



Lund University

School of Economics and Management
Department of Business Law

**European Commission's proposal to implement a
new permanent establishment nexus based on
significant digital presence**

Is it compliant with the EU Law and international tax principles?

by

Lara Coelho Nogueira

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Supervisor: Cécile Brokelind

Author's contact information:

laracnogueira@hotmail.com

+460738905358

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Abstract

The taxation of the digital economy has become a relevant subject, as business models and value creation chains of all sectors have been transformed bringing challenges to the international tax system and parameters for the allocation of taxing rights between source and residence jurisdictions. In view of these changes, the European Commission has published two proposals for directives on the taxation of digital activities, proposing solutions to be harmonized into the system of direct taxation of Member States.

From the analysis of these directives, the new proposal for the implementation of a new PE nexus based on significant digital presence stands out. The present work aims to develop a critical assessment of its legal basis and to answer the question of whether the change of the permanent establishment nexus should be treated as an internal market initiative instead of an international agreement and whether the proposal respects proportionality in light of other possible measures, according to the EU law and other international principles.

The paper intends to provide a broad overview of the theme, starting from the validity of the source taxation rules in the digital economy and the connection of the concept of permanent establishment with the allocation of taxing rights. Following, the details of the proposal, its motivations and the potential impact on the international tax system will be exposed. Finally, other possible solutions to tackle the challenges of the digital economy will be examined combined with the assessment of the proportionality of the proposal and its compatibility with the Ottawa Principles.

List of Abbreviations

| | |
|-----------------------|---|
| ATAD | Anti-Tax Avoidance Directive |
| B2B | Business to Business Transactions |
| B2C | Business to Consumers Transactions |
| BEPS | Base Erosion and Profit Shifting |
| DST | Digital Service Tax |
| ECJ | European Court of Justice |
| ECOFIN | Economic and Financial Affairs Council |
| G20 | The Group of Twenty |
| I.e. Id est (that is) | |
| MNEs | Multinational Enterprises |
| N. | Number |
| OECD | Organization for Economic Co-operation and |
| OECD MTC | Model Tax Convention on Income and on Capital |
| PE | Permanent Establishment |
| P. | Page |
| PS. | Pages |
| Para. | Paragraph |
| Paras. | Paragraphs |
| Pp. | Pages |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| UN | United Nations |
| UTWFA | Unitary taxation with formulary apportionment |
| VAT | Value Added Tax |
| Vol. | Volume |

1 Introduction

1.1 Tax challenges of digital economy and BEPS

There is not a conclusive definition for the expression digital economy, although it has been used for almost three decades to refer to the forms of business relying on the use of information and communication technology (ICT).¹ The Organisation for Economic Co-operation and Development (OECD) states the digital economy is “the result of a transformative process” that has created economic growth and promoted societal change to the extent that nowadays it is impossible to isolate the digital economy as a separate concept to the broad economy.²

The advent of ICT transformed the economy and made it possible for businesses to expand their commercial activities to the global market using advanced communication and data processes.³ The intrinsic association with a fluid and mutable technology as ICT, makes it difficult to define the concept of digital economy.⁴ However, the attempts to define it highlights disconnection between the place of business and the place of consumption of goods or services as a main feature.⁵ Also, the reliance of mobile intangibles such as digitalized products, patents, technical and marketing etc is a relevant characteristic.⁶

The effects of the digital economy on business models and activities brought major challenges for the international tax system, as the main rules for allocating taxing rights amongst states were established in the 1920’s and have not been adapted to the new dynamics of the economy and its global reach.⁷ In this regard, one of the most important consequence arising from the

¹ Li, Jinyan (2014), Protecting the Tax Base in the Digital Economy, United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries, Paper number 9, New York, United Nations, p. 5.

² OECD (2015), Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p. 11, available at <http://dx.doi.org/10.1787/9789264241046-en>.

³ OECD (2015), OECD Digital Economy Outlook 2015, p.11, available at <http://www.oecd.org/Internet/oecd-digital-economy-outlook-2015-9789264232440-en.htm>.

⁴ European Commission (2014), Report of the Commission Expert Group on Taxation of the Digital Economy, p. 11.

⁵ Characteristics pointed by the French Tax Force to national ministers. Collin, Pierre and Colin, Nicolas (2013), Task Force on Taxation of the Digital Economy, ps. 1 and 2, available at https://www.hldataprotection.com/files/2013/06/Taxation_Digital_Economy.pdf.

⁶ Olbert, Marcel and Spengel, Christoph (2017), International Taxation in the Digital Economy: Challenge Accepted?, World Tax Journal, 2017 (Volume 9), No. 1, IBFD, p.13.

⁷ G20 (2013), Tax annex to the Saint Petersburg G20 leaders declaration, paragraph 6, p. 3.

incapacity of international rules to portray the new economic digital reality is base erosion and profit shifting, henceforth BEPS.⁸

Action 1 of the BEPS project points that in the sphere of direct taxation, the BEPS effects can be achieved by MNEs avoiding or lowering withholding tax and eliminating or reducing tax in the market country, intermediate country or in the country of residence of the ultimate parent.⁹ More specifically in regard of eliminating or reducing tax in the market country, there are two main different scenarios, the first one is when the PE status cannot be avoided because of the physical presence or the nature of activity carried out, and the second when the taxable presence can be avoided using tax planning schemes.

When the physical presence creates taxation nexus for the source state, different strategies can be used to promote BEPS, such as shifting profits via internal trading structures and lowering net profit by maximizing deductions.¹⁰ However, the ultimate strategy used by MNEs to achieve BEPs is to avoid a taxable presence in the market countries and consequently the incidence of source taxation. This effect can be accomplished, even when there is a physical presence in the market countries, by using arrangements involving limited-function distributors or commissionaires, applying toll manufacturing or contract manufacturing agreements, fragmenting activities to avoid temporal requirements to qualify as PE or exploiting the exceptions to PE status related to preparatory and ancillary activities as disposed in article 5.4 of the OECD Model Tax Convention (OECD MTC).¹¹

The abovementioned schemes can create artificial tax outcomes that are made possible due to the systematic misalignment between the place where the profits are taxed and where value is created.¹² That means MNEs can operate in different countries, interact with other markets simultaneously and earn substantial revenues without giving rise to a permanent establishment, and consequently tax liability, in the source jurisdiction. And the lack of taxation in the market country, is regarded to be a problematic issue, therefore solutions to address it are being proposed around the world.

That being said, the main objective of the present work is to analyse the proposals for the implementation of a new solution for the digital economy taxation issues and promote a critical assessment of the new nexus featured in the European Commission's proposal to implement a new PE nexus based in significant digital presence.

⁸ Li, Jinyan (2014), p. 2.

⁹ OECD (2015), *Addressing the Tax Challenges of the Digital Economy*, Action 1, p. 78.

¹⁰ OECD (2015), *Addressing the Tax Challenges of the Digital Economy*, Action 1, p. 80.

¹¹ OECD (2015), *Addressing the Tax Challenges of the Digital Economy*, Action 1, p. 79.

¹² Blum, Daniel (2015), *Permanent Establishments and Action 1 on the Digital Economy of the OECD Base Erosion and Profit Shifting Initiative – The Nexus Criterion Redefined?*

1.2 Is a change in the International Tax System needed? An analysis of the indisputable truth behind the proposals

Before the analysis of the European Commission's proposal to implement a new PE nexus based in significant digital presence as well as the other proposals currently being debated in the international tax system, it is necessary to question whether there should be a change in the first place.

The main argument in favour of the international tax reform is the fact the digitalization of economy and the success of business models relying in intangible assets make it possible for MNEs to establish their taxable presence in a country different where the value creation occurs. That fact leads to a challenge for source taxation system as the high profits of digital business in cross-borders activities are not taxed in the market jurisdiction, where they are created.¹³ Nevertheless, while there is no doubt the social and economic transformation arising from the digital economy brings issues to the allocation of taxing powers among jurisdictions, it is necessary to understand "why and for whom" this is a problem before defending the changes in the international tax system.¹⁴ So, the questions presented as follow will guide the analysis carried out in this paper and the answers found will lead to the conclusion.

First of all, the argument the tax base created in the market country should be subjected to meaningful taxation relates to a revenue claim that needs to be analyzed in its justification and consequences. The claim is usually attributed to a historical and economical argument defending the network of tax treaties was built in the notion of economic allegiance, a fundamental idea behind the distribution of taxing rights in accordance with the connection of the profit to other jurisdictions, which is currently set by the existence of physical presence in the territory.

Nevertheless, as the physical presence is not anymore a requirement to determine connection with profits arising in different jurisdiction, the notion of physical presence might not be suitable to provide the benchmarks on how to share the taxing rights. Hence, the modern approach to connect the taxing right to the market country was transformed and nowadays it is justified by the concept of value creation, but the question is not only how to materialize the source taxation but also how to justify it, in sum, justify the idea that taxation shift to the market country as an expression of source-based taxation.

In the second place, the BEPS project debate was initially based in concerns about distortion in competition between MNEs engaged in digitalized activities being subjected to none or low taxation in the market country where

¹³ See, for example, COM(2018)147 (2018) p. 1.

¹⁴ Schön, Wolfgang (2017), Ten Questions about Why and How to Tax the Digitalized Economy, Bulletin for International Taxation, 2018 (Volume 72), No 4/5, IBFD, p. 279.

they were deemed to constitute a PE. And the problem is that this argument leads to the idea of avoiding double non-taxation even if through the creation of a fiscal “back-up” to be applied in the market country in case of the neither the country of residence or any other source country commits to tax substantially the MNEs profits, somehow suggesting the use of source taxation rules is an anti-avoidance measure.¹⁵ In this case, the whole idea behind the efforts to address the tax issues of the digital economy would be to avoid double non-taxation and stateless incomes with a compensatory tax and not to promote revenue shift, as primarily defended by the OECD.

In that regard, it should be defended the source taxation is not and should not be used as an anti-avoidance measure, but instead as a profit allocation mechanism to the source-state. However, it seems that there could be a tendency in attacking a certain sector of the digital business and imposing a discriminatory compensatory treatment that not only goes against an uniform and principle-oriented solution for the whole economy, but also conflicts with the equal-treatment principles assured in most constitutions around the world, as well as the article 20 of the European Charter of Fundamental Rights.¹⁶ So, this paper will discuss the proposals suggested by OECD Action Plans and European Commission to validate whether they are being propelled by the shifting of taxing rights or by political pressures to guarantee the profits of giant tech companies are not granted with double non-taxation.

In the third place and getting more specific to the theme proposed, this paper will analyze the changes on the PE nexus proposed by the COM(2018)147 and the COM(2018)148 proposals for Directives examining till which extent it is proportional according to the EU Law and compliant with other international tax principles in order to conclude if those measures can be regarded as compensatory tax or a revenue shift solution in favour of the source countries.

1.3 Aim

As the international proposals for addressing the tax challenges of the digital economy are still being analysed and designed by the OECD with deadline set for 2020, the European Union decided to implement a new concept of PE based on significative digital presence. According to the Commission, the proposal was released to answer the increased political pressure and ensure all business pay their fair share of tax.¹⁷ And for being the first digital tax

¹⁵ Schön, Wolfgang (2017), p. 279.

¹⁶ European Union (2012), Charter of Fundamental Rights of the European Union, available at <http://www.refworld.org/docid/3ae6b3b70.html>.

¹⁷ European Commission (2018), Questions and Answers on a Fair and Efficient Tax System in the EU for the Digital Single Market, p.1.

solution changing the concept of PE adopted so far, it is the Commission's goal the proposal COM(2018)14 "serve as inspiration and influence the discussions on a global solution".¹⁸

Thus, considering the impact of the measure not only to the European Union, but also to the future of the international tax law system, this paper ultimate purpose's is to analyze the new proposal for the PE nexus and develop a critical assessment of its legal basis, as well as answer the questions whether or not the PE challenge should be addressed as an internal market initiative and if the proposal respects the proportionality in light of the other possible measures, as requested by EU Law, as well as other international principles.¹⁹

To do so, three main questions will be answered in the paper. First if the source-based taxation is still valid in the digital economy as a method to tax where the value creation occurs. Second, if the new proposals tax the digital economy are coherent to the goal proposed – align taxation to value creation – or if they represent compensatory taxes to avoid double non-taxation, turning the source taxation rules into anti-avoidance measures. Third, if the European Commission's proposal to introduce a new PE nexus based in significant digital presence is aligned with the law and principles and if it can be justified.

1.4 Method and material

The purpose of the research is to analyse the Proposal for Directive" COM(2018)147 and to analyse if it is compliant with the EU Law, especially the proportionality principle, as well as other international principles.

Thus, the research here developed will follow the systematization and integration of norms method.²⁰

The analysis of the current PE nexus concept will be conducted in a legal dogmatic method, making use of the European and international rules, its basilar principles, doctrine publications, case law and academic literature.

As there is no international law *stricto sensu* binding the tax system, the definition of the concept is disposed on the OECD Model Convention and the United Nations Model Double Taxation Convention with its associated commentaries, articles, doctrine and relevant case law.

¹⁸ European Commission (2018), Questions and Answers on a Fair and Efficient Tax System in the EU for the Digital Single Market, p.1.

¹⁹ European Union (2007), Consolidated version of the Treaty on European Union, 2008/C 115/01, article 5.

²⁰ Douma, Sjoerd (2014), Legal Research in International and EU Tax Law, Kluwer: Deventer, p. 24.

Concerning the new PE nexus proposals, the main sources are the OECD BEPS Action 1, papers published by the Committee of Experts on International Cooperation in Tax Matters of the United Nations and the recent COM(2018)147, COM(2018)148 and annexed recommendation documents.

Finally, to analyse the legal basis of the proposal, the article 115 TFEU will be the start point followed by a comparative analysis of the other available nexus of PE laid down in the OECD BEPS Action 1 and papers published by the Committee of Experts on International Cooperation in Tax Matters of the United Nations. The analysis of the proportionality will be based in article 5 of the Treaty on European Union as well as the Ottawa Taxation Framework Conditions.

Due to the complexity of the digital economy theme, some concepts of economics, politics and public finance may be needed to address its main challenges and justify the actions toward the change of the PE nexus concept.

1.5 Delimitation

Taking into consideration the complexity and wide scope of the taxation challenges in the digital economy, the analysis will be limited to the issue concerning to the PE nexus for digital activities.

The present work does not intend to define the concept of digital economy, as the term is not conclusively described by doctrine or legal sources and the European Commission advise it is problematic to adhere to one definition considering the connection with the ever-changing technology and widespread diffusion within the whole economy.²¹

Second, although the problem with value creation for digital business is connected to the theme, it will not be analysed in depth in this paper, as the focus will be the analysis of the available approaches to address the taxation issues arising in the digital economy to align the source taxation to where the value is created. In addition, this paper will not focus its efforts on the discussion about the allocation of profits through transfer pricing rules.

Also, when it comes to the analysis of the new proposals for the PE nexus for digital activities, the time limit used will be 21st of March 2018, date when the COM(2018)147, COM(2018)148 were published. By adopting such temporal limitation, this paper will not engage in predicting the future, but instead assess the project as it stands now.

²¹ European Commission (2014), Report of the Commission Expert Group on Taxation of the Digital Economy, p. 11.

1.6 Outline

Following the introduction, Chapter 2 will focus on arguing why and concluding that the source-based taxation is still valid in the current digital economy scenario. In this chapter the benefit and sourcing theory will also be explained and analysed in its new dimensions to adapt to a new economic and social reality.

Chapter 3 will be devoted to analyze the connection between source taxation and PE, followed by the study of the current PE concept and how it implies some tax issues in the digital economy. Along these lines, the new proposals to address the issues will be explained with a focus to the measures suggested by Action 1 of BEPS project.

Chapter 4 is intended to exam the European Commission's Proposal for Directive COM(2018)147 related to the corporate taxation of a significant digital presence. This chapter aims to clarify the new PE threshold based in significant digital presence and its implication on digital business, third countries and on CCCTB.

Chapter 5 constitutes the core of the analysis, where the critical assessment of the new PE nexus will be developed through the investigation of the other valid approaches to the PE nexus and the considerations regarding the legal basis of the Commission's Proposal and its proportionality followed by a scrutiny of the treatment as an internal market problem instead of a global solution.

Lastly, the author's conclusions will be presented in Chapter 6.

2 International allocation of taxing rights in the digital economy

2.1 Residence and Source Taxation

International taxation matters are usually associated to the concepts of source and residence, as they represent the main parameters for the allocation of taxing rights. The power to tax is an expression of sovereignty, according to which countries have the right to tax individuals and businesses that reside in or generate income in their territories. That is, making use of their

sovereignty, countries can tax residents according to the residence taxation and non-residents based on source taxation principles.²²

The main rule is that the residence country has a prevalent power and tax the worldwide income based on the ability to pay of its residents, and the source country levy taxes on profits arising in its territorial base, according to territoriality. The interaction between those taxation powers may cause juridical double taxation, when the same income is taxed in the hands of the same taxpayer, and it can happen when two states recognize the tax residency status, when two states provide the source status or when one state recognizes as source and the other as resident but no relief is given by the residence country concerning source tax levied in the source.

In this sense, a solution adopted since 1920's when a joint international effort studying the problem of double taxation was formed by the League of Nations, is that the source country has the immediate right to tax the income arising in its territory and residence country has the onus of preventing double taxation by using the credit method, granting reduction on its tax for what has been already paid in different countries or refraining from taxing income that has been taxed in the source country.²³ tax treaties are used to avoid problems of double taxation using tie-breaker rules and relieving double taxation using the exemption and credit methods disposed in article 23 of the OECD MTC.²⁴

In sum, resident taxpayers are defined by the national law and have both personal and economic connection to the country where they are located, and this relationship gives rise to the right of the state to claim worldwide income taxation over its residents. That means countries are usually allowed by national laws to tax national and foreign sources of income of its residents and the identification of external taxes is usually supported by bilateral or multilateral treaties with assistance-in-collection provisions.

Non-resident taxpayers are usually submitted to a limited tax nexus, in which the income perceived in a specific country will be economically linked to it, therefore subjected to source taxation. The link here is the relationship of the source state with the income, on the ground that the state contributed to the creation of the income on its borders or simply because the profit was created within its borders.

This historical frame for the allocation of taxing rights is expressed in article 7.1 of the OECD MTC, which perhaps represents the most relevant rule of

²² Cavelti, Luzius, Jaag, Christian and Rohner, Tobias (2017), Why Corporate Taxation Should Mean Source Taxation: A Response to the OECD's Actions against Base Erosion and Profit Shifting, *World Tax Journal*, August 2017, p. 352, IBFD.

²³ Yonah, Reuven (2015), *Advanced Introduction to International Tax Law*, Elgar Advanced Introductions, Edward

²⁴ United Nations, Committee of Experts on International Cooperation in Tax Matters (2011), *Revision of the Manual for the Negotiation of Bilateral Tax Treaties*, Seventh session.

the international taxation system related to direct taxes, and will be further analysed in topic 3, together with the concept of PE.

2.2 Is source-based taxation still in the digital economy? The sourcing and benefit approaches, its new dimensions and critics

To discuss the advantages and disadvantages of source taxation, it is first necessary to understand what this concept means. Klaus Vogel defines source as the state “connected to the production of the income in question, to the state where value is added to a good” and adds that the type of connection that provides the source status to a jurisdiction cannot be defined generally.²⁵

According to the OECD and UN Model Double Taxation Convention, the connection link to the source state, which gives it the right to tax the income of non-resident companies, is the permanent establishment.²⁶ That being said, it is possible to infer the concept of PE reflects an international commitment in assuring a fair balance between the taxation rights of the residence and source state. It represents a mechanism built to guarantee the right of the source country to have its share of taxes connected with the business activities that are developed in its territory.

The goal of establishing a PE nexus is to ensure a solution able to preserve the taxing rights allocation in cross border business by conserving the sovereignty of the source state to tax business income derived from activities linked to its territory and jurisdiction.²⁷ And the two main political theories in favour of the source-based taxation are the source and benefit theory, which will be presented as follow.

The source theory was developed in the 20th century and justifies the source state power to tax in the connection of the creation of wealth within the territory. It was primarily a theory centered in income taxation and not intended to emphasize the personal position of the taxpayer. The main merit of this theory is to connect the exercise of the taxing jurisdiction to the activities produced and income generated in their territory, in other words, to impose a link between the country where the income is sourced and the right to tax of such country regarding to business income. However, the sourcing theory lost importance with the rise of more comprehensive income taxation rules featuring a combination of personal and objective linking factors.

²⁵ Vogel, Klaus (1988), *Worldwide vs, source taxation of income - A review and re-evaluation of arguments (Part I)*, Intertax 216 (Nos. 8/9, 1988), p. 8.

²⁶ See OECD Model Tax Convention, art. 7 (1); U.N. Model Double Taxation Convention, art. 7 (1)

²⁷ Hongler, Peter and Pistone, Pasquale, p. 2.

The benefit theory gained importance defending the notion that taxes are the price paid for all the services provided to society. It is based on an economic argument that anyone benefiting from the public community should bear the cost of the facilities provided by the government through the payment of taxes and was the idea adopted by the OECD Model Convention in its article 5 which defines the PE concept and sets the physical presence as the threshold for source taxation. When this concept was developed and implemented by the OECD, there was no other possible benefits besides the ones generated by physical presence, as computers and the internet were not known yet and the digital economy did not represent a challenge for international taxation as it is nowadays.²⁸

This traditional concept based in the benefit theory has contributed to the success of the allocation of taxing rights until the digital economy arose and changed the business models and activities, decreasing the importance of having a fixed establishment on the consumer market.²⁹ The requirement of a physical presence to verify a PE has advantages for the purpose of guaranteeing certainty for taxpayers and efficiency on enforcing the taxes in the traditional economy but might not be adequate to address the new economic scenario where digital business don't rely on tangibles and physical presence anymore and require further examination about its extent and efficiency.

That is why some scholars believe only residence-based taxation should be maintained in the digital economy, as the only contribution from the source state nowadays is its consumers base, which shall not be regarded as enough to create taxing rights.³⁰ In that regard, the rationale behind the source theory can provide the main justification for the maintenance of the allocation of taxing rights to the source state in the new paradigm of value creation sustaining that any profits arising in connection to a territory should be taxed in that jurisdiction. And if combined to the new analysis of the benefit theory, it can address the issue in an even more comprehensive way, since it understands that new business models still take advantage of many services provided by the state even without a physical presence. Those services were pointed by Dale Pinto as the availability of a legal system, maintenance of the digital environment, protection of intellectual property rights and others, which justify the tax liability in the source countries to counterbalance the public costs.³¹

²⁸ Hongler, Peter and Pistone, p. 21.

²⁹ Arnold, Brian and MacArthur (2014), Carl, Article 5 - Permanent Establishment, Global Tax Commentaries, section 1.2, IBFD.

³⁰ Pinto, Dale (2006), The Need to Reconceptualize the Permanent Establishment Threshold, Bulletin for International Taxation, (Volume 60), No 7, IBFD, p. 267.

³¹ Pinto, Dale, p. 268.

Also, one of the main arguments against the source-taxation in the digital economy is the fact the benefits used in the market state could be paid back as fees, similar consideration or even be financed by consumption-oriented taxes such as VAT, which is a tax directly connected to the market's demand side. But, in case this argument prevails, there would be a not-equal treatment that could be interpreted as breach of freedom of establishment protected by the Article 49 of the Treaty on the Functioning of the European Union. That is because there would be an income tax applied to part of the economy considered the "traditional" while the digital economy would be taxed by different taxes.³²

Another flaw attributed to the source taxation is that it disregards the ability to pay principle by not considering the worldwide income and instead a parcel of it.³³ In response, Klaus Vogel sustain that source-based taxation system achieves neutrality, aligning the tax revenue collected by the source state with the benefits it provides to the companies operating in its territory.³⁴ And by analysing the abovementioned theoretical confrontation, it is possible to conclude the principles sustaining the source-based taxation are still valid and the economic allegiance theory can still be maintained, granting taxing rights to the source state.

Some scholars go beyond and defend the maintenance of source taxation in the digital economy as an effective strategy to fight against double non-taxation.³⁵ Nevertheless, the concept of source taxation should not be seen as an anti-avoidance measure, but instead a tool to base the allocation of taxing rights according to the sourcing and benefit theory and such theoretical position will be further discussed in the following chapters.

In conclusion, there is no valid reason to apply source taxation rules to the traditional economy and treat digital business with different strategies, as for example, utilizing only residence-based taxation. However, it is acknowledged some structural changes are necessary to honor the long-standing commitment assumed by residence and source states and one of them is to adapt the allocation of profits to the source taxation in accordance to the new paradigm of value creation, making it possible to assess the ability to pay in the source country, but the allocation of taxing rights between residence and source states should be maintained.

³² European Union (2007), Consolidated version of the Treaty on the Functioning of the European Union, 2008/C 115/01.

³³ Bosch, Luuk (2014), Fairness in allocating taxation right between source and residence States - Fairness in allocating taxation right between source and residence states, Fiscal Economic Studies, Tilburg University.

³⁴ Vogel, Klaus (1988), Worldwide vs, source taxation of income - A review and re-evaluation of arguments (Part II), *Intertax* 216 (Nos. 10, 1988), p. 313.

³⁵ Brauner, Yariv and Baez, Andrés (2015), Withholding Taxes in the Service of BEPS Action 1: Address the Tax Challenges of the Digital Economy, *IBFD*, p. 9.

3. Traditional concept of PE, taxation challenges caused by it in the digital economy and the proposals to address it

According to article 7.1 of the OECD MTC, the allocation of taxing powers is based on the idea that any state other than the residence can tax business income only when there is PE presence in its territory and to the extent the income is allocated to the PE.³⁶ That means the residence state has the primary right to tax and the source state has a restricted taxing right depending on the presence of a PE. Therefore, to comprehend the distribution of taxing rights amongst residence and source state, it is necessary to study the concept of PE, as it represents the core factor of allocation of rights to levy tax.³⁷ In that sense, the present chapter of the paper will be devoted to analyze the current concept of PE, how the allocation of profits is made, why and how it favours the misalignment of taxation where the value is created and what are the current proposals to address it.

3.1 The concept of PE according to the OECD Model Tax Convention and the UN Model Double Taxation Convention

One of the reasons why the PE concept was elaborated is to serve as a possible mechanism to achieve balance between the rights of the residence state to exercise their taxing rights over incomes while attributing a parcel of tax sovereignty to the source state regarding the profits arising in its territory.³⁸ The concept of PE is mainly regulated by articles 5 and 7 of the OECD MTC, also by the UN MTC and is used in cross border situations as a threshold to the right of the source state to levy tax over the profits arising in its territory, according to the source principle.

The concept of permanent establishment is defined and explained in detail on Article 5 of the OECD MTC and its commentaries.³⁹ According to article 5.1, PE is “a fixed place of business where the business of an enterprise is wholly or partly carried on” and the commentaries adds specific requirements to this concept, as for example the existence of facilities such as premises,

³⁶ OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017.

³⁷ Schwarz, Jonathan (2015), Where to draw the Line? Permanent Establishments and allocation of Taxing Rights’, Kluwer International Tax Blog, available at <http://kluwertaxblog.com/2015/06/13/where-to-draw-the-line-permanent-establishments-and-allocation-of-taxing-rights/>

³⁸ Hongler, Peter and Pistone, Pasquale (2015), p. 15.

³⁹ OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017, Article 5, para. 1.

machinery or equipment and the need to be established with a certain degree of permanence with personnel carrying on the business.⁴⁰ Concerning to human and technical resources, it can be inferred from article 5.1 the wording “through which” implies the need of a substantial link between the infrastructure and activities that must be evaluated on a case-by-case basis considering specific business models and transactions to determine the existence of a PE.

To elucidate the concept, article 5.2 provides a positive list of examples of PEs such as place of management, a branch, an office, a factory, workshop, a mine and other places of extraction of natural resources.⁴¹ According to the commentaries of this article, the list on the OECD MTC is not exhaustive but should be taken as guideline.⁴² Moreover, it must be noticed that all examples listed as in this article are tangible, as according to the current laws, intangible assets like websites, software and data do not give rise to a PE for direct tax law purposes as they do not fit in the a physical presence status required.

As a complement of the positive list, article 5.4 of the OECD MTC brings a list of cases which shall be deemed not to constitute a PE even if it meets the criteria specified in previous paragraphs of article 5.⁴³ These provisions limit the coverage of the paragraph 1 and exclude some activities from the wide scope of fixed place of business.⁴⁴ Those limitations are mentioned as activities regarded to be of preparatory and auxiliary nature, such as storage, display, delivery of goods or merchandise, maintenance of a stock of goods or merchandise, processing, purchasing and collecting information.

Article 5.4.1 rules that in order to define whether or not the activities have a preparatory or auxiliary nature, the business activity hosted in the source state cannot be the same as the main business performed in the residence state. To verify such requirement, a comparison must be made examining individual circumstances of each case.

The UN Model basically follows the same guidelines as the OECD Model Convention and the main difference to be pointed - considering the scope of this paper - is the different concept of service permanent establishment laid down in article 5.3.b. According to this article if the employees or personnel are present in more than 183 days in a 12 months period in the source state

⁴⁰ OECD (2017), Model Tax Convention on Income and on Capital: Commentaries on the articles of the Model Tax Convention, p. 117.

⁴¹ OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017, Article 5, para. 2.

⁴² OECD (2017), Model Tax Convention on Income and on Capital: Commentaries on the articles of the Model Tax Convention, p. 127.

⁴³ OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017, Article 5, para. 4.

⁴⁴ OECD (2017), Model Tax Convention on Income and on Capital: Commentaries on the articles of the Model Tax Convention, p. 132.

with the purpose of carrying out services, the PE will be deemed to exist, even if there is no fixed place of business.⁴⁵

3.1.1 Action 7 and modifications on article 5.4

The Action 1 brings some proposals regarding the taxable nexus issues in the digital economy and the first one is to modify the exceptions of article 5.4 of the OECD MC. The redesign of the abovementioned exemptions was treated specifically in Action 7 of the BEPS project, which focuses in preventing the artificial avoidance of the PE status and suggest proposals to change the preparatory and auxiliary characterization of business adapting it to the digital economy reality.

The proposal added the subparagraph 5.4.1 stating the exceptions will only apply if the overall activity of the fixed place of business is of a preparatory or auxiliary character.⁴⁶ In addition, among important changes on the commentaries of the article, paragraph 60 was added to clarify the concept of preparatory and auxiliary activities, as it follows “As a general rule, an activity that has a preparatory character is one that is carried on in contemplation of the carrying on of what constitutes the essential and significant part of the activity of the enterprise as a whole. (...) An activity that has an auxiliary character, on the other hand, generally corresponds to an activity that is carried on to support, without being part of, the essential and significant part of the activity of the enterprise as a whole. It is unlikely that an activity that requires a significant proportion of the assets or employees of the enterprise could be considered as having an auxiliary character.”⁴⁷

The main goal of the proposed amendments is to establish an economic and substance test for the use of the exemption, based on singulatities of the taxpayer’s business. The goal of the test is to prevent that significant activities taking place on the source state are classified as preparatory and auxiliary, therefore not taxed in that state. And to achieve such result, the analysis needs to be done considering each business scenario, since preparatory and auxiliary activities for one business model can be considered core activities to others.

In addition, assuming the limitations on the applicability of article 5.4 are not enough to prevent MNEs from engaging in artificial avoidance of PE, the

⁴⁵ United Nations (2011), United Nations Model Double Taxation Convention between Developed and Developing Countries, article 5.

⁴⁶ OECD (2015), Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p. 29.

⁴⁷ OECD (2017), Model Tax Convention on Income and on Capital: Commentaries on the articles of the Model Tax Convention, p. 133.

Action 7 proposed an anti-fragmentation rule with the aim to prevent the splitting of cohesive business operations. This measure adopted in article 5.4.1 of the OECD MTC has the objective of impeding operations that would constitute a permanent establishment to be splitted creating small business operations using the exemption granted to preparatory and auxiliary activities.⁴⁸

Those proposals were accepted and the OECD MTC of 2017 was updated with new provisions in its article 5.4, lowering the threshold for the determination of the PE status according to the new article 5.4.1 and adjusting source taxation. However, the changes have been regarded as not effective considering the fact that it only impacts schemes where the business has a physical presence in the source state, which is only a parcel of the business models available in the digital economy and does not cover digital chains wholly conducted online without physical presence.

Another polemic aspect of those proposals is the interaction of the new provisions laid down in article 5.4.1 of the OECD MTC with domestic tax systems, as they ultimately impact rules of determining and allocating taxing rights already established. Thus, in order to address the implementation issues of BEPS project proposals, the OECD presented a Multilateral Tax Treaty as a tool to articulate a coherent and uniform interpretation and application of the rules.⁴⁹ Finally, it seems that the new rules regarding exceptions will change the burden of proof from the tax authorities to the foreign taxpayer, who will now need to prove the operations they are having in the source country are not core activities, but instead preparatory or auxiliary.

3.2 Taxation challenges of the digital economy and current proposals for addressing them

With the growth of the digital economy and the increase of trade and movement of capital, companies can operate in many countries without a physical presence established. As the article 5 of the OECD MTC requires a physical presence, some MNEs manage to avoid the configuration of the PE status and consequently a taxable presence in the market countries operating fully digital activities and not giving rise to the taxing rights of the source state.

⁴⁸ OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017, Article 5, para. 4.1.

⁴⁹ OECD (2015), Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.

Another way digital businesses avoid the PE status is being classified as preparatory or auxiliary activities and exempted in terms of article 5.4, when not rarely these activities represent the core of e-commerce business. Thus, the need for tangible presence in order to constitute a PE, as well as the non-suitability of the exemptions may serve as an obstacle for granting taxation rights to the market jurisdiction and in those cases the traditional concept of PE becomes a cage.⁵⁰ Therefore, new proposals are emerging to establish a PE status on dematerialized digital activities fully conducted through digital ways, by establishing a new concept of significant digital presence and in connection, there are other proposals being suggested to tackle the issue of allocating the taxing power to the market state without changing the traditional PE rules.

3.2.1 Action 1 and proposals

Action 1 of BEPS project is focused on the tax issues related to the digital economy and proposes three alternatives to deal with the allocation of taxing rights to the source state in regard to digital business activities. It parts from the assumption the current international tax framework is not able to address those challenge and suggests one proposal to change the concept of PE nexus to include digital activities, and two other proposals constituting payments to the exercise of digital activities, such as withholding taxes and equalization levy.⁵¹

The first proposal is a new PE nexus based on the concept of significant economic presence which allows the source state to tax when a non-resident enterprise establishes or realizes a significant economic presence in its jurisdiction. And the justification for such change is the fact MNEs can operate significant activities without physical presence and, therefore, do not get taxed by the source country in the absence of PE. So, by adopting a new nexus based in economic presence to attribute a PE to a business, the right allocation of taxing rights to the source state would be reestablished in the digital economy.⁵²

This proposal is intended to be applied to enterprises that perform fully dematerialized digital activities, as a solution to be deemed a taxable presence when they maintain significant digital presence abroad. However, this

⁵⁰ Brauner, Yariv and Pistone, Pasquale (2017), *Adapting Current International Taxation to the New Business Models: Two Proposals for the European Union*, *Bulletin for International Taxation*, 2017 (Volume 71), No 12, IBFD, p.681.

⁵¹ OECD (2015), *Addressing the Tax Challenges of the Digital Economy*, Action 1, p. 276.

⁵² OECD (2015), *Addressing the Tax Challenges of the Digital Economy*, Action 1, ps. 107 to 113.

concept is still being addressed in an early stage and needs further analysis, as the OECD suggests.

The second proposal is the introduction of a withholding tax on digital transactions that could be applied in a gross or net basis to payments made to products acquired from a foreign company through online means and according to the OECD, the scope of the withholding tax would be specifically defined to avoid uncertainty. In case the withholding tax was adopted, it would be the buyer's responsibility to withhold the tax and in B2C transactions it would represent a critic responsibility to costumers, who are mostly not familiar with the tax obligations.⁵³

The third proposal is an equalization levy aiming to place foreign and domestic businesses in an equal taxation level. It could be imposed to all contracts managed through digital platforms, by a foreign company or to data and user information collected within a country or in any other way that respects the current tax treaty obligations.⁵⁴

3.2.2 Proposal in the European Union

New taxation approaches for the digital economy have been regarded as a political priority in the European Union, pressured by its own citizens discontent with the austerity policies imposed to them while U.S. tech giants operate in their market and profit from it paying a little or no corporation income tax.⁵⁵ A joint initiative from Germany, France, Italy and Spain stated the European Union “should no longer accept that these companies profit in Europe while paying minimal amounts of tax to our treasuries” and warned that economic efficiency is at stake, as well as tax fairness and sovereignty.⁵⁶ The countries involved in the abovementioned political statement have already introduced an equalization levy to be collected on the turnover of digital economies generated in their territory as a “quick fix” and claimed for a joint initiative from the European Commission to propose an equalization levy at the Union level. At the ECOFIN meeting in Tallinn on September 2017, some states expressed opposition and concerns about the proposed

⁵³ OECD (2015), Addressing the Tax Challenges of the Digital Economy, Action 1, ps. 113 to 115.

⁵⁴ OECD (2015), Addressing the Tax Challenges of the Digital Economy, Action 1, ps. 115 to 117.

⁵⁵ Sheperd, Lee (2018), Digital Permanent Establishment and Digital Equalization Taxes, Bulletin for International Taxation, 2018 (Volume 72), No. 4a/Special Issue, IBFD, p. 6.

⁵⁶ Political statement from Germany, Italy, France and Spain – Joint initiative on the taxation of companies operating in the digital economy, available at: http://www.mef.gov.it/inevidenza/banner/170907_joint_initiative_digital_taxation.pdf

changes to the tax structure applied to the digital business, on the other hand, some states agreed on implementing a new approach to the PE nexus and profit attribution rules.⁵⁷ In the same month, the European Commission released the communication of a “A Fair and Efficient Tax System in the European Union for the Digital Single Market” starting the project of the implementation of short terms measures such as a new PE nexus and a equalization levy and long term solutions.⁵⁸ In March of 2018, the proposals were released and they will be detailed and analyzed in the next topic of this paper.

4 EU commission's proposal to the corporate taxation of a significant digital presence

4.1 A new PE nexus based on non-physical digital presence

The European Union, together with the OECD and G20 aim for a multilateral agreement to implement tax solutions to the digital economy at the widest geographical extent as possible.⁵⁹ However, some European countries consider neither the OECD BEPS Project nor the European Anti-Tax Avoidance Directive (ATAD) address the digital economy in a complete way and started implementing unilateral measures, which made the European Union propose a consolidated approach to ensure consistency through the Member States, protect tax revenue and competition regarding to the taxation of the digital economy.⁶⁰

Hence, In March 21st of 2018, the European Commission published two proposals of Directive regarding the taxation of digital activities setting out solutions to be integrated within the Member States direct tax system. The COM(2018)147 brings a new PE nexus based on the concept of significant digital presence, and also sets out principles to the profit attribution of digital business relying on intangibles.⁶¹ COM(2018)148 advocates to the implementation of an interim solution named Digital Services Tax (DST), an

⁵⁷ ECOFIN Press Release (2017), EU finance ministers agreed to develop new digital taxation rules available at: <https://www.eu2017.ee/news/press-releases/eu-finance-ministers-agreed-develop-new-digital-taxation-rules>

⁵⁸ European Commission (2017), A Fair and Efficient Tax System in the European Union for the Digital Single Market, COM(2017)547, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/1_en_act_part1_v10_en.pdf

⁵⁹ OECD Secretary-General (2017), ECOFIN meeting on international taxation – opening remarks, available at <http://www.oecd.org/about/secretary-general/ecofin-international-taxation-opening-remarks.htm>.

⁶⁰ Kofler, Georg and Mayr, Gunter and Schlager, Christoph (2017), p. 524.

⁶¹ European Commission (2018), COM(2018)147, explanatory memorandum.

equalization tax proposed as a temporary taxation measure for specific digital activities.⁶²

The proposal to establish a PE nexus based on significant digital presence aims to impact the digital economy sector that rely in fully dematerialized digital activities, with the objective to establish a taxable presence for those enterprises in the Member States they operate. According to the justification, the proposal is intended to create PE nexus to allocate taxing rights to the state where the value is created, as well as tackle the competition issues arising from the lack of taxation of digital companies within the Union.⁶³

According to the proposal for directive COM(2018)147, a digital platform will be deemed to have a taxable presence or a virtual PE in a Member State if its business is wholly or partially carried on and (i) it exceeds a threshold of EUR 7 million in annual revenues in the Member State, (ii) it has more than 100,000 users in the Member State in a taxable year, (iii) over 3,000 business contracts for digital services are drawn up between the company and business users in a taxable year.⁶⁴ If the criteria laid down in article 4 of the proposal are fulfilled, the taxable nexus is established in the market state and the DST can be levied.

And as a brief introduction to the DTS proposed, it should be highlighted this tax is applicable to both domestic and multinational companies, but the threshold stipulated reveal the tax will hit mostly U.S. giant tech companies such as Google and Facebook, taking in consideration few European companies present those figures.⁶⁵ Thus, in a direct and critical analysis of the proposals for directive, it is possible to infer they are not only targeting the allocation of taxing right to the source states, but also creating a strategy to tax the stateless income generated by those companies operating in the European Union territory. That is due to the fact the U.S. tech giants are generally not taxed in the resident state, fact regarded as having the potential to create distortion in the competition, since they are not taxed in the European Union either.

Conforming to article 2 of COM(2018)147, the new PE nexus will be applicable amongst Member States and the new measures will supersede the existing double tax treaties involving Member States. It will also be applicable to third countries if there is no previous double tax treaty in force, but it will not change the existing ones, although the Commission suggest adjustments should be made to contemplate the new PE concept. That means entities that are incorporated or established in the European Union may give

⁶² European Commission (2018), COM(2018)148, explanatory memorandum.

⁶³ European Commission (2018), COM(2018)147, explanatory memorandum.

⁶⁴ European Commission (2018), COM(2018)147, article 4.

⁶⁵ Becker, Johannes (2018), EU Digital Services Tax: A Populist and Flawed Proposal, Kluwer Law International BV, The Netherlands, p. 2.

rise to a PE and consequently the taxable nexus.⁶⁶ So, even though foreign companies are out of the scope of the proposal, they will be affected if they have subsidiaries operating in the EU, which means U.S. tech giants would be ultimately taxed under the new rules, since most of them have holdings and important operations centers established in the EU, especially in Ireland and Netherlands.

In conclusion, the legislative proposals emanated by the Commission will be submitted to the Council for adoption, as they require unanimity from the Member States to be implemented imposed in article 115 of the TFEU. The deadline for the adoption is 31 December 2019 at the latest and the provisions shall be in force in 2020.⁶⁷

4.2 New PE nexus based in significant digital presence and its impact on CCCTB

The European Commission acknowledges the Common Consolidated Corporate Tax Base (CCCTB) is the ideal tool to ensure an efficient and equitable direct taxation in the European Union.⁶⁸ However, the Commission considers amendments are necessary to adapt the CCCTB to the digital economy and a way to proceed would be to integrate the new proposals regarding a new PE nexus and DST. But, before the arguments why the CCCTB would be a good fit to the digital economy challenges, it is necessary to clarify what the project is about.

In 2016, the CCCTB project was re-launched and the proposal is that it represents a consolidated system to calculate the legal persons profits arising in the EU.⁶⁹ The main idea of the CCCTB is to allow MNEs operating in different Member States to be considered one group for tax purposes, and to comply with only one system for calculating the tax base instead of following the rules of 28 different domestic tax systems.⁷⁰

The CCCTB is a project focused in establishing a ‘unitary business approach’ as opposed to the separate entity approach currently implemented

⁶⁶ European Commission (2018), COM(2018)147, article 2.

⁶⁷ European Commission (2018), COM(2018)147, article 9.

⁶⁸ European Commission (2018), Questions and Answers on a Fair and Efficient Tax System in the EU for the Digital Single Market, p.7.

⁶⁹ European Commission (2016), Common Consolidated Corporate Tax Base (CCCTB), available at https://ec.europa.eu/taxation_customs/business/company-tax/common-consolidated-corporate-tax-base-cctb_en

⁷⁰ European Parliament (2017), Briefing EU Legislation in Progress Common consolidated corporate tax base (CCCTB), available at

[http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599395/EPRS_BRI\(2017\)599395_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599395/EPRS_BRI(2017)599395_EN.pdf)

nowadays.⁷¹ This new approach intends to treat MNEs as one whole entity despite the division in permanent establishments in different countries to form a single tax base from which the taxing rights will be allocated according to a formulary apportionment approach and this way reflect the real economic substance of businesses. In general lines, the CCCTB will represent a one stop shop for MNEs, as they will be able to fill only one combined tax return for all the operations held in the European Union, calculate the common tax base, and then divide it according to the apportionment formula granting the adequate parcel to each Member State.⁷²

The division of the tax base within the Member States is based in the formula apportionment which comprise three equally weighted factors, namely "labour, assets and sales by destination" but a fourth criteria might be implemented to estimate data collection by digital companies.⁷³ Those factors are supposed to promote a balanced solution for the allocation of taxable profits amongst the Member States after the calculation of a consolidated tax base and to ensure the taxation occurs where the value creation happens.

According to the COM(2017)547 proposal, the CCCTB represents a good base for establishing a fair taxation of digital activities, as it is applied for both bricks-and-mortar and digital businesses operating cross-border activities and intended to tax business where the value is created. In that sense, the Commission aims the amendment of the CCCTB proposal in order to cover the scope of the new PE nexus.⁷⁴

4.3 Is the proposal a compensatory tax or a revenue shift?

Even though there are still many critics about the changes in international tax system, it is undeniable the process is already happening based on the urge to adapt to the digital economy challenges and avoid BEPS. Examples of that are the unilateral measures implemented by countries and the European proposal to adopt a new PE nexus for digital activities in a regional framework. However, instead of just accepting the changes as facts, it is crucial to get back to the origin of the idea to understand its base and from this point judge whether the proposal is aligned and based in legal parameters or substantiated only in politic pressures.

⁷¹ Picciotto, Sol (2016), Taxing Multinational Enterprises as Unitary Firms, ICTD, p. 25.

⁷² Sarfo, Nana (2018), European Union - News Analysis: Reading the CCCTB's Tea Leaves, Journals Tax Analysts, IBFD, p.2.

⁷³ COM(2016)683 final (2016), Proposal for a COUNCIL DIRECTIVE on a Common Consolidated Corporate Tax Base (CCCTB), paragraph 10, p.14.

⁷⁴ COM(2018)147 (2018), p.4.

Regarding the new proposals, two main different justifications for the changes are considered, the first is a shift of the revenue towards the market country where the value is created and the second one is the implementation of compensatory measures to ensure digital businesses pay their "fair" share of taxes in respect to the jurisdiction where the profits are derived and to balance competition with domestic companies.

The compensatory approach was the first justification adopted to introduce the European Commission's proposal and it is mostly justified by the notion of fighting against tax evasion and avoidance and has major political influence. On its communication about the taxation of the digital economy project released in September 2017, it was listed as an option the implementation of "A tax on all untaxed or insufficiently taxed income generated from all internet-based business activities, including business-to-business and business-to-consumer, creditable against the corporate income tax or as a separate tax."⁷⁵

In the same line, some countries like Germany have proposed compensatory measures in their tax systems with the aim to protect the level playing field for domestic business and MNEs. The so called "Lizenzschranke" lowers the deductibility of royalties in cases where the PE nexus is not efficient and the company is taking benefits of low tax jurisdictions schemes, in a clear example of compensatory approach which is not applicable in case the taxpayer proves it was submitted to substantial foreign tax on the profits shifted abroad.⁷⁶

The compensatory tax is an answer to the single-tax principle, which exposes the notion that all profits arising from activities operated by MNEs should be taxed at least once, it is a solution aiming to combat double non-taxation and stateless incomes.⁷⁷ However, if in one hand it is undeniable the use of intangibles makes it possible to drive profits to no or low tax burden jurisdictions, it is also indisputable that such schemes are not limited to the digital economy and one example of that is the Starbucks case which deals with major base erosion generated through planning with intangibles such as royalties. That means compensatory measures should not be implemented to attack only the digital economy, as double non-taxation is an outcome that can be achieved in the whole economy.

Thus, the Council of the European Union in December 2017, published a meeting document where it reveals a change of perspective into a revenue

⁷⁵ European Commission (2017), A Fair and Efficient Tax System in the European Union for the Digital Single Market, COM(2017)547.

⁷⁶ Heidecke, Björn and Holst, Rainer (2017), Germany - An Assessment of the Draft Rule Limiting the Deduction of Royalties, *International Transfer Pricing Journal*, 2017 (Volume 24), No. 3, Amsterdam, IBFD .

⁷⁷ Yonah, Reuven (2015).

shift. In the document, it was stated “the need to address the remaining challenge to ensure that international tax rules are suitable for both the digital and more traditional sectors of the economy, which goes beyond tax avoidance”, which means the proposal decided to adopt a more sophisticated political basis assuring the rules should be applied to the whole economy, not only to the specific sector of the economy.⁷⁸ So, the proposals COM(2018)147 and COM(2018)148 justify the new PE nexus based in significant digital presence and the implementation of a DST on the arguments of fairness and right allocation of taxing rights, not in as a compensatory tax.

As they were mainly based on the results of the report on Action 1 of the BEPS project, those suggestions are intended to assure taxation in the market country, irrespective of the occurrence of abuse or lack of substantial tax burden in other countries. So, theoretically both cases are regarded as measures to shift taxing rights, as the development of a new PE nexus is not only focused on combating BEPS, but also pertains the goal of reallocating taxing rights in the era of digital business in such way the source state also gets its share. However, when analyzing the proportionality of the new measures in the next chapter, the question whether the proposals are more focused on allocating the taxing rights to where the value was created or avoiding double non-taxation will be analyzed in a more detailed way.

5. Analysis of the new PE nexus based in significant digital presence proposed by the European Commission

5.1 Is the implementation of a new PE nexus needed? Are there other solutions?

Introducing a new concept of PE to enlarge the nexus framework can be an effective way to ensure taxation rights to the source state. Nevertheless, from both legal and practical point views, such proposal can be disputed and give rise to questions about what are the limits we are willing to defy to guarantee the enforcement of taxing rights in the market country and what are our real basis to do so.⁷⁹ In this regard, it is important to begin analyzing whether there are more appropriate and effective ways of allocating the tax rights to ensure

⁷⁸ General Secretariat of the Council (2017), Council conclusions on 'Responding to the Challenges of Taxation of Profits of the Digital Economy'.

⁷⁹ Hellerstein, Walter (2014), Jurisdiction to Tax in the Digital Economy: Permanent and Other Establishments, Bulletin for International Taxation, (Volume 68), No 6/7, IBFD.

the balance between the residence and source states and from there assess the proportionality of the measure suggested by the European Commission.

5.1.1 Withholding taxes

As noted in the Final Report on Action 1, the implementation of withholding taxes on digital transactions would also be a valid approach to secure the income tax is levied in the market country.⁸⁰ According to the BEPS project, such withholding tax could be structured as (i) final gross withholding tax on specific payments, (ii) a back-up mechanism imposed to enforce the net-basis taxation.⁸¹

The European Commission itself considered the implementation of a withholding tax as a "standalone gross-basis final withholding tax on certain payments made to non-resident providers of goods and services ordered online" in its communication in September 2017, when analyzed the possible approaches to be implemented in the European Union.⁸² However, in face of many concerns raised about the withholding tax, specifically regarding the practicalities of its implementation and to the fact it would be applied to gross income instead of net, the European Commission chose to adopt a new PE nexus combined with an interim measure DST.

According to the critics, a standalone withholding tax applied under a invariable assessment throughout the digital economy would not be able to differentiate the business models available in the digital economy and, therefore, would not consider the value creation schemes of each one of them properly. Besides, the critics state the taxation on gross income could give rise on discriminatory practices between digital and traditional business under international commerce law systems and EU Law as income tax is usually levied on a net-basis.⁸³

However, some alternatives besides the standalone withholding could have been more feasible. One example of that is the suggestion presented by Yariv Brauner and Pasquale Pistone, as a "10% withholding tax on B2B transactions on all base-eroding payments made to non-residents" with the possibility of exemption when the payee is registered on a net taxation scheme in the source country.⁸⁴ The implementation of such withholding model in B2B operations would be simple as the payee registered in the source country for a net basis

⁸⁰ Valente, Piergiorgio (2018), International/OECD - Digital Revolution. Tax Revolution?, Bulletin for International Taxation, 2018 (Volume 72), No. 4a/Special Issue, IBFD, p.6.

⁸¹ OECD (2015), Addressing the Tax Challenges of the Digital Economy, Action 1, p. 113.

⁸² European Commission (2017), A Fair and Efficient Tax System in the European Union for the Digital Single Market, COM(2017)547, p. 10.

⁸³ Kofler, Georg and Mayr, Gunter and Schlager, Christoph (2017), p. 529.

⁸⁴ Brauner, Yariv and Pistone, Pasquale (2017), p.686.

tax assessment would have a code to identify the transaction as exempt from the need of collecting the withholding tax and if not would just collect the due tax. In B2C operations, the withholding tax could be collected by credit card companies or financial institutions responsible for collecting payment and this way the differentiation from the VAT collection system would be maintained, as well as the practical measures not to directly involve consumers in the payment.

According to Yariv Brauner and Pasquale Pistone, for this withholding model, there is no differentiation between domestic companies and MNEs and the implementation could be done in a simple process, since it respects all the rules currently agreed by countries. It would also not be levied on a gross-basis, but instead on the base-eroding payments made to non-residents. In addition, it could be regarded as a "back-up" strategy to apply in case the MNEs don't have a taxable nexus in the market countries, but with the benefit of driving non-resident to recognize themselves as taxpayers in the market country to calculate their due tax on a net-basis and avoid the withholding.

Besides, withholding tax is universally accepted as a source taxation method, so the implementation of withholding taxes is regarded as a pragmatic method to combat base erosion due to its collectability and enforceability, so it could be a feasible solution to implement in the European Union before a consensus in an international level is achieved.⁸⁵

5.1.2 Unitary taxation combined formulary apportionment

According to the law as it stands now, each company is regarded as an autonomous taxpayer, despite of the integration level it has on the corporate group it belongs. And such division implies the risk of profit shifting inside the corporate structure to obtain tax benefits, therefore, the arm's length principle is applied to guarantee the intra-group transactions are priced the same way as an independent transaction would and get taxed as it naturally would in each country they have operation if they were single entities.⁸⁶

However, there are some objections to the separate entity approach, based on the argument that in practical terms, the MNEs are under one control but simply with different operations in each unity generating synergy.⁸⁷ Although the OECD still protects the arm's length principle, it has stated measures

⁸⁵ Brauner, Yariv and Pistone, Pasquale (2017), p.686.

⁸⁶ Escribano, Eva (2017), Is the OECD/G20 BEPS Initiative Heading in the Right Direction? Some Forgotten (and Uncomfortable) Questions, Bulletin for International Taxation, 2017 (Volume 71), No 5, IBFD, p. 253.

⁸⁷ Yonah, Reuven and Clausing, Kimberly (2007), Reforming Corporate Taxation in a Global Economy: A Proposed to Adopt Formulary Apportionment, The Hamilton Project Discussion Papers, p. 10.

within or beyond it will be necessary to achieve the goals proposed by the BEPS project in long term, which may lead to the implementation of a unitary approach combined with formulary apportionment method.⁸⁸

That being said, the alternative would be to consider global MNEs as one single entity, so that the attribution of profits among the entities operating in different countries become irrelevant and the company is taxed on its global profits. That is the case of the unitary taxation with formulary apportionment method (UTWFA).⁸⁹ The unitary taxation combined with formulary apportionment of taxing rights method have been used by federal states such as Canada, United States and Switzerland and even though they apply the apportionment amongst states in the federation, the rationale can be used to the European Union accordingly.

In the EU scenario, such method would represent an effective option if an agreement was reached between Member States to allow the common tax base to be calculated and reverted to a supranational body that could distribute the share for each state according to the criteria defined. Another way of implementing UTWFA in the European Union would be establishing a unitary framework to calculate the global tax base and then allow each member state to exercise the taxation over the common tax base considering its adequate share. In that regard, the CCCTB is the ideal vehicle for implementing such method, as it was already proposed in COM(2016)683.⁹⁰

The unitary taxation with formulary apportionment method was proposed by the European Commission in COM(2016)683 as a way to provide a more holistic approach to the challenge of taxing digital business in the EU and replace the need to use transfer pricing, as well as anti-avoidance rules like to limit interest deduction and anti-hybrid provision. Thus, since the UTWFA method is already being discussed in the CCCTB sphere, it would be effective to develop this alternative in the European Union in long term and if needed, implement a temporary solution to tax the digital economy that does not change the international tax system rules substantially until a consensus is reached in a wider level.

5.2 Legal basis and principles applicable to the new PE nexus

⁸⁸ OECD (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing, Paris, p.20.

⁸⁹ Picciotto, Sol (2016), International Taxation and Economic Substance, (Volume 70), No 12, IBFD, p. 757.

⁹⁰ European Commission (2016), Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB).

At the OECD level there is still no unanimity about the need to address non-taxation as a problem.⁹¹ Even though, the latest proposals in the international taxation field such as Action 1 of BEPS project and the European Union proposals to tax the digital economy reveal there is a tendency towards establishing a minimum tax on MNEs by making use of different arguments, such as the fair allocation of taxing rights in the market countries and alignment of taxation where the value is created.

And since unilateral changes in the international tax rules are already being carried out, this paper intends to analyze the European Commissions proposal to establish a new concept of PE based in significant digital presence in light of the existing international tax principles that governs the current PE rules.⁹²

5.2.1 Subsidiarity and Proportionality of the proposal. Should the European Union implement a new nexus for PE?

Article 115 of the Treaty on the Functioning of the European Union rules the European Commission can issue measures of approximation between Member States, as they impact the establishment and functioning of the internal market.⁹³ In its turn, article 5 of the Treaty on the European Union rules that the use of Union competences shall be governed by the principles of subsidiarity and proportionality.⁹⁴ Under the principle of subsidiarity, the Union shall act only when better results can be achieved at Union level than if Member States acted at a regional level. Under the principle of proportionality, "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties" and both principles are better regulated in the Protocol 2.⁹⁵

In practical terms, the subsidiarity principle defends the national issues should be dealt at a domestic level while cross-border issues should be addressed at the Union level. And in that sense, the justification of the proposal may be regarded as valid, as uniform measure within the Union addressing the tax

⁹¹ Stewart, Miranda (2015), Abuse and Economic Substance in a Digital BEPS World, Bulletin for International Taxation, (Volume 69), No 6/7, IBFD, p. 409.

⁹² Goel, Shilpa (2017), 'Should we supplement physical PE with a virtual PE to tax digital services?', Kluwer International Tax Blog, available at <http://kluwertaxblog.com/2017/10/24/15735/>

⁹³ European Union (2007), Consolidated version of the Treaty on the Functioning of the European Union, 2008/C 115/01, article 115.

⁹⁴ European Union (2007), Consolidated version of the Treaty on European Union, 2008/C 115/01, article 5.

⁹⁵ European Union (2007), Consolidated version of the Treaty on European Union, 2008/C 115/01, Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

issues of the digital economy is an effective approach to protect the single market in lieu of creating not harmonized unilateral domestic policies that could clash between each other and become obstacles for business in the European Union. Thus, the coordination of measures by the European Commission can be regarded the appropriate way forward.

The questionings arise in regard the proportionality principle, in the analysis of whether the new PE nexus proposed can be considered a necessary, suitable and appropriate measure for achieving the desired end. And before proceeding to the examination, it is important to clarify the concept of proportionality addressed in this paper is the one respect to the competence of the European Union institutions.

In the proportionality test, the first step is to identify the aim of the measure, which will serve as the main parameter to mark the following analysis. After the identification, of the objective three elements should be considered, the suitability test refers to checking if the measure is capable to achieve the desired goal, the necessity test intends to analyze if the measure is necessary to obtain the aim proposed. Finally, the proportionality test *strictu sensu* should be carried out to understand if the measure introduces an excessive burden when compared to the objective pursued, and for this last step, a weighting of the conflicting interests is necessary.⁹⁶

As an example, in the Case of British American Tobacco and Imperial Tobacco, the European Court of justice stated that in order to comply with the proportionality principle, the measure “should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it”.⁹⁷ Also, to better elucidate the proportionality test, the Court ruled in *Fédération européenne de la santé animale (Fedesa)* Case that "when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".⁹⁸

In that sense, as stated in the explanatory memorandum of COM(2018)147, the main goal of the proposal is to tackle the misalignment between the place where the profits are taxed and where value is created by establishing a taxable nexus to an operating cross-border business without a physical commercial presence and to set principles to attribute profits to digital businesses.⁹⁹ Also, the executive summary of the proposal points as goals of the proposal the allocation of taxing rights in order to avoid the erosion of tax

⁹⁶ Craig, Paul and Burca, Grainne (2015), *EU Law: Text, Cases and Materials*. Sixth Edition, Oxford University Press, p. 551.

⁹⁷ Case C-491/01 (2002), *British American Tobacco (Investments) and Imperial Tobacco*, ECLI:EU:C:2002:741, para. 122

⁹⁸ Case C-331/88 (1990), *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others*, ECLI:EU:C:1990:391, para. 13.

⁹⁹ COM(2018)147 (2018), ps. 1 and 2.

base in the source state as one of the goals, in addition to the protection of the internal market and preservation of social fairness and a level playing field between businesses.¹⁰⁰

From this starting point, the proportionality test follows with the check of suitability of the measure and the conclusion is that the proposal is indeed able to achieve the goal of allocating the taxing rights to the source state. Concerning necessity, it can be defended the proposal for directive was an efficient method to assure harmonization throughout the European Union and avoid the obstacles to the internal market created by unilateral measures, which have already started to be issued by Member States. The critical aspect regards to the analysis of the proportionality, guided by the parameters sustained by the European Court of Justice in the abovementioned cases.

Considering the options available to achieve the supposed goal stated in the proposal, it can be said both the withholding tax and the unitary taxation combined formulary apportionment could have been least onerous approaches compared to the introduction of a new PE nexus by the European Union. This conclusion can be sustained considering the duty to adequate international tax mechanisms to the digital economy challenges is primarily led by the OECD, as even though their suggestions are not binding, they arise from a joint international effort and tend to express international agreements. Thus, an international and not unilateral measures represent the best way to deal with the challenges of the digital economy in long term.¹⁰¹

That does not mean the European Union couldn't implement measures to avoid erosion of the taxing base of market countries, but those would be better elaborated as interim measures with low potential to change the tax allocation rules disposed in the OECD MTC and adopted by majority of countries and double tax treaties. It is hardly possible to adopt a new PE nexus regionally without harming commitments formally accepted in international tax treaties, thus even the most noticeable defenders of the implementation of a new PE nexus for digital activities don't agree with the use of unilateral measures to do so, but instead wait for a consensus to be achieved under penalty of incurring in double taxation, infringements of tax treaties and as well as disrespect with traditional principles set in the international tax system.

Also, the implementation of withholding taxes would not require a change in the international tax rules already established and implemented in the majority of the double tax treaties existent, whereas the new PE nexus

¹⁰⁰ European Commission (2018), Executive Summary of the impact assessment accompanying the document Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence and Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, p. 2.

¹⁰¹ Valente, Piergiorgio (2018), p.5.

changes implies the change of the system as it is now. But the main argument to sustain the implementation of the withholding tax instead of a new PE nexus is that the latter measure is result in the application of different sets of rules for the constitution of a PE for traditional business and digital businesses, while the withholding does not impose a different treatment for the digital economy. That being said, the implementation of a withholding tax could be a much less onerous measure at that moment, considering it would not impact existing double tax treaties or deviate unilaterally from the principles and rules adopted in the world and still would be able to achieve the goal, being it the allocation of taxing rights to the market state or even avoiding double non-taxation with stateless income.

5.2.2 Principles of the Ottawa Taxation Framework Conditions

The principles of the Ottawa Taxation Framework Conditions were set to guide the taxation of the digital economy and recently had its relevance reaffirmed by OECD.¹⁰² They represent guidelines for the creation of new rules towards taxation of the digital economy and need to be taken into consideration when analysing the new proposal for PE nexus of the European Commission, as they are a source of soft law internationally accepted.

The Ottawa principles are neutrality, efficiency, certainty, simplicity, effectiveness, fairness and flexibility.¹⁰³ Neutrality principle is related to promoting equitable taxation of traditional commerce and digital economy, and assuring similar transactions are given a similar tax burden. It is intended to avoid differentiation between the two economies recognizing they are intrinsically connected, thus a fragmented approach would not be the way forward.

In this regard, it can be questioned whether the COM(2018)147 complies with the neutrality principle, as the new PE nexus has its application directed to digital economy businesses, specifically the ones carrying wholly digitalized activities. If in one hand the traditional PE nexus laid down in article 5 of OECD MTC is applied in a segmented way targeting traditional business models and not covering the digital economy, on the other hand, the compliance with the neutrality principle would require the new measures arising to be extended to the whole economy and not only for business "consisting wholly or partly of the supply of digital services through a digital

¹⁰² OECD (2015), Addressing the Tax Challenges of the Digital Economy, Action 1, Annex A.2, p. 152.

¹⁰³ OECD (2013), Implementation of the Ottawa taxation framework conditions – The 2003 report, p. 12.

interface", as suggested in article 4.¹⁰⁴ That being said, it is really difficult to sustain the implementation of the new PE nexus as a neutral solution.

The principle of efficiency aims to minimize the costs of compliance for taxpayers and tax authorities whereas certainty and simplicity emphasizes the need to be clear, simple and accessible to taxpayers. Principles of effectiveness and fairness rules that potential for tax avoidance and evasion should be minimized with proportional measures to the risks involved, and flexibility principle aims to maintain the taxation system as flexible and dynamic as possible to keep up with the developments of the digital economy.

While it is most certain the proposal for a new PE concept complies with certainty, simplicity and flexibility, the notion of effectiveness can be questioned with the same argumentation used when analysing the principle of proportionality laid down in article 5 of the Treaty on the European Union and explored in the previous topic of this study.

Analyzing which method would be the most proportional to address the risks and to achieve the goals established by the European Commission, it is concluded the withholding tax would take advantage over the implementation new PE nexus, as it would delivery basically the same results, but would bring less impact to the international tax system. The concern about the impacts is relevant as the proposal is a unilateral measure and may be conflicting with possible future solutions carried out internationally based on the OECD research, which is the preferable way to deal with the issues of the digital economy.

In sum, the implementation of a new PE nexus is not aligned with the Ottawa principles of neutrality and effectiveness, therefore, may not be regarded as a the most appropriate solution to be implemented in the European Union as a unilateral measure before an international consensus is reached.

6. Conclusion

As stated, the aim of this paper is to analyze the proposal of the European Commission for the implementation of a new PE nexus based on significant digital presence. The main questions to be answered are if the solution to deal with the digital economy should be addressed as a unilateral European Union initiative and if the proposal respects the proportionality principle, as requested by EU Law, as well as other international principles.¹⁰⁵

¹⁰⁴ COM(2018)147 (2018), article 4.

¹⁰⁵ European Union (2007), Consolidated version of the Treaty on European Union, 2008/C 115/01, article 5.

The explicit motivations of the proposal were to avoid distortion of the competition and to assure the tax is levied where the value is created. In this regard, one thing is known for sure, the new PE nexus is capable to shift the taxing rights to the source state, where the value is theoretically created, but what was left to answer is whether this measure is proportional considering the whole scenario given and other alternatives that could lead to the same result.

By analyzing the OECD's three main proposals laid down in Action 1 of the BEPS, it is possible to conclude the European Commission decided to adopt two of them, the equalization levy and a new PE nexus concept. However, the proposal left behind the withholding tax, which in our view would have been the most suitable measure under the proportionality principle according to the interpretation the European Court of Justice provided on the Case of British American Tobacco and Imperial Tobacco when stated the measure should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it.

As explained in the chapter 5, withholding tax is a well-established source taxation method, and the most effective way to combat base erosion and guarantee the taxing rights of the source state is respected. That is because the implementation of a withholding tax in the European Union would not require a change in the traditional rules of PE adopted by majority of the countries and tax treaties in the world. Also, it would not create different treatments between the "traditional" and digital economy by having two different rules concerning the PE status, as it will happen if the proposal is approved and enter in force.

Those are important arguments especially considering the proposals are unilateral measures not consented by the rest of the world. So, as the European Commission proposals are not arising from an international consensus, the reform of the tax system should incorporate a suitable treatment for the digital economy challenges in the existing framework in lieu of implementing completely new parameter that would create totally new approaches.

In addition, even if the measures proposed by the European Commission are seen as temporary and intended to address the taxing misalignment until the international consensus is reached and a long-term proposal is agreed, the quick fixes, such as equalization taxes, don't seem to be the most appropriate measures at this point, but in fact may represent a temporary solution to address political pressure for quick actions.¹⁰⁶ So, there is no sufficient legal fundament on the choice for the implementation of a new PE nexus instead of the other less harmful available measures. And a new parameter for the

¹⁰⁶ Kofler, Georg, Mayr, Gunter, Schlager, Cristoph (2018), Taxation of the Digital Economy: A Pragmatic Approach to Short-Term Measures, European Taxation, 2018 (Volume 58), No 4, IBFD, p. 1.

allocation of taxing rights should not be implemented without a robust legal basis and preferably not implemented in a unilateral way when there is a joint effort on studying the best way to address the issues being carried out internationally.¹⁰⁷

Taking into account what has been discussed, while implementing a new PE nexus might be a valid decision, it shall take some maturing time in order to tackle the issue in a more comprehensive way and through an international cooperation. A quick fix solution implemented in a unilateral way might not only be distortive and inefficient, but also might also undermine international consensus, creating more problems than solving them.¹⁰⁸ It seems the implementation of a new PE nexus based in significant digital presence is a good alternative to shift the allocation of profits to the market country and avoid double non-taxation, however, it is sustained such measure should be taken in an international context and not in the European Union sphere, and if the Commission is determined to act, there are effective measures that could be taken and would not compromise the whole international taxation system as it is now.

Besides, the European Union has been working on the project of the CCCTB which can lead to the adoption of a Unitary taxation with formulary apportionment, a valid method for guaranteeing the taxation is aligned with the value creation in the market countries and also able to combat distortion in the competition in a long term, as all the profits arising from value creation will be certainly taxed with the adoption of this method. In long term, that is a valid alternative to be implemented in Europe without changing the traditional rules for PE but at the same time assuring the taxing rights of the source countries in the digital economy.

Some scholars go beyond and state the primary goal of the BEPS Project and the proposals to tackle the tax challenges of the digital economy might be to avoid double non-taxation by targeting stateless incomes.¹⁰⁹ Considering the European Commission's proposal might be targeting double non-taxation, it can be stated that solutions are not aligned with its explicit goals, therefore, do not respect the principle of proportionality required by article 5 of the Treaty on the European Union and principles of neutrality and efficiency of the Ottawa Taxation Framework Conditions. Hence, the conclusion the measures might represent a compensatory taxation scheme instead of a revenue shift initiative can be achieved.

And in this sense, it is necessary to consider there are more effective and neutral ways to avoid double non-taxation of giant tech companies without

¹⁰⁷ Hurk, Hans (2018), Tax Planning, Ethics and Our New World, Bulletin for International Taxation, 2018 (Volume 72), No 2, IBFD, p. 127.

¹⁰⁸ Brauner, Yariv and Pistone, Pasquale (2017), p.681.

¹⁰⁹ Brauner, Yariv and Baez, Andrés (2015), p.6.

harming the whole international system by implementing unilateral measures creating different rules for the traditional and digital economy. Besides, it must be pointed that source taxation rules are not meant to be used as anti-avoidance measures or strategies to control tax base erosion, and if it is used this way, there will be a clear risk of affecting much more than the U.S tech giants and impacting the economy as a whole, as most companies are operating some sort of digital transactions.

In conclusion, the proposal for implementing a new PE nexus based in significant digital presence in the European Union is not proportional to the achievement of the goal of allocating taxing rights to the source countries, where the value is created. Even more, it might not be proportional to achieve the goal of preventing double non-taxation to occur and might bring structural problems to the international tax system. If a new system is regarded as necessary, it should be implemented internationally based on developed and comprehensive studies and not in a unilateral way as the European Union is suggesting. After all, even if international bodies such as OECD are not able to create laws, they have already taken the role of pacifying such themes as a way to guarantee a consolidated approach throughout the world based in international agreements.

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