Kohar

Chapter 14 ITALY 197
Giuliano Foglia

Chapter 15 JAPAN 214
Kei Sasaki, Yoshiko Nakamura and Go Yoshimoto

Chapter 16 LEBANON 231
Simon El Kai, Souraya Machnouk, Hachem El Housseini and Thierry Abou Jaoude

Chapter 17 LUXEMBOURG..246
Pieter Stalman and Delphine Martel

Chapter 18 MEXICO 269
Eduardo Barrón

Chapter 19 NETHERLANDS 293
Jian-Cheng Ku and Rhys Bane

Chapter 20 NIGERIA..307
Theophilus I Emuwa, Chinyerugo Ugoji, Jibrin Dasun and Ilamosi Ekenimoh

Chapter 21 NORWAY..323
Anders Nordli and Kari-Ann Mosti

Chapter 22 RUSSIA 338
Sergei Eremin

Chapter 23 SOUTH KOREA 352
Sungdoo Jang and Maria Chang

© 2022 Law Business Research Ltd

Chapter 24 SPAIN ... 366

Raúl Salas Lúcia, Elena Ferrer-Sama Server, Pilar Vacas Barreda and Javier de Diego de Mingo

Chapter 25 SWEDEN ... 384

Carl-Magnus Uggla

Chapter 26 SWITZERLAND ... 398

Fabian Sutter and Beat Baumgartner

Chapter 27 TAIWAN ... 412

Dennis Lee and Michael Wong

Chapter 28 THAILAND ... 423

Panya Sittisakonsin and Sirirasi Gobpradit

Chapter 29 TURKEY ... 438

Oytun Canyas

Chapter 30 UNITED ARAB EMIRATES ... 454

Danielle Lobo and Silvia A Pretorius

Chapter 31 UNITED KINGDOM ... 472

Tim Sanders

Chapter 32 UNITED STATES ... 499

Moshe Spinowitz, Robert C Stevenson and Leonard I Greenberg

Chapter 33 VIETNAM ... 523

Thanh Vinh Nguyen

Appendix 1 ABOUT THE AUTHORS ... 539

Appendix 2 CONTRIBUTORS' CONTACT DETAILS ... 559

© 2022 Law Business Research Ltd

PREFACE

In January 2021, the 11th edition identified and described two material global tax trends that emerged in 2020: the response of economies to the covid-19 pandemic and the taxation of the digital economy. These two trends evolved through 2021 and can be expected to occupy centre stage in 2022 and beyond.

In 2020 and 2021, governments sought to bolster economies hit by the pandemic through a series of measures ranging from furlough schemes, postponing tax deadlines and deferring tax payments to relaxing residence rules. In 2021 and into 2022, governments will face the difficult balancing act of continuing to support their economies and encourage growth on the one hand, while needing to raise money from damaged economies to pay for such support and reduce the size of large deficits on the other, without such tax raising stifling any recovery. Precisely how each jurisdiction will deal with this balance remains uncertain and is a key area to observe in 2022. At this stage it appears that, while we may see some limited tax rises, more rigorous tax enforcement is likely to play a material role.

On 1 July 2021, a statement was made by the G20 Finance Ministers that on 8 October 2021 resulted in the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS 2) that contains details of how Pillars 1 and 2, which seek to address the issues raised by the digital economy, will be applied in practice. Pillar 1 deals with the reallocation of certain profits from very large multinational enterprises to market jurisdictions, while Pillar 2 deals with a global minimum tax. Among significant points to note is that under Pillar 1 it is intended that a new multilateral convention will be drafted and available for signature in 2022 that will remove unilateral digital services taxes and similar measures. Some jurisdictions that have applied a unilateral solution, notably the United Kingdom, Austria, France, Italy and Spain, have committed to transition from existing digital services taxes to the new multilateral approach solution. Under Pillar 2, the minimum tax rate is set at 15 per cent rather than the previously proposed rate of 'at least 15 per cent'. This has already had an impact, with Ireland announcing an increase in its minimum corporate rate to 15 per cent. While a remarkable amount of progress has been made in a short time, there are still important technical issues to be addressed quickly if the timetable, which proposes implementation in 2023, is to be adhered to. However, there is sufficient detail in the proposals for businesses likely to be affected to consider starting the process of reviewing their internal procedures and processes to ensure they can be compliant.

It is hoped that this volume will prove to be a useful guide to the tax rules in the jurisdictions where clients conduct their businesses. Each chapter aims to provide topical and current insights from leading experts on the tax issues and opportunities in their respective jurisdictions. While specific tax advice is always essential, it is also necessary to have a broad understanding of the nature of the potential issues and advantages.

© 2022 Law Business Research Ltd

The views expressed in this book are those of the authors and not of their firms, the editor or the publishers. Every endeavour has been made to ensure that what you read is the latest intelligence.

Tim Sanders
London
January 2022

© 2022 Law Business Research Ltd

Chapter 1

THE CONTINUING CHALLENGES OF TAXING THE DIGITALISED ECONOMY: AN INTRODUCTION

Alex Jupp, Joshua Atkinson and Alex Rigby[1]

In October 2021, the Organisation for Economic Co-operation and Development (OECD) and G20 released a revised statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (the Joint Statement).[2] The statement built on a similar document released in July 2021,[3] and sets out the components of both Pillar One (Reallocation of Profit and Revised Nexus Rules) and Pillar Two (Global Anti-Base Erosion Proposal) agreed by the Inclusive Framework,[4] following its work on the taxation of the digital economy ('digital taxation').

The Inclusive Framework hopes that these Pillars will be implemented according to a plan annexed to the Joint Statement and will address tax challenges arising from the digitalisation of the economy; challenges that have received increasing focus from policy-makers, advisers and taxpayers alike.

The challenges posed by digital taxation are well explored, with commentators (including the OECD) highlighting the novel aspects of value creation in digitised businesses, such as scale without mass, a heavy reliance on intangibles, and the role of data and user participation, which together allow the creation of value by activities closely linked to a jurisdiction without the need for a physical presence.[5]

The covid-19 pandemic has only slightly slowed the work of the Inclusive Framework on Pillar One, with the OECD Secretary-General stating in 2020 that digital businesses that are thriving during the pandemic would 'be the targets' of countries looking for resources to 'make ends meet'.[6] Indeed, the blueprints on which the Joint Statement is based were released in October 2020 against a background of the continuing development and implementation of unilateral measures and proposals (including digital services taxes (DSTs)) by jurisdictions seeking to ensure that they receive a greater (some would argue, fairer) share of the taxation payable by highly digitised business models. Some of these unilateral measures have been

1 Alex Jupp is a partner, and Joshua Atkinson and Alex Rigby are associates in the UK tax group of Skadden, Arps, Slate, Meagher & Flom (UK) LLP.
2 Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy; 8 October 2021.
3 Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy; 1 July 2021.
4 The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting ('Inclusive Framework') brings together over 125 countries and jurisdictions to collaborate on the implementation of the base erosion and profit shifting (BEPS) package (www.oecd.org/tax/beps/beps-about.htm/).
5 Pillar One Blueprint, Paragraphs 22 and 31; OECD February 2019 Consultation, Paragraph 12.
6 Angel Gurría, online press conference, 12 October 2020, available at: https://oecdtv.webtv-solution.com/7020/or/international_taxation_addressing_the_tax_challenges_arising_from_digitalisation_of_the_economy.html.

© 2022 Law Business Research Ltd

implemented despite opposition and potential retaliation from the United States,[7] with any resulting trade tensions risking further losses of gross domestic product, considered to be 'unacceptable' in the context of the pandemic by the OECD.[8]

While the United States agreed with Austria, France, Italy, Spain and the United Kingdom in October 2021 that DST liabilities incurred by US companies during the interim period prior to the full implementation of Pillar One will be creditable against future income taxes imposed under Pillar One (the Transitional Agreement),[9] given the remaining challenges to the implementation of the Inclusive Framework's proposals, these unilateral measures are likely to remain key points of leverage in the OECD negotiations, and may yet be reinstated if the Joint Statement is not fully implemented.[10]

This chapter will outline the most recent proposals by the OECD and discuss key aspects of, and remaining questions regarding, the proposal. It will also highlight and categorise certain unilateral measures imposed to date, identifying commonalities of approach and exploring what links these ideas to the work of the OECD.

Developments in the sphere of digital taxation occur almost daily. This chapter speaks to the state of affairs as at 30 November 2021.

I OECD PROPOSALS

Since the call for further reports and work on the OECD's Action 1: 2015 Final Report (the Final Report),[11] the OECD has released a number of key publications and held consultation meetings regarding taxation of the digitalised economy.[12] Most recently,[13] the Inclusive Framework released the Joint Statement setting out an agreement on its (1) Proposal under Pillar One; and (2) Global Anti-Base Erosion Proposal under Pillar Two, and published model rules for Pillar Two shortly thereafter.[14] The components of Pillar Two include, inter

7 According to a press release of 2 June 2021 from the Office of the US Trade Representative (USTR), the USTR concluded its investigations under Section 301 of the 1974 Trade Act with regard to digital taxes introduced or being considered by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey and the United Kingdom. The USTR concluded its investigation regarding France's DST in July 2020 (see Notice of Action in the Section 301 Investigation of France's Digital Services Tax from 16 July 2020). The result of the two investigations was the imposition and immediate suspension of tariffs on certain goods from the countries that have imposed DSTs.

8 See footnote 7.

9 Joint statement from the United Kingdom, Austria, France, Italy, Spain and the United States regarding a compromise on a transitional approach to existing unilateral measures during the interim period before Pillar 1 is implemented.

10 While Turkey and India did not join the original agreement with the United States, Turkey joined the agreement on 22 November 2021 and India has agreed in principle to transition away from its equalisation levy to Pillar One (see Joint Statement from the United States and Turkey Regarding a Compromise on a Transitional Approach to Existing Unilateral Measures During the Interim Period Before Pillar 1 Is in Effect | US Department of the Treasury and Treasury Announces Agreement on the Transition from Existing Indian Equalization Levy to New Multilateral Solution Agreed by the OECD-G20 Inclusive Framework | US Department of the Treasury).

11 Final Report, Paragraph 361.

12 For further details, see Pillar One Blueprint, Paragraphs 1–5.

13 At time of writing.

14 https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two.htm.

© 2022 Law Business Research Ltd

alia, two interlocking domestic rules: an income inclusion rule (IRR)[15] together with an undertaxed payments rule[16] acting as a backstop, designed to define a global minimum tax and strengthen anti-abuse provisions in a post-BEPS world. These rules are complemented by a treaty-based subject to tax rule,[17] which the OECD noted in 2020 is important to a number of jurisdictions, particularly developing countries.[18] It is proposed that countries have discretion with regard to whether and to what extent they implement these rules, although members of the Inclusive Framework have agreed to accept the implementation of these rules by other members.[19] While Pillar Two is likely to play an important role in any international digital taxation regime adopted,[20] we will focus on the Pillar One Blueprint and the interactions between, and cross-influences seen in, the updated proposal and DSTs.

Pillar One – Joint Statement

The Pillar One Blueprint stated an aim to adapt the international income tax system to new business models by adapting the profit allocation and nexus rules applicable to business profits.[21] The Inclusive Framework noted that proposal involves the expansion of the taxing rights of market jurisdictions where there is an active and sustained participation of a business in the economy of that jurisdiction through activities in, or remotely directed at, that jurisdiction.[22] The OECD previously identified reallocation as motivating all three proposals in its Programme of Work that defined the scope of Pillar One,[23] namely 'user participation', 'marketing intangibles' and 'significant economic presence' proposals.[24]

The Joint Statement reflects agreement on a developed version of the Unified Approach as set out in the Pillar One Blueprint, which is based on identified commonalities within those three proposals (such as a new nexus rule independent of physical presence).[25] While

15 '[The IIR] imposes top-up tax on a parent entity in respect of the low taxed income of a constituent entity'. Joint Statement, p. 3.

16 '[The UTPR] denies deductions or requires an equivalent adjustment to the extent the low tax income of a constituent entity is not subject to tax under an IIR'. Joint Statement, p. 3.

17 '[The STR] is a treaty-based rule that specifically targets risks to source countries posed by BEPS structures relating to intragroup payments [and possibly some other payments] that take advantage of low nominal rates of taxation in the other contracting jurisdiction (that is, the jurisdiction of the payee). It allows the source jurisdiction to impose additional taxation on certain covered payments up to the agreed minimum rate'. Pillar Two Blueprint, Paragraph 20.
'The minimum rate for the [STR] will be 9%'. Joint Statement, p. 5.

18 Joint Statement, p. 5.

19 Joint Statement, p. 3.

20 And could be seen as the more effective first step, see Moises Dorey, 'A Road Map for Reaching Global Consensus on How to Tax the Digitalized Economy', *International Transfer Pricing Journal*, 2019 (Volume 26), No. 5, Section 3.

21 Pillar One Blueprint, Paragraph 6.

22 ibid.

23 OECD Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy, available at: www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.htm.

24 Unified Approach, Paragraph 4.

25 Unified Approach, Paragraph 13.

© 2022 Law Business Research Ltd

elements of the Unified Approach remain within the Joint Statement, the agreement confirms that the proposal for an Amount C will not be taken forward,[26] and sets out an agreement on mechanisms to ensure tax certainty.

The following is a brief overview of the proposal within the Pillar One Blueprint as confirmed in the Joint Statement:

a Amount A – the 'New Taxing Right' under Pillar One, this amount is a simplified proxy of the portion of the residual profit of a business that can reasonably be associated with the sustained and significant participation of that multinational enterprise (MNE) in the economy of a market jurisdiction:[27]
- in-scope companies will be MNEs with a global turnover above €20 billion and Profit before Tax (PBT) of above 10 per cent using an averaging mechanism;[28]
- extractives and regulated financial services are excluded;
- identifying the tax base – the relevant measure of profit or loss of the in-scope MNE will be determined by reference to financial accounting income of that MNE, with a small number of adjustments;
- the residual profit subject to reallocation will be 25 per cent of profit in excess of 10 per cent of revenue;
- new nexus rule that allocates Amount A to each market jurisdiction in which the MNE derives at least €1 million in revenue (or €250,000 for market jurisdictions with GDP of less than €40 billion);
- revenue will be sourced to market jurisdictions where goods or services are used or consumed, with the detailed rules for specific categories of transactions still being developed;[29]
- segmentation will only occur in exceptional circumstances where a segment disclosed in financial accounts meets the scope rules;
- if residual profits of an MNE are already taxed in a jurisdiction, a marketing and distribution profits safe harbour will cap the residual profit allocated to that jurisdiction;
- double taxation of profit allocated under Amount A will be relieved using exemptions or credits;
- only those entities that earn residual profit will bear the relevant tax liability; and
- dispute prevention and resolution mechanisms to resolve double taxation and other issues relating to Amount A in a mandatory and binding manner.[30]

26 Amount C was proposed to be an additional amount above Amount B that may be allocated to a jurisdiction using the arm's-length principle where an MNE's activities there exceed the routine activities that are compensated through Amount B. Unified Approach, Paragraph 30.

27 Pillar One Blueprint, Paragraph 507.

28 There is a proposal for the turnover threshold to be reduce to €10 billion, contingent on successful implementation including tax certain on Amount A, beginning seven years after the agreement comes into force. Joint Statement, p. 1.

29 In-scope MNEs must use a reliable method based on the MNE's specific facts and circumstances. Joint Statement, p. 2.

30 Developing economies eligible for deferral of their BEPS Action 14 peer review and that have no or low levels of mutual agreement procedure disputes may use an elective binding dispute resolution mechanism.

© 2022 Law Business Research Ltd

b Amount B – the tax due on the remuneration of baseline distribution and marketing operations in each market jurisdiction in line with the arm's-length principle (ALP).[31] This amount is intended to enhance tax certainty by streamlining and simplifying the reward for these activities. Work on this amount is to be completed by the end of 2022.

This system, as currently outlined, will allow in-scope MNEs to manage the process through a single entity, creates a new nexus independent of physical presence, and includes a new profit allocation rule that moves beyond the ALP.[32]

Crucially, the Multilateral Convention (MLC) implementing Amount A will require parties to remove DSTs and other relevant similar measures with respect to all companies.[33]

II DEPARTURE FROM THE ALP

One of the most radical aspects of the inclusion of Amount A within the Joint Statement is the agreement to a departure from the ALP. St Amans acknowledged in August 2019 that 'it was something of a shock . . . that the OECD – the organisation that wrote the bible on arm's length – would have doubts about the ALP'.[34]

However, doubts about the suitability of the ALP as the primary tool of the international tax regime are not new. For example, following the release of the new OECD Model Treaty in 2010, countries including India reserved the right to incorporate the 2008 version of Article 7 into their double tax treaties, seemingly as a result of a belief that the reference to the fractional apportionment in the earlier version provided more suitable tools to carry out an apportionment of profits based on where value is created.[35]

Some argue that the development, enhancement, maintenance, protection and exploitation of intangibles functions introduced as part of the Final Report on Action 8-10 of the BEPS project reveal that the OECD was willing to adopt formulary apportionment at that time, even if it was not willing to label it such.[36]

III THE OECD'S 2015 FINAL REPORT AND THE FIRST WAVE OF DIGITAL TAXES

Before the publication of the Final Report, very few jurisdictions had implemented unilateral measures and such measures have subsequently largely been developed in parallel with the OECD measures discussed in Sections I and II. The Final Report looked at a number of possible short-term solutions to the challenges of digital taxation. The most prominent and influential were: (1) a new nexus based on 'significant economic presence'; (2) a withholding

31 Pillar One Blueprint, Paragraph 686.

32 Pillar One Blueprint, Paragraph 512.

33 See discussion below at Section V.vi for discussion of recent proposals for the introduction of online goods and services taxes payable by consumers.

34 J White, 'Big tech changed everything for international tax', *ITR* (22 Aug 2019).

35 Ranjan Das, 'Is the Arm's-Length-Principle-Based Authorised OECD Approach to the Attribution of Profits to a Permanent Establishment Losing its Authority?', *Bulletin for International Taxation*, 2019 (Volume 73), No. 12.

36 Wilkie, 'New Rules of Engagement? Corporate Personality and the Allocation of 'International Income' and Taxing Rights, in Brian J Arnold (ed.), 'Tax Treaties After the BEPS Project A Tribute to Jacques Sasseville' (Toronto: Canadian Tax Foundation, 2018), 349–386.

© 2022 Law Business Research Ltd

tax on certain types of digital transactions; and (3) an equalisation levy.[37] These solutions were broadly mirrored by the three solutions assessed in the European Commission's 2017 Report on Digital Taxation (the 2017 Report):[38] (1) an equalisation levy; (2) a withholding tax on digital transactions; and (3) a levy on revenues generated from the provision of digital services or advertising activity that 'could be applied to all transactions concluded remotely with in-country customers where a non-resident entity has a significant economic presence'.[39]

While no solution was recommended in either the Final Report or the 2017 Report, both acknowledged the need for action and countries' abilities to implement domestic laws to account for a lack of international agreement.[40],[41] By implying that countries both had the right to tax revenues they could not access under current laws and were justified in adopting such solutions, the OECD and the European Union opened the doors to, and provided the blueprint for, the implementation of unilateral measures that attempt to address these issues. Unilateral measures can take many forms; the categories adopted for discussion in this chapter are:

a DSTs;
b DSTs based on consideration (consideration DSTs);
c withholding taxes;
d extended concepts of permanent establishment (PE); and
e indirect taxes (which are predominantly outside of the scope of this chapter).

The equalisation levy, a withholding tax and the reassessment of the concept of PE proposed by the European Union and the OECD are digital taxes within the consensus international tax framework. The DST proposed by the European Union (its third solution) both attempts to expand the tax base and tax value as yet untaxed. It is this second aim that distinguishes DSTs from other unilateral measures.

IV DSTS

DSTs represent a rudimentary and imprecise means of taxing the perceived value targeted by most of the OECD's proposals. By taxing gross revenues, DSTs seek to tax value created by persons in a jurisdiction currently not covered by conventional taxes.

The first DST was proposed in March 2018 by the European Union in its proposal paper setting out long-term and short-term digital taxation solutions (the Policy Paper).[42] This was intended as a short-term stop-gap and was based on the third solution in the 2017 Report: an 'indirect tax [that] would apply to revenues created from certain digital activities which escape the current tax framework entirely'.[43] As drafted, the EU DST would apply to

37 Final Report, pp. 13, 132, 136–137.
38 Commission, 'A Fair and Efficient Tax System in the European Union for the Digital Single Market', 21 September 2017, COM (2017) 547 final.
39 2017 Report, p. 10.
40 Final Report, p. 317.
41 2017 Report, p. 9.
42 https://ec.europa.eu/taxation_customs/business/company-tax/fair-taxation-digital-economy_en (Policy Paper).
43 Proposal 2: An interim tax on certain revenue from digital actives, Policy Paper.

© 2022 Law Business Research Ltd

revenues of activities or services that derive substantial value from users and that are '[hard] to capture with current tax rules'.[44] The EU DST would be charged at 3 per cent on revenues derived from:

a the selling of online advertising space;

b digital intermediary activities allowing users to interact and facilitating the sale of goods and services between them; and

c the selling of data generated from information provided by users.[45]

Only companies with total annual worldwide revenues of €750 million and EU revenues of €50 million would be taxable under the DST.[46] The thresholds embedded in the DST arguably represent a variation on the concept of 'significant economic presence' and, by encompassing more than simply services provided for consideration, on the scope of taxable activities and revenues identified as generating untaxed value.

One interesting aspect of the proposed EU DST and the DSTs modelled after it is the challenge of determining what falls within the parameters of taxable revenue. This affects both the where (PE/nexus) and what (taxable value) questions of taxation.[47]

In May 2021, the European Commission announced the withdrawal of its DST proposal, but provided an update on proposals for a digital levy that it was suggested would be compatible with the OECD agreement.[48] However, in December 2021 it was reported that a senior European Commission official had confirmed (confidentially) that this proposal would be removed permanently from the EU's legislative agenda,[49] and that a leaked draft of the EU budget stated that the revenue gap arising from this decision would be made up by a contribution by member states of a proportion of the profits reallocated under Pillar One.[50]

i France

The French DST offers a much wider approach to both of these questions. France introduced its own DST in July 2019, with retroactive effective from 1 January 2019.[51] This DST is still in force and has inspired many others. The French DST is levied on two types of digital services:

a Intermediary services, which provide a digital interface enabling users to enter into contact and interact. Certain specific services (including some communication and payment services) are excluded.

b Advertising services reliant on user data, which provide services allowing advertisers to place targeted advertising messages on a digital interface based on data collected

44 Why Do We Need New Rules for the Taxation of the Digital Economy?, Policy Paper.

45 Article 3(1), 'Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 2018/0073' (EU DST Legislation).

46 Article 4, EU DST Legislation.

47 Policy Paper, p. 7.

48 Communication from the Commission to the European Parliament and the Council – Business Taxation for the 21st Century, p. 5.

49 https://www.law360.com/tax-authority/international/articles/1448404/eu-digital-tax-to-be-scrapped-for-good-official-confirms.

50 https://www.law360.com/tax-authority/international/articles/1449298/oecd-pillar-1-replaces-digital-tax-in-eu-budget-draft-says.

51 https://news.bloombergtax.com/daily-tax-report-international/insight-frances-digital-services-tax-goes-ahead-1.

© 2022 Law Business Research Ltd

> about users and generated upon the consultation of such interface. This includes the purchase and storage of advertising messages, advertising monitoring, and performance measurement, as well as the management and transmission of user data.[52]

While the scope of intermediary services is similar to the proposed EU DST, the French DST catches all players involved in the placing of advertising rather than just those placing the final advert or facilitating it.[53]

The French DST features thresholds similar to that of the proposed EU DST (€750 million of worldwide revenue and €25 million of French revenue (compared with €50 million of EU revenue)).[54] Unless France accounts for at least 50 per cent of EU revenues, in practice, the French thresholds are higher and therefore appear to target only certain larger multinationals.

The EU and French DSTs have formed the basis of many of the other DSTs that have been proposed or introduced. The DST introduced in Italy[55] and the DSTs proposed in Israel[56] and Canada[57] are modelled on the French DST, and the DST recently introduced in Spain[58] and the DSTs currently proposed in Belgium[59] and (previously) in the Czech Republic[60] are modelled on the EU DST. Both the proposed Czech DST and the Turkey DST have higher tax rates (5 per cent and 7.5 per cent, respectively) than the 2 to 3 per cent adopted in most other proposals.[61]

52 Article 1, LOI n. 2019-759 (Fr.) (24 July 2019); see Law No. 2019-759 (24 July 2019) 'Concerning Creation of a Tax on Digital Services and Modification of the Downward Correction of the Corporation Tax' (translation) (French DST Legislation). Translation taken from Appendix 1 of the US Trade Representative's 'Report on France's Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act 1974', 2 December 2019.

53 Bob Michel, 'The French Crusade to Tax the Online Advertisement Business: Reflections on the French Google Case and the Newly Introduced Digital Services Tax', *European Taxation*, November 2019, pp. 535–536.

54 Article 1, French DST Legislation.

55 See R-A Papotti and M Caziero, 'Analyzing the Italina Digital Servicees Tax Through European Glasses', *Tax Notes Int.*, 4 November 2019. See also, P Ludovivi, 'Chapter 12: Taxing the Digital Economy: The Italian Digital Services Tax in Taxing the Digital Economy: The EU Proposals and Other Insights' (P Pistone & D Weber eds, IBFD 2019) Books IBFD (Italian DST in Taxing the Digital Economy).

56 https://tax.thomsonreuters.com/blog/israel-preparing-digital-services-tax-modelled-off-pending-french-proposal/.

57 https://news.bloombergtax.com/daily-tax-report-international/canadas-trudeau-proposes-french-style-digital-services-tax.

58 Law 4/2020 on the Taxation of Certain Digital Services, 15 October 2020 (Section I, p. 88569, Boletín Oficial del Estado, No 274, 16 October 2020).

59 Proposition on the on the creation of a provisional tax covering the products generated by certain activities of digital giants, 29 March 2020, *Chambre des Représentants de Belgique*, Doc 55, 0096/005.

60 https://danovky.cz/en/news/detail/923.

61 www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-turkey-28-october-2019.pdf. The Czech DST as originally proposed was intended to be levied at 7 per cent.

© 2022 Law Business Research Ltd

ii The United Kingdom

The United Kingdom introduced a 2 per cent tax on UK revenues of internet search engines, social media services and online marketplaces and any associated online advertising undertaken by any such businesses, with effect from 1 April 2020.[62] The UK DST takes a different approach to taxable revenues to those already discussed by targeting specific business models rather than types of services. UK revenues are defined as those that can be attributed to a user who it is reasonable to assume is either an individual normally resident in the United Kingdom or a business established in the United Kingdom.[63]

While the UK DST has thresholds akin to those in other DSTs and a similar UK-specific threshold of £25 million, its global revenue threshold of £500 million is much lower than the €750 million in the EU and French DSTs.[64] The UK DST excludes the first £25 million of taxable revenues and contains a safe harbour provision for businesses with low profit margins or those that record a net loss, allowing a group to divide its various chargeable activities to exempt the loss-making taxable activities from the DST and to subject the activities with a slim profit margin to a lower charge.[65]

iii The influence on other DSTs

While tax authorities disagree over the introduction of DSTs and to which revenues and services these new taxes should apply, political impetus for DSTs (in particular those based on the French or EU model) grew greatly due a perceived lack of momentum to reach a multilateral solution at the international level. Common among the DSTs surveyed is the idea that, within the profits of a company or group, an amount derived from user value and that value should be taxed in a market jurisdiction.

Absent any agreement by the OECD and the Inclusive Framework on Pillar One, more DSTs are expected to be implemented. However, jurisdictions such as the United Kingdom, France, Italy and Spain have agreed in the Joint Statement to the removal of their DSTs (although this is likely contingent on the full implementation of Pillar One).[66]

V CONSIDERATION-BASED TAXES

Most other unilateral measures do not look to tax untaxed value but rather seek to bring into a charge to tax or increase the tax on certain services provided for consideration. Consideration DSTs, equalisation levies and withholding taxes all contain these features.

62 Sections 41 and 43, UK's Finance Act 2020 (FA 2020).

63 Section 44, FA 2020.

64 Section 46, FA 2020. The Italian DST also has the same worldwide threshold as the EU and French DSTs. See R-A Papotti and M Caziero, 'Italian DST in Taxing the Digital Economy'.

65 Sections 47(3) and 48(4), FA 2020. This is expected to be beneficial to businesses that have a taxable business model with a profit margin under 2.5 per cent (see, H Buchanan and other, 'The UK's proposed digital services tax', *Tax Journal*, November 2018).

66 See confirmation of this requirement from France's Finance Minister on 29 November 2021 (https://www.law360.com/tax-authority/international/articles/1443807/france-to-keep-digital-tax-until-global-deal-implemented?nl_pk=199318ec-5700-4a00-8345-e2153494cdaa&utm_source=newsletter&utm_medium=email&utm_campaign=tax-authority/international).

© 2022 Law Business Research Ltd

i Consideration DSTs

Effective from 1 January 2020, Austria has taxed online advertising services provided for consideration by companies with worldwide advertising revenues of at least €750 million and Austrian revenues of €25 million at a rate of 5 per cent.[67]

Similarly, after its initial tiered advertising tax was declared to be in violation of EU law by the European Commission,[68] effective as of 1 July 2017, Hungary introduced a 7.5 per cent tax on revenues from advertisements that are published in the Hungarian language, or where an advertisement is not published in the Hungarian language but is available on a website that is mainly displayed in the Hungarian language. The first 100 million forints of revenue is taxed at zero per cent.[69] Austria too has agreed in the Joint Statement to the removal of their DSTs.

Rather than tax digital services as a whole (or a large proportion thereof), consideration DSTs specifically target one form of digital service: advertising services provided for consideration. With this explicit focus, they equalise the treatment of online and conventional businesses and more easily tax a specific metric of value; the consideration paid for the service. In so doing, jurisdictions may be attempting to make their tax systems horizontally equitable (so that similar business models are taxed in similar ways) rather than tap into an as yet domestically untaxed revenue stream.

ii Equalisation levy

Equalisation levies also function to equalise the tax treatment of the digital and conventional economies.[70] In 2016, India became the first, and only to date, jurisdiction to introduce a pure digital 'equalisation levy' (the Advertising Levy).[71] India specifically mentioned the suggestion by the OECD when introducing the levy.[72]

Like the two consideration DSTs discussed above, the Advertising Levy taxes revenues derived from online advertising, specifically 'online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement' at a rate of 6 per cent. To 'equalise' treatment, the levy only applies to taxable services provided by a non-resident (other than a non-resident with an Indian permanent establishment) that are received or receivable by an Indian resident conducting a business or profession, or a non-resident's Indian permanent establishment.[73]

In 2020, India introduced a second and distinct 'equalisation levy' at a rate of 2 per cent on consideration received by non-resident e-commerce operators for e-commerce supplies with a certain nexus to India or where the consideration is received from a person resident

67 Austrian Digital Tax Act 2020, Federal Law Gazette I No. 91/2019 (DiStG 2020).

68 Albeit that that decision was annulled by the General Court, www.tax-news.com/news/EU_Court_Rules_For_Hungary_In_Advertising_Tax_Dispute____97182.html. See also that that annulment has recently been upheld in an option by Advocate General Kokott, Advocate General's Opinions in Cases C-562/19 *P Commission v. Poland* and C-596/19 *P Commission v. Hungary*.

69 https://taxinsights.ey.com/archive/archive-news/hungary -advertisement-tax-amended.aspx.

70 G Kofler, 'Equalization Taxes and the EU's "Digital Services Tax"', 47 Intertax 2, p. 183 (2019).

71 Chapter VIII, Finance Act 2016 (FA 2016).

72 Memorandum Explaining the Provisions of the Finance Bill, 2016, p. 5.

73 Section 165(1), FA 2016.

© 2022 Law Business Research Ltd

in India (the General Levy). Like the Advertising Levy, the General Levy is not applicable if the consideration relates to an e-commerce operator's Indian permanent establishment. Furthermore, the General Levy will not apply if the Advertising Levy is applicable.

Thus, the Advertising Levy and the General Levy seek to establish equality between Indian businesses and non-Indian businesses providing services into India (rather than digital services as a whole irrespective of by whom they are provided). Similar to DSTs and consideration DSTs, equalisation levies include an economic nexus in the form of a threshold requirement of aggregate consideration between the parties.[74] As noted previously, while India is not a party to the Joint Statement, it has agreed with the United States to transition from its General Levy to Pillar One. However, at this stage it is unclear whether India also plans to repeal its Advertising Levy if Pillar One is implemented.

iii Withholding

On 16 March 2018, the Malaysian Inland Revenue Board published a practice note stating that income from the provision of digital advertising services earned by non-residents without a Malaysian PE would be subject to withholding at a rate of 10 per cent (unless reduced by a treaty) as either royalty or service income.[75] This provides an example of recharacterising income to bring it into a charge to tax under the current international framework.

Turkey introduced a similar withholding provision into its tax law, effective 1 January 2019, placing a 15 per cent withholding on payments for online advertising services when they are provided by non-resident persons. Pakistan has introduced withholding at 5 per cent on consideration provided for an even wider array of digital services,[76] and India operates withholding at 1 per cent on certain transactions with e-commerce operators.[77]

Withholding taxes are comparatively easy to introduce and are usually levied at higher rates than other unilateral measures discussed in this chapter (compare the UK DST rate of 2 per cent and the Turkish withholding at 15 per cent). However, notwithstanding their simplicity, withholding taxes have not proved to be a universally popular form of digital taxation and relatively few are in play at present.

iv Extending the definition of PE

All of the unilateral measures discussed above (other than withholding) seek, to some extent, to tax persons with an economic presence in the jurisdiction that does not amount to a PE in the traditional sense. Certain jurisdictions, however, have further sought to amend the definition of PE within their domestic tax legislation.

Following the Final Report, the Israel Tax Authority (ITA) announced in April 2016 that it would tax income of digital businesses that had 'significant economic presence' in Israel. Indicators of such a presence included a substantial number of online transactions with Israeli residents, the provision of online services, the use of services provided by non-residents

74 A total of 100,000 rupees with respect to the Advertising Levy (Sections 165(2) and 166, FA 2016) and consideration equalling 10 million rupees with respect to the General Levy (Section 194-O Income Tax Act 1961).

75 Practice Note No. 1/2018, Tax Treatment on Digital Advertising Provided by a Non-Resident.

76 Section 152, Pakistan's Income Tax Ordinance 2001.

77 https://home.kpmg/us/en/home/insights/2020/10/tnf-india-tax-withholding-at-rate-of-1-percent-on-transactions-with-e-commerce-operators.html.

© 2022 Law Business Research Ltd

being used by a large number of Israelis, and a correlation between consideration and the user base in Israel. This approach, however, has proven unsuccessful and the DST mentioned above is intended to replace it.[78]

The EU's longer-term proposal in the Policy Paper was to introduce the concept of a virtual PE and 'enable Member States to tax profits that are generated in their territory, even if a company does not have a physical presence there'.[79] A digital platform would be taxable if it had a 'digital presence' or virtual permanent establishment in a Member State as a result of its annual revenues, number of users or number of business contracts entered into in, or with residents of, a Member State. The European Commission was so committed to this idea that it advised Member States to renegotiate their tax treaties to include 'significant economic presence' within the concept of permanent establishment.[80] Romania, for example, stated that it would seek to renegotiate its treaties on this basis[81] and Belgium, alongside publishing a draft DST, published a draft bill to include 'significant economic presence' within its concept of a 'Belgian institution' for the purposes of establishing a PE.[82]

In its 2019 Finance Act, Nigeria expanded its tax nexus by introducing the concept of a 'significant economic presence'. Guidance recently issued by the Nigerian Ministry of Finance regarding the scope of this term confirmed that a foreign company would have a 'significant economic presence' in Nigeria if: (1) it derives annual gross turnover of more than 25 million naira from certain digital services relating to Nigeria; (2) uses a Nigerian domain name or registers a Nigerian website address; or (3) 'has a purposeful and sustained interaction with persons in Nigeria by customising its digital page or platform to target persons in Nigeria'.[83]

v A US hybrid – example of indirect taxes

While indirect taxes predominantly fall outside the scope of the chapter (as they are not derived from the OECD's work leading to Unified Approach), their introduction should be noted. Although many developments in digital taxation have faced opposition from the US federal government, US states have been active in implementing their own digital taxes in the form of indirect sales taxes on consumers. These taxes are an attempt to equalise the treatment of brick-and-mortar retailers physically present in the relevant state and larger online distributors with no such presence. These taxes share many similarities with consideration DSTs and equalisation levies.

Some states have specifically targeted the sale of certain digital services, such as streaming services. In 2015, Chicago expanded its 9 per cent amusement tax, enacted to tax sporting or concert tickets, to cover streaming services.[84] In August 2021, the West Virginia State Tax Department released updated guidance that clarified that streaming services are subject to

78 www.lexology.com/library/detail.aspx?g=4101bdb6-f3a4-4b65-b61c-842e0e224bff.

79 Proposal 1: A common reform of the EU's corporate tax rules for digital services, Policy Paper.

80 Commission, 'Commission Recommendation of 21.3.2018 relating to the corporate taxation of a significant digital presence', Brussels 21.3.2018 C(2018) 1650 final.

81 Parliament Decisions No. 68 and 69 of 23 May 2018, 'Official Gazette of Romania', No. 435.

82 https://news.bloombergtax.com/daily-tax-report-international/belgium-mulls-plan-to-tax-digital-companies.

83 Companies Income Tax (Significant Economic Presence) Order, 2020.

84 Amusement Tax Ruling #5, Electronically Delivered Amusements, Chicago Dep't of Fin. (9 June 2015).

© 2022 Law Business Research Ltd

West Virginia's sales and use tax.[85] In 2016, Pennsylvania expanded its 6 per cent sales tax to cover both streaming services and other downloadable services.[86] Other states, including Alabama,[87] Illinois,[88] Louisiana[89] and Maine,[90] have considered similar taxes.

More recently, general digital sales taxes have increased after the US Supreme Court decision of *South Dakota v. Wayfair*.[91] This case overturned previous case law and held that states may collect taxes on internet sales even when the purchaser does not have a physical presence in the state. Essentially, this judgment accepted that entities could be taxable if they had a sufficient economic nexus in a state. Subsequently, many states have amended their tax laws to account for this change in law and some have specifically widened the scope of such taxes to target digitalised businesses. Since July 2021, all US states that have sales taxes have moved to an economic taxation nexus.[92]

While these indirect taxes are levied on the consumer, they embody many of the concepts seen in other forms of digital taxation: in particular they seek to equalise tax treatment across business and to expand the concept of a PE. However, what these taxes do not address and what DSTs are trying to accomplish is to locate as yet untaxed user value not covered by 'standard' forms of taxation.

VI UK CONSULTATION AND EU PROPOSAL ON ONLINE SALES TAXES

Despite the agreement to the removal of DSTs within the Joint Statement, various jurisdictions appear to be considering alternative tax regimes to supplement any additional revenues derived through Pillar One to ensure that revenue from DSTs and similar measures is not lost. For example, on or around the date of the Joint Statement, the United Kingdom announced it will shortly consult on the introduction of an online sales tax,[93] suggesting this could 'help to rebalance the tax burden between bricks-and-mortar shops and online retail'.[94] It is arguable that this tax would operate as a less selective form of DST, with consumers generally bearing the burden of the tax,[95] as was the case with certain DSTs according to various news reports.[96]

A further example of this new tactic by market jurisdictions is that the European Commission is now reportedly considering a 0.3 per cent tax on goods and services sold online by all companies operating in the European Union with an annual turnover of €50

85 https://www.jdsupra.com/legalnews/west-virginia-streaming-services-9780796.

86 Pennsylvania's Act 84 of 2016.

87 www.govtech.com/budget-finance/Alabama-Proposes-Taxes-on-Streaming-Services-Like-Netflix-Spotify.html.

88 Illinois' House Bill 3359.

89 Louisiana's House Bill 655.

90 20-C, An Act Making Unified Appropriations and Allocations for the Expenditures of State Government, General Fund and Other Funds, and Changing Certain Provisions of the Law Necessary to the Proper Operations of State Government for the Fiscal years Ending 30 June 2018 and 30 June 2019.

91 138 S.Ct. 2080.

92 https://www.taxjar.com/blog/07-21-missouri-final-state-to-enact-wayfair-sales-tax-laws.

93 Autumn Budget 2021: Overview of tax legislation and rates (OOTLAR), at Paragraph 2.11.

94 Business Rates Review: Final Report, October 2021, at 2.14.

95 ibid.

96 https://www.telegraph.co.uk/technology/2020/09/03/facebook-breaks-google-apple-amazon-refusing-pass-uk-tech-tax/.

© 2022 Law Business Research Ltd

million or more. This suggestion seemingly attempts to remove the elements of the levy perceived as discriminatory in the United States,[97] which it is understood may be a point of consideration in the design of any UK proposal.

VI UNCERTAINTIES REGARDING THE IMPLEMENTATION OF THE JOINT STATEMENT

Despite the covid-19 pandemic, the OECD and the Inclusive Framework have continued their work in reaching agreement on Pillar One. However, while the Joint Statement does indicate agreement on a number of aspects of the approach, it is understood that there is cautious optimism among the members of the Inclusive Framework.[98] Previously, the authors suggested the melding of all three proposals under Pillar One within the Unified Approach could be seen as an attempt to provide a 'pragmatic fudge',[99] and that the stakeholders could be grouped into:

a Headquarter jurisdictions: where the intangibles that are attributed profits under the ALP are largely located, leading to a significant allocation of residual profits. However, these jurisdictions also deal with reductions in their tax base because of credits given for unsuccessful investments.

b Market jurisdictions: contain a large number of digital consumers despite digital MNEs having limited or no physical presence. Under traditional tax principles, the operations of MNEs in these countries will not amount to a permanent establishment, nor will significant profits be allocated under the ALP.

c Developing jurisdictions: similar concerns to market jurisdictions, but the tax authorities of these countries are in favour of a simple, administrable regime, given limitations in tax authority function.[100]

The tensions between these groups can be seen in the evolving positions taken with respect to the two Pillars, particularly on the increasingly important debate on whether the two Pillars should be delinked if there are any implementation issues with either (principally, the authors suggest, with the implementation of Pillar One).[101] For example, countries that have raised (or may seek to raise) their corporate income tax rates in response to the covid-19 pandemic are understood to be generally supportive of Pillar Two being implemented independently if required on the basis that it will reduce the ability of other jurisdictions to engage in tax competition.

Further, these groups have generally taken different attitudes to DSTs, as market jurisdictions have generally instigated the measures, headquarter jurisdictions have generally met implementation of DSTs with hostility and are resistant to giving credit for DST

97 https://www.politico.eu/article/eu-to-postpone-digital-tax-proposal/.

98 The conflicts of interest between the various stakeholders were previously described as 'insurmountable' by certain commentators, see Dorey, footnote 26, at Section 1.

99 The Final Report on Actions 8-10 in 2015 was similarly described by Andrew Hickman, former head of the OECD transfer pricing unit, see R Finley, 'OECD Took a Pragmatic Approach to Arm's-Length Principle, Hickman Says', 22 July 2016, *Tax Analysts*.

100 Liu, Reyneveld and Straatman, 'OECD's Work on the Digital Economy: Impact Far Beyond the Digital Economy', *International Transfer Pricing Journal*, 2019 (Volume 6), No. 5, Section 4.

101 Separate OECD Proposals Possible, But Politics May Interfere, 2020 Law360 310-24, 5 November 2020.

© 2022 Law Business Research Ltd

payments,[102] and developing jurisdictions have adopted a variety of different measures, some of which are conceptually similar to a DST (i.e., all are akin to an excise tax),[103] but others of which are organised around more easily measurable metrics than revenue, such as levies on access to social media.[104]

One of the largest areas of uncertainty that could yet reignite these debates is the ability of the United States to implement the Pillars, particularly Pillar One. The proposed reconciliation bill for fiscal year 2021 contains amendments to the global intangible low-taxed income (GILTI) regime to better align with Pillar Two, such as raising the GILTI rate to the minimum rate of 15 per cent.[105]

However, there is debate within the United States on whether Pillar One would require a treaty approved by the US Senate, a requirement that would present significant political challenges. Janet Yellen previously indicated the administration was considering 'a number of ways' for the implementation of Pillar One,[106] a suggestion that provoked strong pushback from Senate Republicans.[107]

To what extent the United States failing to implement Pillar One would undermine the agreement within the Joint Statement is not yet clear. The authors understand that a number of jurisdictions see both Pillars as linked, and therefore it is possible that a clear indication of the inability to implement Pillar One globally could yet derail the agreement reached in the Joint Statement and raise the possibility of further unilateral measures being implemented. It is notable that only some unilateral measures were included within the Transitional Agreement,[108] and it is understood that various measures may remain in force or be reintroduced in full if the implementation of the agreement on Pillar One is unsuccessful.

Finally, the Joint Statement appears to promise that a version of the radical rethinking of existing multilateral dispute mechanisms set out in the Pillar One Blueprint will be introduced in an attempt to deliver tax certainty for MNEs and tax authorities alike.[109] An effective dispute mechanism is crucial to avoiding double taxation if Pillar One is adopted, and consensus on the proposed mandatory binding dispute resolution mechanism for Amount A and other disputes must remain a focus of the Inclusive Framework in its implementation work.[110]

102 *New York Times*, 'U.S. Announces Inquiry of French Digital Tax that May End in Tariffs', 10 July 2019, available at: www.nytimes.com/2019/07/10/business/us-france-tariffs.html.

103 Congressional Research Services, 'Digital Services Taxes (DSTs): Policy and Economic Analysis', 25 February 2019, p. 8, available at: https://fas.org/sgp/crs/misc/R45532.pdf.

104 IMF Policy Paper, 'Corporate Taxation in the Global Economy', Paragraph 26, available at: www.imf.org/~/media/Files/Publications/PP/2019/PPEA2019007.ashx.

105 https://globaltaxnews.ey.com/news/2021-6061-report-on-recent-us-international-tax-developments-15-october-2021.

106 https://home.treasury.gov/news/press-releases/jy0451.

107 https://www.finance.senate.gov/ranking-members-news/ranking-members-warn-against-bypassing-treaty-process.

108 See footnote 11.

109 Pillar One Blueprint, Section 9; Joint Statement, p. 2.

110 Pillar One Blueprint, Paragraph 19.

© 2022 Law Business Research Ltd

VII CONCLUSION

It remains to be seen how the proposed implementation of the Joint Statement will progress. The authors take no position on whether the agreement that existing taxing rights should be reallocated to market jurisdictions is a welcome one or not, but strongly believe that the implementation of the Joint Statement must create an administrable system, must not lead to double taxation, and must provide for strong and sensible dispute resolution as promised. What is clear is that the concepts behind the short-term solutions remain influential on both the OECD's thinking and ongoing discourse in market jurisdictions. Both conversations appear to recognise the need for a new nexus independent of physical presence and the right for market jurisdictions to tax value that is, as yet, domestically untaxed. The Joint Statement regarding Pillar One purports to have achieved agreement on how to locate value and reallocate profits accordingly in an (arguably) more scientific manner. The implementation of that agreement, however, faces ongoing challenges and it is not yet clear how successful the Joint Statement will be.

© 2022 Law Business Research Ltd

Appendix 1

ABOUT THE AUTHORS

ALEX JUPP

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Alex Jupp's practice covers a broad range of UK and cross-border tax matters, with a particular focus on the tax aspects of corporate acquisitions, financings and restructurings, group structure planning, corporate relocations, asset management structures, and the resolution of disputes on related matters. His recent representation advising on the acquisition of a British supermarket chain was named a 2021 Impact Deal of the Year by the *International Tax Review*. He also was named a Next Generation Partner in *The Legal 500 UK* 2022 and is a member of the team named 'Best International Tax Team of the Year' at the 2019 Tolley's Taxation Awards. Alex is also part of the Skadden Tax Group, ranked in Band 1 in *Chambers Global* for Global Tax. He also is recommended as a leading practitioner in *World Tax, Chambers Global* and *Chambers UK*, with clients describing him as 'able to apply his expertise to particular situations in a timely way' who has 'excellent experience and is very commercially astute with deep international tax knowledge'. Alex chairs the British branch of the International Fiscal Association (IFA).

JOSHUA ATKINSON

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Joshua Atkinson is an associate in the London office of Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates. He works within the firm's tax practice, advising on international and domestic corporate transactions for a wide range of clients that include multinational corporations, private equity funds and financial institutions, credit operations and employee compensation and share scheme matters, as well as group reorganisations, restructurings and tax controversy matters.

ALEX RIGBY

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Alex Rigby is an associate in the London office of Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates. He works within the firm's tax practice, advising on international corporate transactions, credit operations, group structures and reorganisations, employment taxation, tax-related disclosure and compliance regimes, and tax controversy matters.

© 2022 Law Business Research Ltd

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Skadden, Arps, Slate, Meagher & Flom (UK) LLP
40 Bank Street
Canary Wharf
London E14 5DS
United Kingdom
Tel: +44 20 7519 7000
alex.jupp@skadden.com
joshua.atkinson@skadden.com
alex.rigby@skadden.com

500 Boylston Street
Boston, MA 02116
United States
Tel: +1 617 573 4800
Fax: +1 617 573 4822
moshe.spinowitz@skadden.com
robert.stevenson@skadden.com
leonard.greenberg@skadden.com

www.skadden.com

© 2022 Law Business Research Ltd

an **LBR** business

ISBN 978-1-83862-532-0

© 2022 Law Business Research Ltd