Lund University

School of Economics and Management
Department of Business Law

Legal analysis of an EU DST: Is there a legal basis for it under EU law and would it violate the EU's duty to respect international law?

by

Tobias Egger

HARN60 Master Thesis

Master's Programme in European and International Tax Law

2022/2023

Spring semester 2023

Supervisor: Cécile Brokelind

Examiner: Sigrid Hemels

Author's contact information:

egger.tobias@gmx.net

+49/17643800230

Table of Contents

Summary

This thesis examines a potential EU digital services tax under two aspects. Those are first, whether a sufficient legal basis is given for it within EU law and second, whether it would violate the EU's duty to respect international law. To make the analysis more tangible it is based on the directive proposal for such a tax from 2018.

In the first content part the concept of a digital services tax is explained, and its nature is examined. The major issue discussed here is, whether the tax can be classified as a turnover tax, a general indirect tax, or a direct tax under EU law. In this regard, the thesis qualifies a DST as a direct tax.

The second content part of the thesis deals with a potential legal basis. Examined are Art. 113, 115 and 116 TFEU. The focus lies on Art. 115 TFEU. For this provision its material requirement and the principles of subsidiarity and proportionality are examined, and it is concluded that a DST would not fulfil the material requirement and that it violates the two principles.

The last content part examines a violation of the EU's duty to respect international law. The focus here lies on the principle of territoriality, as a digital services tax would not be dependent on an actual physical presence within the territory of its taxed subjects. Nonetheless, the principle of nationality is also mentioned. For both principles the outcome of the research is that a DST would not violate them.

Preface

First, and foremost I would like to thank my supervisor and main professor Cécile Brokelind, as her teaching throughout the year and her supervisions were constant sources of inspiration for me.

Second, I would like to extend my gratitude to my friends and family, as they were a constant source of support. Especially my parents, since without them I would not have made it to Lund.

List of Abbreviations

Art.	Article
CJEU / Court	Court of Justice of the European Union
DST	Digital Services Tax
DST proposal	The proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services
DTT	Double Tax Treaty
EC	Treaty establishing the European Community
ECtHR	European Court of Human Rights
EU	European Union
FTT	Financial Transaction Tax
ICJ	International Court of Justice
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
PE	Permanent Establishment
SDP proposal	The proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VD	VAT Directive

1. Introduction

1.1. Background

As a reaction to the failure of an agreement on the global stage regarding the OECD's Pillar One, the European Commission introduced two Directive Proposals on 21 March 2018. Those were the proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence (SDP proposal) and the proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services (DST proposal).[1] Both of them remain unimplemented until today.[2] Nevertheless, in the meantime several EU Member States, including for example France, Spain and Austria, have implemented a digital tax.[3] Therefore, one could question if the taxation of the so called digital economy is still on the agenda of the EU legislators. At least in 2021 it was.[4] The Committee on Budgets of the standing EU Parliament published an Opinion on 17 March 2021 on the matter.[5] While the main stress of this document is on demanding an EU digital levy as own budgetary resource for the Union, for a levy to become an own resource, the included and underlying demand is the introduction of such a levy.[6] Later that year, on 31 August 2021, the Budget Commissioner Johannes Hahn stated in a speech at the Parliaments Committee on Budgets that the Commission will deliver a proposal on a digital levy.[7] Additionally, as reported by Bloomberg in February of 2023, Bruno Le Maire, the Minister of the Economy and Finance of France, demanded the EU to enact its own digital tax as, in his view, a global compromise is not in sight.[8] All three statements show the continuous relevance of the digital tax topic for the EU. Moreover, the demand of a digital levy as an own resource for the EU might present an additional issue, as a Digital Services Tax (DST) would then be an own EU tax. This highlights the need for further and new research on the matter.

---

[1] European Commission, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence (2018) COM(2018) 147 final (SDP proposal); European Commission, Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services (2018) COM(2018) 148 final (DST proposal).

[2] See 'Fair Taxation of the Digital Economy' < https://taxation-customs.ec.europa.eu/fair-taxation-digital-economy_en> last accessed 25 May 2023; 'Digital Taxation, Timeline' <https://www.consilium.europa.eu/en/policies/digital-taxation/> last accessed 25 May 2023.

[3] See 'Digital Services Taxes in Europe' <https://taxfoundation.org/digital-tax-europe-2022/> last accessed 25 May 2023.

[4] See European Parliament Committee on Budgets, Opinion on Digital taxation: OECD negotiations, tax residency of digital companies and a possible European Digital Tax (2021) 2021/2010(INI); Sarah Paez, 'EU Will Propose Digital Levy Regardless of OECD Tax Deal' *Tax Notes* (2 September 2021).

[5] European Parliament, Opinion on Digital taxation (n 4).

[6] European Parliament, Opinion on Digital taxation (n 4) 3-5.

[7] Paez, 'EU Will Propose Digital Levy Regardless of OECD Tax Deal' (n 4).

[8] William Horobin, 'France Says EU Must Prepare Digital Tax as Global Deal Blocked', *Bloomberg* (20 February 2023) <https://www.bloomberg.com/news/articles/2023-02-20/france-says-eu-must-prepare-digital-tax-as-global-deal-blocked> last accessed 25 May 2023.

1.2. Aim

As highlighted in the background, a DST is meant as an alternate solution to the OECD's Pillar One. Nevertheless, this does not mean that it does not have its own hurdles to surpass, which demand separate assessment. In that regard the aim of this work is to analyse two possible EU law obstacles for the introduction of a DST by the EU legislator. Those are first, the question whether there exists a legal basis within EU law for such a tax and second, whether it would be compliant with the EU´s duty to respect international law. In that context the goal is to examine if a DST would be possible within the existing legal framework set out by EU law, and if there are some obstacles or boundaries the legislator needs to be aware of or must not cross. Necessarily, the DST proposal from 2018 will serve as an example for a possible concrete implementation of a DST. While some issues have yet been broadly discussed in literature, the issues of this thesis, in the eyes of the author, so far did not get the attention that they would have deserved.[9]

1.3. Method and Material

To examine the issues, the traditional approach of legal-dogmatic research is used as a method.[10] This approach is used since the thesis examines the interpretation of standing EU primary and secondary law, and other standing law. As the thesis examines EU law issues for the implementation of a DST, the standing law is required as a benchmark for the legal assessment. In case of conflict, the arising issues are solved through the methods of legal interpretation applied by the CJEU. As already indicated in *Van Gend den Loos*,[11] the three methods are textual or wording, contextual or systematic, and purpose or telos.[12]

The materials used in this thesis are various. First, the standing EU primary and secondary law is needed, as it is setting the scene for a potential DST. Second, essential case law of the CJEU and other courts is presented with detail. Nevertheless, many cases are cited without greater detail as support and prove of the underlying argument and to give interested readers an opportunity to inform themselves. Third, relevant publications from EU institutions such as the Commission and the European Parliament are needed for the conducted analysis. For example, to examine the telos of provisions.

---

[9] See for state aid Mateusz Kaźmierczak, 'EU Proposal on Digital Service Tax in View of EU State Aid Law' (2022) Financial Law Review 93; Rita Szudoczky and Balázs Károlyi, 'Progressive Turnover Taxes under the Prism of the State Aid Rules: Effective Tools to Tax High Financial Capacity or Inconsistent Tax Design Granting Advantages?' (2020) European State Aid Law Quarterly 251; See for fairness aspects Gianluigi Bizioli, 'Fairness of the Taxation of the Digital Economy' in Werner C Haslehner and Others (eds), *Tax and the Digital Economy: Challenges and Proposals for Reform* (Series on International Taxation vol 69, Kluwer Law International B.V. 2019) 49; See for Art. 110 TFEU and Discrimination Christina Dimitropoulou, 'The Proposed EU Digital Services Tax: An Anti-Protectionist Appraisal Under EU Primary Law' (2019) vol 47, Intertax 268.

[10] Sjoers CW Douma, *Legal Research in International and EU Tax Law: Rede in Verkorte Vorm* (Kluwer 2014) 17, 18.

[11] Case C-26/62 - *Van Gend en Loos v Administratie der Belastingen*, EU:C:1963:1, 2, 12, 13.

[12] Miguel Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2008) issue 1, European Journal of Legal Studies 137, 139.

Finally, scholarly publications and books are used to present important opinions and views from academia.

1.4. Delimitation

This thesis will not elaborate the details of the SDP proposal.[13] Thus, the concept of a significant digital presence will not be closely examined. Within the section on the appropriate legal basis of a DST, Art. 116 TFEU is only touched upon, as it so far never was of significant value for EU policy.[14]

In addition, this work focuses on the legal issues of a possible DST. Therefore, the issues examined are of a legal nature. Political or economic perspectives on a DST, as brought up by other authors, are largely excluded.[15] Moreover, the focus is on the possibility of enacting a DST and not on its actual enforceability.[16]

1.5. Outline

As a starting point the thesis explains and examines the nature of a DST (Chapter 2). Subsequently, the question whether the EU has a legal basis to implement a DST is investigated (Chapter 3). In this chapter Art. 113, 115 and 116 TFEU will be examined. The thesis then proceeds to potential problems with the EU's duty to respect international law (Chapter 4). The focus lies on the principle of territoriality and the tax nexus requirement. Nonetheless, the nationality principle will be discussed, too. Finally, the results of the research are summarized in the conclusion and an outlook for future research is given (Chapter 5).

2. Nature of a DST

2.1. Definition of DST

Before the nature of a DST itself can be examined, it is needed to roughly define what a DST is. The foundation of what a DST contains in an EU context will be derived from the DST proposal of 2018.[17] The proposal gives an example of how a DST could be drawn up and therefore functions as starting point for the examinations in the following parts.

Taxable revenues are listed in Art. 3 of the proposal.[18] According to Art. 3 (1) DST proposal those shall be the revenues stemming from three types of

[13] SDP proposal (n 1).
[14] See Rita Szudoczky and Dennis Weber, 'Constitutional Foundations: EU Tax Competences; Treaty Basis for Tax Integration; Sources and Enactment of EU Tax Law' in Peter J. Wattel and Others (eds), *Terra/Wattel - European Tax Law* (vol 1, seventh edition, Kluwer Law International B.V., 2019) 37.
[15] See for that Georg Kofler and Julia Sinnig, 'Equalization Taxes and the EU's 'Digital Services Tax'' (2019) vol 47, Intertax 176; Wouter Lips, 'The EU Commission's digital tax proposals and its cross-platform impact in the EU and the OECD' (2020) vol 42, Journal of European Integration 975.
[16] See for that Kofler and Sinnig, 'Equalization Taxes and the EU's 'Digital Services Tax'' (n 15).
[17] DST proposal (n 1).
[18] DST proposal (n 1) Art. 3.

services, namely " (a) the placing on a digital interface of advertising targeted at users of that interface; (b) the making available to users of a multi-sided digital interface which allows users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users; [and] (c) the transmission of data collected about users and generated from users' activities on digital interfaces."[19] As the Commission clarified in the explanatory memorandum ahead of the directive proposal the goal of this is not to tax the participation of users themselves, but to tax the revenues stemming from earnings through the user input.[20]

Taxable persons are defined in Art. 4 of the proposal and must meet two conditions.[21] Within the relevant financial year an entities worldwide revenue must exceed 750 000 000 EUR and it must have more than 50 000 000 EUR of taxable revenues within the EU.[22]

The place of taxation is regulated in Art. 5 and is determined according to the users' location.[23]

Art. 8 sets the tax rate at 3%.[24] No deduction of costs is allowed and no carry forward of losses granted.[25] However, in recital 27 of the preamble it is stated that the Commission expects Member States to allow a paid DST to be deducted as a cost from the tax base of the respective corporate income tax.[26]

Hence, the outcome of the DST proposal would have been a tax on turnover with a 3% rate on the gross revenue arising from the listed digital services.[27] For the following, this assumption is used as base of how a DST would be implemented in the EU.

Nevertheless, the new demand for a DST as an EU own resource needs to be mentioned here, too.[28] The DST proposal would have allocated the tax revenues to the Member States.[29] If a renewed attempt were to give the tax revenues to the EU, it would be a possibly important change of the substance of a DST.

In conclusion, a DST in the EU context, for the purposes of this thesis, is defined as a tax on turnover applied on gross revenue of certain digital services whose tax revenue would go either to the Member States or directly to the EU's own budget.

[19] DST proposal (n 1) Art. 3 (1).
[20] DST proposal (n 1) 7.
[21] DST proposal (n 1) Art. 4.
[22] DST proposal (n 1) Art. 4 (1).
[23] DST proposal (n 1) Art. 5.
[24] DST proposal (n 1) Art. 8.
[25] Kofler and Sinnig, 'Equalization Taxes and the EU's Digital Services Tax', *Tax and the Digital Economy* (n 9) 128.
[26] DST proposal (n 1) 20, para 27.
[27] Kofler and Sinnig, 'Equalization Taxes and the EU's Digital Services Tax', *Tax and the Digital Economy* (n 9) 144.
[28] See 1.1..
[29] DST proposal (n 1) 11, Art. 5.

2.2. Qualification of the Tax

2.2.1. Introductory remarks

The next step is to qualify a DST. Therefore, it needs to be established whether the tax is a turnover, indirect or direct tax under EU law. This is necessary because the different types of taxes have a different potential legal basis. For a turnover or general indirect tax the legal basis could be Art. 113 TFEU[30], whereas the basis for a direct tax would have to be either Art. 115 TFEU or, as sometimes discussed, Art. 116 TFEU.[31]

2.2.2. Turnover Tax

At first sight a DST could be a turnover tax. In the CJEU's case law on Art. 401 of the VAT Directive (VD)[32] the term turnover tax is defined.[33] This provision in general forbids Member States from implementing turnover taxes other than the harmonized VAT. The Court repeatedly held that a turnover tax in the meaning of Art. 401 VD is a tax that "has the effect of jeopardising the common system of value added tax".[34] The deciding factors for the Court in that regard are the essential factors of VAT.[35] As such the Court identified four characteristics of VAT, which would have to be fulfilled.[36] These consist of applying VAT generally to goods and services, ensuring that it is proportionate to the price charged, applying it at every stage of production and distribution, and allowing taxpayers to deduct input VAT paid.[37] The DST proposal from 2018 is an example that a DST, even if it would slightly differ from the proposal, is unlikely to satisfy all four criteria. Thus, it would apply only to digital services and therefore is not a generally applied tax. Additionally, there would be no tax collection on several steps and no deduction mechanism like the one for input VAT.[38] Therefore, under

[30] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.
[31] Haslehner, 'EU and WTO Law Limits on Digital Business Taxation', *Tax and the Digital Economy* (n 9) 36.
[32] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1.
[33] See Case C-75/18 - *Vodafone Magyarország Mobil Távközlési Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, EU:C:2020:139; Joined Cases C-283/06 and C-312/07 - *KÖGÁZ and Others v Vas Megyei Közigazgatási Hivatal*, EU:C:2007:598; Case C-475/03 - *Banca popolare di Cremona Soc. coop. arl v Agenzia Entrate Ufficio Cremona*, EU:C:2006:629; Case C-437/97 - *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wein & Co. HandelsgesmbH v Oberösterreichische Landesregierung*, EU:C:2000:110.
[34] Case C-75/18 - *Vodafone Magyarország* (n 33) para 59; See also Joined Cases C-283/06 and C-312/07 - *KÖGÁZ and Others* (n 33) para 34.
[35] Case C-75/18 - *Vodafone Magyarország* (n 33) para 61; Case C-475/17 - *Viking Motors AS and Others v Tallinna linn and Maksu- ja Tolliamet*, EU:C:2018:636, para 38.
[36] Case C-75/18 - *Vodafone Magyarország* (n 33) para 62; Case C-475/03 - *Banca popolare di Cremona* (n 33) para 28.
[37] Case C-75/18 - *Vodafone Magyarország* (n 33) para 62; Case C-475/03 - *Banca popolare di Cremona* (n 33) para 28; Haslehner, 'EU and WTO Law Limits on Digital Business Taxation', *Tax and the Digital Economy* (n 9) 34.
[38] Haslehner, 'EU and WTO Law Limits on Digital Business Taxation', *Tax and the Digital Economy* (n 9) 35.

the Court's definition of a turnover tax of Art. 401 VD a DST would not be a turnover tax.

The question arising is whether this definition of the Court for a turnover tax is to be seen as the general definition of a turnover tax under EU law. It could be seen as a specific definition only for the purposes of the VD. This would mean that apart from the area of VAT, a DST could still be classified as a turnover tax under EU law. This line of argumentation is followed by *Haslehner*.[39] He argues, while examining the correct legal basis for a DST, and therefore in the context of Art. 113 TFEU, that it is of merely limited sense to interpret the term in Art. 113 TFEU similarly to the term in Art. 401 VD.[40] His main argument for that is of a circular nature, as he concludes, that the choice of the EU legislator on implementing the VD under Art. 113 TFEU cannot retrospectively shape the meaning of the term turnover tax in a restrictive way.[41] While this is a solid argument, in the author's point of view, there are some points missing within that logic.

At least a hint is the statement in recital 4 of the VD's preamble, that the VD is intended to entirely harmonize the field of turnover taxes.[42] As the Council writes VAT "will eliminate, as far as possible, factors which may distort conditions of competition, whether at national or Community level."[43] From this it becomes clear that according to the Council's legislative intent the telos of Art. 401 VD is to exclude all other turnover taxes. From this follows that, according to the Council, there seems to be no place left for another turnover tax besides VAT, on national level as well as on Community level, which would lead an interpretation of the term turnover tax under Art. 401 VD to be an interpretation of the term in its general EU law meaning.

More importantly, as *Haslehner* acknowledges himself, so far there is no case law on the interpretation of the term turnover tax that explicitly deals with Art. 113 TFEU.[44] Therefore, it is possible that the Court's definition of a turnover tax within Art. 401 VD is intended to function as the general EU law definition of a turnover tax. Moreover, it seems impossible to define the term turnover tax differently in Art. 113 TFEU than in Art. 401 VD. As stated above, Art. 401 VD aims to generally forbid the implementation of a turnover tax through Member States. The wording of the Article itself does not specifically mention that it only forbids turnover taxes like VAT. Without a clue to a specific nature or limited scope within the VD, the definition of the term turnover tax within Art. 401 VD cannot differ from the definition used in primary law within Art. 113 TFEU. Therefore, by interpreting the term turnover tax in Art. 401 VD, and without explicitly clarifying otherwise, the

[39] Haslehner, 'EU and WTO Law Limits on Digital Business Taxation', *Tax and the Digital Economy* (n 9) 38.
[40] Haslehner, 'EU and WTO Law Limits on Digital Business Taxation', *Tax and the Digital Economy* (n 9) 38.
[41] Haslehner, 'EU and WTO Law Limits on Digital Business Taxation', *Tax and the Digital Economy* (n 9) 38.
[42] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (n 32) 1, para 4.
[43] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (n 32) 1, para 4.
[44] Haslehner, 'EU and WTO Law Limits on Digital Business Taxation', *Tax and the Digital Economy* (n 9) 38.

Court necessarily defines the term turnover tax within the meaning of Art. 113 TFEU, too. Hence, the Court's definition under Art. 401 VD needs to be seen as the general EU law definition of the term turnover tax.

This leads to the conclusion, that a DST does not qualify as a turnover tax under EU law, as the Court's case law on Art. 401 VD is applicable and a DST would not fulfil the criteria set out therein.

2.2.3. Indirect Tax

Even though a DST would not qualify as a turnover tax it could still qualify as a general indirect tax. Therefore, a DST would need to fulfil the general characteristics of an indirect tax. Traditionally an indirect tax is seen as a tax that is paid by another person than the one who is carrying the burden of its costs.[45] In simpler words the deciding factor is whether the income of the person paying the tax is reduced through payment of the tax.[46] A DST, like the one proposed by the Commission in 2018, includes no mechanism to switch over the burden of the tax directly on to the consumers or customers of the digital services, that are targeted by the tax. As the Commission pointed out in a Questions and Answers there is also no intention for that to happen.[47] Therefore, under the traditional definitions of an indirect tax, a DST cannot be qualified as an indirect tax.

This result coincides with the one reached by *Haslehner* in his book.[48] He states that the EU Council Legal service, in an internal document, defines an indirect tax through the use of three features.[49] Those are first, that the tax is levied on transactions, like consumption, second, that it does not take into consideration the taxpayer's ability to pay, and third, that there is a difference between the person paying the tax and the person bearing its actual cost.[50] Especially the third point of that definition coincides with the above established traditional definition of an indirect tax and is not fulfilled.

All in all, this leads to the conclusion that a DST cannot be qualified as a general indirect tax.

2.2.4. Direct Tax

Following from the previously established definition of an indirect tax, a definition of a direct tax can be derived.[51] In contrast to an indirect tax, a direct tax is characterized by the fact that it is paid by the person who also

---

[45] Ben Terra and Julie Kajus, *Introduction to European VAT* (IBFD 2023) chp.7 p.6; Alan Schenk and Oliver Oldman, *Value Added Tax: A Comparative Approach* (Cambridge University Press 2007) 5; Case C-475/03 - *Banca popolare di Cremona Soc. coop. arl v Agenzia Entrate Ufficio Cremona*, Opinion of AG Jacobs, EU:C:2005:183, para 35.
[46] Terra and Kajus, *Introduction to European VAT* (n 45) chp.7 p.6.
[47] 'Questions and Answers on a Fair and Efficient Tax System in the EU for the Digital Single Market' <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_2141> last accessed 25 May 2023.
[48] Haslehner, 'EU and WTO Law Limits on Digital Business Taxation', *Tax and the Digital Economy* (n 9) 39.
[49] Haslehner, 'EU and WTO Law Limits on Digital Business Taxation', *Tax and the Digital Economy* (n 9) 39.
[50] Haslehner, 'EU and WTO Law Limits on Digital Business Taxation', *Tax and the Digital Economy* (n 9) 39.
[51] See 2.2.3..

bears the economic burden of the tax.[52] Thus, the income of the person paying the tax is effectively reduced through paying it. A DST would be designed in a way that it cannot be directly passed on.[53] Therefore, as previously concluded by *Brokelind*, a DST is a direct tax.[54]

2.3. Conclusion Nature of a DST

Following from the examination in this chapter a DST is a direct tax, as it is neither a turnover tax nor a general indirect tax.

3. Legal basis for a DST

3.1. Principle of conferral

After establishing that a DST is a direct tax, in this chapter it is examined whether the EU has a legal basis giving it the competence to implement a DST. The method adopted for this purpose is to assess the applicability of several norms of the TFEU that could function as a legal basis for a DST. This is necessary as the principle of conferral, regulated in Art. 5 (2) TEU[55] states that "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

3.2. Art. 113 TFEU

The first norm examined is Art. 113 TFEU. This norm was chosen by the Commission as legal basis for its 2018 DST proposal.[56] Art. 113 TFEU enables the EU to "adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation". As the wording of the provision shows, it is only applicable for indirect taxes. A DST however, as analysed above, would be a direct tax.[57] Therefore, contrary to the view of the Commission, Art. 113 TFEU cannot be used as a legal basis for a DST in the shape of the DST proposal.

[52] Case C-475/03 - *Banca popolare di Cremona*, Opinion of AG Jacobs (n 45) para 35.
[53] See 2.2.3..
[54] Cécile Brokelind, 'An Overview of Legal Issues Arising from the Implementation in the European Union of the OECD's Pillar One and Pillar Two Blueprint' (2021) vol 75, Bulletin for International Taxation 212, 214.
[55] Consolidated version of the Treaty on European Union [2012] OJ C326/13.
[56] DST proposal (n 1) 5, 15.
[57] See 2.2..

3.3. Art. 115 TFEU

3.3.1. Introductory remarks

The second norm examined is Art. 115 TFEU. So far, all directives adopted in the field of direct tax law have this Article as their respective legal basis.[58]

The Article states that, "[w]ithout prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market." Before assessing the details, it must be noted that the prejudice to Art. 114 TFEU is irrelevant in tax law, as Art. 114 (2) TFEU states explicitly that Art. 114 (1) "shall not apply to fiscal provisions".[59]

3.3.2. Material requirement

3.3.2.1. Wording of Art. 115 TFEU

As the wording of Art. 115 TFEU shows, its scope is broad.[60] The only material requirement is that a directive issued under Art. 115 TFEU has to "directly affect the establishment or functioning of the internal market." The question to be answered now, is when this is the case and if this is the case for a DST. For this analysis the DST proposal will serve as an example.[61]

[58] See Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [2011] OJ L345/8; Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States [2009] OJ L 310/34; Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States [2003] OJ L 157/49; Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L 193/1; Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union [2022] OJ L 328/1 (Pillar Two Directive); Rita Szudoczky, 'The relationship between primary, secondary and national law' in Christiana HJI Panayi and Others (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing Limited 2020) 99.

[59] See also Szudoczky, 'The relationship between primary, secondary and national law', *Research Handbook on European Union Taxation Law* (n 58) 99; Kofler, 'EU power to tax: Competences in the area of direct taxation', *Research Handbook on European Union Taxation Law* (n 58) 11.

[60] Kofler, 'EU power to tax: Competences in the area of direct taxation', *Research Handbook on European Union Taxation Law* (n 58) 18.

[61] DST proposal (n 1).

3.3.2.2. Applicability of case law

The first problem here is, that the most influential case law in that regard is about Art. 114 TFEU.[62] However, as pointed out by *Szudoczky* and indicated by *Chalmers*, *Davies* and *Monties*, by using the term "analogous powers", the material requirement of Art. 114 TFEU is virtually identical with Art. 115 TFEU.[63] This enables the use of the case law on Art. 114 TFEU for the interpretation of Art. 115 TFEU.[64]

3.3.2.3. Definition of the Internal Market requirement

Having established this, it is now possible to examine the substance of when the internal market's establishment or functioning is directly affected. The leading case in this field up to today is the *Tobacco Advertising I* case.[65] In this case the Court ruled a Directive that banned advertisement for tobacco to be ultra vires.[66] In its ruling the Court held, that measures under Art. 114 TFEU must be "intended to improve the conditions for the establishment and functioning of the internal market."[67] Moreover, it held that the Article does not give a general power to regulate the internal market to the Community.[68] The Court concluded this from the wording and from it being contrary to the principle of conferral.[69] Therefore, the mere finding of different measures in different Member States is not enough to justify the use of Art. 114 TFEU.[70] What is required is, that an enacted provision contributes to the removal of distortions of competition or hurdles to interstate trade.[71] That standard is set by the Court because otherwise "judicial review of compliance with the proper legal basis might be rendered nugatory."[72] Consequently, the Court considers Art. 114 TFEU, or in the case of this thesis Art. 115 TFEU, to be the correct legal basis, if "the measure whose validity is at issue in fact pursues the objectives stated by the Community legislature".[73] Important to add is, that future obstacles are also enough, if their emergence is likely.[74]

---

[62] Szudoczky, 'The relationship between primary, secondary and national law', *Research Handbook on European Union Taxation Law* (n 58) 99.
[63] Szudoczky, 'The relationship between primary, secondary and national law', *Research Handbook on European Union Taxation Law* (n 58) 99; Damian Chalmers and Others, *European Union Law: Text and Materials* (Fourth edition, Cambridge University Press 2019) 635.
[64] Szudoczky, 'The relationship between primary, secondary and national law', *Research Handbook on European Union Taxation Law* (n 58) 99.
[65] Case C-376/98 - *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising I)*, EU:C:2000:544.
[66] Case C-376/98 - *Tobacco Advertising I* (n 65) para 111; Koen Lenaerts, 'The Basic Constitutional Charter of a Community Based on the Rule of Law' in Miguel Poiares Maduro and Loïc Azoulai (eds) *The Past and Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 300.
[67] Case C-376/98 - *Tobacco Advertising I* (n 65) para 83.
[68] Case C-376/98 - *Tobacco Advertising I* (n 65) para 83.
[69] Case C-376/98 - *Tobacco Advertising I* (n 65) para 83.
[70] Case C-376/98 - *Tobacco Advertising I* (n 65) para 84.
[71] Chalmers, *European Union Law: Text and Materials* (n 63) 38; Case C-376/98 - *Tobacco Advertising I* (n 65) para s 84, 95.
[72] Case C-376/98 - *Tobacco Advertising I* (n 65) para 84.
[73] Case C-376/98 - *Tobacco Advertising I* (n 65) para 85; See also Szudoczky, 'The relationship between primary, secondary and national law', *Research Handbook on European Union Taxation Law* (n 58) 99.
[74] Case C-376/98 - *Tobacco Advertising I* (n 65) para 86.

Hence, the definition of the Internal Market requirement can be summarized as the demand for an enacted legislation to contribute to the removal of distortions of competition or hurdles to interstate trade.

3.3.2.4. Problems for a DST

The next step of the analysis is to concretely examine whether a DST would fulfil the Court's definition. A first problem could be the objectives of a DST. For the proposal from 2018 the single market is not its main objective. The main objective, as can be seen in the explanatory memorandum part of the proposal, is fair taxation.[75] Nonetheless, protection of the functioning and the integrity of the single market is stated to be an objective, too.[76] As the Court held in *Tobacco Advertising I* the EU legislator can rely on other objectives than the internal market, if the internal market requirement is fulfilled.[77] Therefore, the other main objective is not a problem. The question to answer is whether the internal market requirement is fulfilled.

Precisely, the explanatory memorandum of the DST proposal expresses the fear of distortion of the internal market through unilateral measures of different Member States.[78] This was a rational thought and as we can see today, now there are multiple states with different digital services taxes within the EU, while other states did not implement such a tax. Following from this, at first glance, it seems not excluded that a DST would contribute to the functioning of the internal market. Taking into consideration that, as Advocate General *Kokott* stated in her Opinion on the case *C*, which dealt with age discrimination through supplementary taxation of pension income,[79] there "is hardly any restriction, from the point of view of substance, on the competence enjoyed by the Community or the European Union under [Article 94 EC (now Article 115 TFEU)]", one might be tempted to conclude that this is enough to fulfil the material requirement of Art. 115 TFEU.[80]

Nevertheless, on second glance, one could doubt whether a unified DST in the shape of the DST proposal would help the establishment of the internal market through the contribution to the removal of distortions of competition or hurdles to interstate trade. A first potential issue, as indicated by *Nogueira*, could be the strengthening of bigger economies.[81] He reasons, that bigger economies are the ones with the most users and hence, the ones that get the biggest share of the new tax revenues.[82] According to him, this is against the establishment and functioning of the internal market because "a robust internal market integrates smaller and bigger economies."[83] In the view of the author this argument does not hold a high value. While the integration of all

[75] DST proposal (n 1) 1-3.
[76] DST proposal (n 1) 3.
[77] Case C-376/98 - *Tobacco Advertising I* (n 65) para 88.
[78] DST proposal (n 1) 3.
[79] Case C-122/15 - *C*, EU:C:2016:391, paras 1, 2.
[80] Case C-122/15 - *C*, Opinion of AG Kokott, EU:C:2016:65, para 52.
[81] João Félix Pinto Nogueira, 'The Compatibility of the EU Digital Services Tax with EU and WTO Law: Requiem Aeternam Donate Nascenti Tributo' (2019) issue 1, International Tax Studies 3, 13.
[82] Nogueira, 'The Compatibility of the EU Digital Services Tax with EU and WTO Law' (n 81) 13.
[83] Nogueira, 'The Compatibility of the EU Digital Services Tax with EU and WTO Law' (n 81) 13.

sizes of economies into the market in general might be seen as valuable to it, why a specific tax, that generates more revenues for big economies than for small ones, should go against this remains mysterious. It seems to be the nature of things that bigger economies have a higher income through taxes than smaller ones.

More convincing might be the issue that a DST could lead to double taxation. In order to discuss double taxation, it is first necessary to distinguish between the two types of double taxation, which are juridical and economical double taxation. Juridical or legal double taxation occurs when the same tax base is taxed twice at the hands of the same person.[84] Any other form of double burdening is qualified as economical double taxation. Since a DST would have gross revenue as its tax base and traditional corporate income taxes are aimed at profits, there could not occur a taxation of the same tax base at the hands of the taxed companies. Hence, there would not be a juridical double taxation. Nonetheless, economical double taxation could be the case. As, stated above, the preamble of the proposal contains regarding double taxation, that "it is expected that Member States will allow businesses to deduct the DST paid as a cost from the corporate income tax base in their territory, irrespective of whether both taxes are paid in the same Member State or in different ones."[85] Merely expressing this in the preamble does not require Member States to grant any deduction of a paid tax. Without any deduction economical double taxation would be the case. Moreover, even if Member States were to allow the deduction according to the preamble, it would still not eradicate the burden of a DST.[86] A deduction of the tax paid from the corporate income tax base would not be sufficient.[87] While it would reduce the burden, deducting a tax paid from the tax base of another tax does not completely eliminate the burden of the former.[88] Therefore, economical double taxation would be the result, and as the Commission stated in 2011, double taxation in general is among the major concerns of EU businesses and citizens.[89] Hence, creating economical double taxation is not contributing to the removal of hurdles to interstate trade. To the contrary it adds obstacles to it. This contradicts the establishment and functioning of the internal market.[90]

---

[84] Vermeulen, 'Cross-Border Dividen Taxation', *Terra/Wattel - European Tax Law* (n 14) 808; Joined Cases C-436/08 and C-437/08 - *Haribo Lakritzen Hans Riegel BetriebsgmbH and Österreichische Salinen AG v Finanzamt Linz*, EU:C:2011:61, para 168; Case C-403/19 - *Société Générale SA v Ministre de l'Action and des Comptes publics*, EU:C:2021:136, para 27.

[85] DST proposal (n 1) 20, para 27.

[86] Nogueira, 'The Compatibility of the EU Digital Services Tax with EU and WTO Law' (n 81) 11.

[87] Nogueira, 'The Compatibility of the EU Digital Services Tax with EU and WTO Law' (n 81) 11.

[88] Nogueira, 'The Compatibility of the EU Digital Services Tax with EU and WTO Law' (n 81) 11.

[89] European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Double Taxation in the Single Market (2011) COM(2011) 712 final, 6.

[90] Nogueira, 'The Compatibility of the EU Digital Services Tax with EU and WTO Law' (n 81) 12.

A next argument against a DST might be that one could question whether it would help to avoid distortions of competition.[91] Regarding competition the CJEU repeatedly held that a distortion of competition targeted by a measure must be "appreciable".[92] The issue therefore is whether unilateral DSTs of Member States lead to an appreciable distortion of competition. In its impact assessment on the DST proposal the Commission assumes that to happen.[93] This seems questionable. One must keep in mind that direct taxation is not harmonized.[94] This means that Member States are traditionally free to enact their own tax laws.[95] Therefore, in the author's view, it seems unlikely that different direct taxes constitute an appreciable distortion of competition.

Moreover, the Court, in the area of direct taxation, only intervenes if the fundamental freedoms are not respected.[96] Otherwise, consequences like double taxation or double non-taxation are accepted.[97] If now, as argued by *Nogueira* for Art. 113 TFEU, differences within domestic tax laws would be enough to enable the EU to enact taxes on its own, it could harmonize the entire sector of Member States' direct tax laws.[98] This argument has even higher value towards Art. 115 TFEU, as there the EU would completely overtake the direct taxation competence from the Member States by enacting direct taxes on its own. Especially, the new demand of a DST as an EU own digital levy and hence, as a true EU own tax adds a new level to this point. An EU own direct tax would go even further than the Pillar Two Directive, since the latter one grants taxing rights to the Member States, while an own EU DST would generate revenue for the EU itself. This line of argumentation shows a conflict with the above stated ruling in *Tobacco Advertising I*. Enabling material direct tax law under Art. 115 TFEU, would mean creating harmonization in an unharmonized area. This would lead to the granting of a general power to regulate the internal market, and essentially eliminate the principle of conferral. Therefore, unless the CJEU would overrule its previous case law the outcome of a potential DST case in front of it, would have to be that the enactment of a DST is ultra vires.

In conclusion, even though the scope of Art. 115 TFEU is broad, a DST could not be enacted on it as a legal basis, mainly because it would go against the

---

[91] Nogueira, 'The Compatibility of the EU Digital Services Tax with EU and WTO Law' (n 81) 14.
[92] Case C-376/98 - *Tobacco Advertising I* (n 65) para 106; Case C-300/89 - *Commission of the European Communities v Council of the European Communities (Titanium Dioxide)*, EU:C:1991:244, para 23.
[93] European Commission, 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 (Impact Assessment), Commission Staff working Document (2018) SWD (2018) 81 final, 139.
[94] Case C-279/93 - *Finanzamt Köln-Altstadt v Roland Schumacker*, EU:C:1995:31, para 21.
[95] Nogueira, 'The Compatibility of the EU Digital Services Tax with EU and WTO Law' (n 81) 12.
[96] Case C-279/93 - *Schumacker* (n 94) para 21.
[97] Nogueira, 'The Compatibility of the EU Digital Services Tax with EU and WTO Law' (n 81) 12.
[98] Nogueira, 'The Compatibility of the EU Digital Services Tax with EU and WTO Law' (n 81) 12.

principle of conferral and the CJEU's previous case law, but also because it leads to economical double taxation.

3.3.3. Subsidiarity

Even though it is already established at this point, that Art. 115 TFEU does not work as legal basis for a DST, for the sake of completeness, it nonetheless seems appropriate to continue the examination. The next hurdle is the principle of subsidiarity, that is stemming from Art. 5 (1) and (3) TEU. The principle of subsidiarity only applies "in areas which do not fall within [the EU's] exclusive competences".[99] According to Art. 4 (2) (a) TFEU the internal market falls under the category of shared competences. Therefore, the subsidiarity principle is applicable. Content wise it is set out in Art. 5 (3) TEU, that "the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, […] but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." In other words, the principle of subsidiarity is fulfilled, if the Member States on their own are unable to sufficiently achieve the goals of the unified legislation and if the EU can in fact better achieve them.[100]

Regarding the first requirement, the fragmentation that originated from the differences between the Member States, shows that, on their own, they are unable to achieve a unified DST legislation.[101] The issue in this instance is the second requirement, and thus whether the EU could fulfil it better. One could think about international standards as an alternate solution.[102] In the field of a DST this could be the OECD's Pillar One.[103] However, this would first require a discussion of the value of OECD sources in an EU law context. This is debatable, considering that the OECD is merely an intergovernmental organisation without legitimisation through any democratically elected lawmaker.[104] Nevertheless, this does not need to be analysed in detail here, since no concrete agreement on an international level about Pillar One has been reached so far. Hence, international standards cannot provide an alternate solution at this point. Another concern raised by *Haslehner* regarding the second requirement is, whether a DST would need to exclude unilateral measures of Member States on top of it.[105] The 2018 proposal did

[99] Art. 5 (3) TEU (n 55).
[100] See also Kofler, 'EU power to tax: Competences in the area of direct taxation', *Research Handbook on European Union Taxation Law* (n 58) 28,29; Haslehner, 'EU and WTO Law Limits on Digital Business Taxation', *Tax and the Digital Economy* (n 9) 37.
[101] Haslehner, 'EU and WTO Law Limits on Digital Business Taxation', *Tax and the Digital Economy* (n 9) 37, 38.
[102] Kofler, 'EU power to tax: Competences in the area of direct taxation', *Research Handbook on European Union Taxation Law* (n 58) 29.
[103] See OECD (2020), *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/beba0634-en> last accessed 25 May 2023.
[104] Stefanie Geringer, 'Is the OECD Able to Exert Influence on the Essence of OECD-Inspired EU Secondary Law?' in Anders Hultqvist and Johan Lindholm (eds), *The Power to Tax in Europe* (Swedish Studies in European Law vol 14, Hart Publishing 2023) 252.
[105] Haslehner, 'EU and WTO Law Limits on Digital Business Taxation', *Tax and the Digital Economy* (n 9) 38.

not include such a prohibition.[106] But, according to him, an EU DST would still help with reaching its proposed goal, whether it excludes unilateral measures or not.[107] However, as shown in the previous section, a DST, in the shape of the proposal, would lead to economical double taxation.[108] This is contrary to its goal of the supporting of the establishment and functioning of the Internal Market and shows that the EU cannot better achieve the goal through enacting a unified DST.

Therefore, the principle of subsidiarity would not be met.

3.3.4. Proportionality

The last hurdle is the principle of proportionality, stemming from Art. 5 (1) and (4) TEU. As stated in Art. 5 (4) TFEU, "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties." It applies to all acts of Union institutions.[109] In its case law the CJEU consistently holds that the principle requires "that acts adopted by European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question".[110] In general this implies that "where there is a choice between several appropriate measures, recourse must be had to the least onerous one, and the disadvantages caused must not be disproportionate to the aims pursued".[111] This two factor test could be the benchmark for a DST at this point. However, the Court held in multiple occasion that, in fields where the legislator deals with "political, economic and social choices" including "complex assessments and evaluations" the principle of proportionality merely demands a measure not to be "manifestly inappropriate" regarding the pursued objective.[112] Nevertheless, "the Community legislator must base its choice on objective criteria."[113] Additionally, "in assessing the burdens associated with various possible measures, it must examine whether objectives pursued by the measure chosen

---

[106] See DST proposal (n 1); Haslehner, 'EU and WTO Law Limits on Digital Business Taxation', *Tax and the Digital Economy* (n 9) 38.
[107] Haslehner, 'EU and WTO Law Limits on Digital Business Taxation', *Tax and the Digital Economy* (n 9) 38.
[108] See 3.3.2..
[109] Joined Cases C-187/12 to C-189/12 - *SFIR and Others*, EU:C:2013:737, para 42; Kofler, 'EU power to tax: Competences in the area of direct taxation', *Research Handbook on European Union Taxation Law* (n 58) 30.
[110] Joined Cases C-187/12 to C-189/12 - *SFIR and Others* (n 109) para 42; See also Case C-649/20 - *Orde van Vlaamse Balies and Others v Vlaamse Regering*, EU:C:2022:963, para 41; Case C-331/88 - *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and Others (Fedesa and Others)*, EU:C:1990:391, para 13.
[111] Joined Cases C-187/12 to C-189/12 - *SFIR and Others* (n 109) para 42; See also Case C-649/20 - *Orde van Vlaamse Balies and Others* (n 110) para 41; Case C-331/88 - *Fedesa and Others* (n 110) para 13.
[112] Case C-58/08 - *The Queen on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform (Vodafone and Others)*, EU:C:2010:321, para 52; See also Case C-491/01 - *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, EU:C:2002:741, para 123; Case C-558/07 - *The Queen on the application of S.P.C.M. SA and Others v Secretary of State for the Environmental, Food and Rural Affairs*, EU:C:2009:430, para 42.
[113] Case C-58/08 - *Vodafone and Others* (n 112) para 53.

are such as to justify even substantial negative economic consequences for certain operators".[114] Even though this sounds substantially different from a regular proportionality analysis, in its case law the Court, after stating this, still checks whether the EU should have stuck to less exhaustive methods.[115]

Therefore, what must be examined here is whether there are less exhaustive methods available, to an extent that makes the choice of the legislator manifestly inappropriate regarding the objectives pursued by it. Naturally, for this analysis the 2018 DST proposal must function as a potential concrete example of a DST. The way of performing the analysis is to first summarize the objectives and to afterwards analyse if there would have been a less extensive method available. Fair taxation has already been established as the overarching main objective of the proposal.[116] However, the explanatory memorandum lists a total of four concrete objectives for the tax.[117] Those are, first, "to protect the integrity of the Single Market and to ensure its proper functioning", second, "to make sure that the public finances within the Union are sustainable and that the national tax bases are not eroded", third, "to ensure that social fairness is preserved and that there is a level playing field for all business operating in the Union", and fourth, "to fight against aggressive tax planning and to close the gaps that currently exist in the international rules which makes it possible for some digital companies to escape taxation in countries where they operate and create value."[118]

The first possible issue here is that a DST would not take losses into account.[119] Since it is levied on a company's gross revenue and not on its income it is independent from the actual profits of a company. This could lead to the taxation of an effectively loss-making company. To the author it is unclear how the taxation of loss-making companies would help to achieve the goals of social fairness and of fighting tax evasion. Additionally, this type of taxation contradicts the ability to pay principle since a company with losses traditionally is not subject to direct taxation. A less exhaustive method could be to provide a mechanism for not levying the tax on loss-making companies. But is that enough to rule out proportionality under the Court's higher standard of demanding manifest inappropriateness? Solely based on this, one could question that.

Nevertheless, this is not the only issue here. Moreover, it could be questionable whether a DST in the shape of the proposal leads to more social fairness and helps levelling the playing field for businesses operating within the EU.[120] As set out above the proposal introduces high thresholds for companies to become a taxable person.[121] Companies below them are not taxed.[122] The core of the issue here is that companies above the threshold

[114] Case C-58/08 - *Vodafone and Others* (n 112) para 53.
[115] See Case C-58/08 - *Vodafone and Others* (n 112) para 53.
[116] See 3.3.2..
[117] DST proposal (n 1) 3,4.
[118] DST proposal (n 1) 3,4.
[119] Nogueira, 'The Compatibility of the EU Digital Services Tax with EU and WTO Law' (n 81) 12.
[120] Szudoczky and Károlyi, 'Progressive Turnover Taxes under the Prism of State Aid Rules' (n 9) 265.
[121] See 2.1..
[122] See DST proposal (n 1) Art. 4.

would be taxed on the basis of their entire gross revenue and not only on the part exceeding the threshold.[123] The problem becomes visible through a comparison between two companies offering digital services. One of them slightly above the thresholds and the other one slightly below them.[124] The first would be taxed on its entire gross revenue, while the other one would be entirely untouched by a DST. This places the company slightly above the threshold at a disadvantage. How this would create social fairness and level the playing field is beyond the imagination of the author of this thesis. In this regard a less exhaustive method could be to only tax the revenues above the threshold or to lower the threshold and include a progressive tax rate.

Additionally, there could also be less exhaustive methods available for the creation of a level playing field between digitally and traditionally operating companies. In its impact assessment on the DST proposal the Commission identified three factors as reasons for different effective tax rates between the two types of businesses.[125] First, that digital companies have much more expenses for intangible goods like software, which are usually immediately fully deductible, whereas traditional companies invest more in physical goods which are depreciated much slower.[126] Second, digital companies spend more on research and development activities which are often incentivised by countries and third, a lot of countries offer so called patent boxes, which lower the taxation on intellectual property.[127] Through placing its patent boxes in the right countries, digital businesses are able to lower their effective tax rates.[128] If those are the real reason for the differences in taxation the question is, why the Commission does not deal with them directly.[129] It could try to act against each one separately and in a more specific way than by just enacting a DST that comes from a different angle. For example, the Commission could work on adjusting depreciation legislation and tax incentives in the Member States. This would be less restrictive than a DST that is levied on all digital companies above the threshold regardless of whether they make use of the potential advantages or not.[130] Even further, e contrario it seems like through a DST, digital companies would be forced to use every advantage that they could potentially get, through the nature of their business, in order to offset the additional tax burden through a DST.

Seeing all three arguments together, at least a DST in the shape of the proposal from 2018 seems manifestly inappropriate regarding the objectives it pursues. Therefore, a DST would not be compliant with the principle of proportionality.

---

[123] DST proposal (n 1) Art. 3; Szudoczky and Károlyi, 'Progressive Turnover Taxes under the Prism of State Aid Rules' (n 9) 265.
[124] Nogueira, 'The Compatibility of the EU Digital Services Tax with EU and WTO Law' (n 81) 14.
[125] European Commission, Impact Assessment (n 93) 136.
[126] European Commission, Impact Assessment (n 93) 136.
[127] European Commission, Impact Assessment (n 93) 136.
[128] European Commission, Impact Assessment (n 93) 136, 137.
[129] Nogueira, 'The Compatibility of the EU Digital Services Tax with EU and WTO Law' (n 81) 16.
[130] Nogueira, 'The Compatibility of the EU Digital Services Tax with EU and WTO Law' (n 81) 16.

3.3.5. Conclusion Art. 115 TFEU

Art. 115 TFEU would not be a sufficient legal basis for the implementation of a DST, as its substantial requirement, and the principles of subsidiarity and proportionality would not be fulfilled.

3.4. Art. 116 TFEU

The last option mentioned for a legal basis is Art. 116 TFEU. The provision enables the enactment of directives under the ordinary legislative procedure in cases where the Commission finds a distortion of competition within the internal market that cannot be eliminated through a consultation of the concerned Member States.[131] The benefit of Art. 116 TFEU in opposition to Art. 115 TFEU is that success under the ordinary legislative procedure is easier than under the special legislative procedure of the latter. It requires only a qualified majority and not unanimity.[132] As argued in *Terra*/*Wattel* Art. 116 TFEU could function "as a safety valve" in times of crisis within the internal market.[133] Whether the DST issue is to be seen as a time of crisis can be doubted. Especially with the implementation of the Pillar Two Directive in December 2022[134] and its minimum taxation this seems improbable. In addition, so far Art. 116 TFEU was never a significant factor in policies of the Union until today.[135] Moreover, the concerns that lead to Art. 115 TFEU not being an option as the legal basis mostly apply to Art. 116 TFEU, too.

Therefore, Art. 116 TFEU cannot be used as a legal basis for a DST in the shape of the proposal from 2018.

3.5. Conclusion legal basis for a DST

The EU does not have a legal basis that gives it the competence to enact a DST available under the current stand of EU law.

4. Violation of the EU's duty to respect international law

4.1. Introductory remarks

After examining the potential legal basis for a DST, the following section deals with the second main issue examined in this thesis. It is the issue of whether a DST could be a violation of the EU's duty to respect international law. As the CJEU ruled in *AATA* the EU is bound under Art. 3 (5) TEU "to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon

[131] Art. 116 TFEU (n 30).
[132] Szudoczky and Weber, 'Constitutional Foundations: EU Tax Competences', *Terra/Wattel - European Tax Law* (n 14) 36, 37.
[133] Szudoczky and Weber, 'Constitutional Foundations: EU Tax Competences', *Terra/Wattel - European Tax Law* (n 14) 37.
[134] Pillar Two Directive (n 58).
[135] Szudoczky and Weber, 'Constitutional Foundations: EU Tax Competences', *Terra/Wattel - European Tax Law* (n 14) 37.

the institutions of the European Union".[136] By this judgement the Court linked its standing case law on the binding force of international law to Art. 3 (5) TEU that was introduced by the Treaty of Lisbon.[137] Important to note is that the Court limits its review under customary international law to the question, if the Union, in adopting a legal act, made a manifest error in the assessment of the application of a customary international principle.[138] The reason for this is that "customary international law does not have the same degree of precision as a provision of an international agreement".[139] This view of the Court is not undisputed.[140] Nevertheless, as the aim of this thesis is to look at the practicability of the implementation of an EU DST, for which the rulings and interpretations of the CJEU are an essential factor, it is accepted as the standard of dealing with international customary law within the EU's legal system.

Important to mention is, that the main perspective applied regarding international law is the one of prescriptive jurisdiction. Thus, the primary objective is to determine whether the EU has the jurisdiction needed to legislate.[141]

With this in mind, the following section aims to identify principles of international customary law, that apply to the field of tax law. In case of success, the goal is to use the respective principle as a benchmark, under which the compliance of a potential EU DST is examined.

4.2. Territoriality

4.2.1. Status of the principle of territoriality in general

The first question to answer is whether the principle of territoriality in general is customary international law. As one can imagine, determining whether a principle qualifies as customary international law can be difficult to achieve and going too far into the details would lead out of scope for this work's research question. Nevertheless, some time needs to be spent on the matter.

According to the International Court of Justice (ICJ), customary international law has two conditions.[142] "Not only must the acts concerned amount to a

---

[136] Case C-366/10 - *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change (AATA)*, EU:C:2011:864, para 101.
[137] Suzanne Kingston, 'Territoriality in EU (Tax) Law: A Sacred Principle, or Dépassé?' in Joachim Englisch (ed), *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism* (IBFD 2016) chp.2 p.4; see also Case C-162/96 - *A. Racke GmbH&Co. v Hauptzollamt Mainz*, EU:C:1998:293, paras 45, 46; Case C-286/90 - *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.*, EU:C:1992:453, para 9.
[138] Case C-366/10 - *AATA* (n 136) para 110; Case C-162/96 - *Racke* (n 137) para 52.
[139] Case C-366/10 - *AATA* (n 136) para 110.
[140] See Kingston, 'Territoriality in EU (Tax) Law: A Sacred Principle, or Dépassé?', *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism* (n 137) chp.2 p.4; Case C-366/10 - *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change (AATA)*, Opinion of AG Kokott, EU:C:2011:637, paras 111, 112.
[141] Kingston, 'Territoriality in EU (Tax) Law: A Sacred Principle, or Dépassé?', *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism* (n 137) chp.2 p.2.
[142] *North Sea Continental Shelf*, Judgement, I.C.J. Reports 1969, p.3, para 77.

settled practice, but they must also be such, or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. […] The States concerned must therefore feel that they are conforming to what amounts to a legal obligation."[143] In other words a principle qualifies as customary international law when it is not only settled practice but also accepted by states as a matter of their legislative practice.[144]

As multiple scholars point out, in international law, the principle of territoriality is widely acknowledged as a fundamental principle of customary international law.[145] In addition, the CJEU acknowledged the principle as a limitation of the legislative powers of the EU.[146]

Therefore, the principle in general has the status of customary international law.

4.2.2. General definition of the principle of territoriality

The next step is to define the general scope of the principle of territoriality. Regarding this, until today, the *Lotus* case from 1927 needs to be mentioned.[147] In that case the Permanent Court of International Justice (PCIJ) held that "the first and foremost restriction imposed by the international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. […] It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law."[148] What the PCIJ did here was to split up territoriality in two parts.[149] While, on the one hand, enforcement is

[143] *North Sea Continental Shelf* (n 142) para 77.
[144] Kingston, 'Territoriality in EU (Tax) Law: A Sacred Principle, or Dépassé?', *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism* (n 137) chp.2 p.2.
[145] See Kingston, 'Territoriality in EU (Tax) Law: A Sacred Principle, or Dépassé?', *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism* (n 137) chp.2 p.2; Cécile Brokelind, 'Direct Taxation and the Future of EU Harmonization: Lessons from Past Experience' in Edoardo Traversa (ed), *Tax Nexus and Jurisdiction in International and EU Law* (IBFD 2022) 189; James Crawford, *Brownlie`s Principles of Public International Law* (Ninth edition, Oxford University Press 2019) 440,441; Joachim Englisch and Others, 'The financial transaction tax proposal under the enhanced cooperation procedure: legal and practical considerations' [2013] British Tax Review 223, 237-240; Stjepan Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (2018) vol 46, Intertax 194, 195; Kokott, 'The 'Genuine Link' Requirement for Source Taxation in Public International Law', *Tax and the Digital Economy* (n 9) 17.
[146] Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85 - *Ahlström Osakeyhtiö and Others v Commission*, EU:C:1993:120, para 30; see also Englisch and Others, 'The financial transaction tax proposal under the enhanced cooperation procedure: legal and practical considerations' (n 145) 238.
[147] *The Case of the S.S: "Lotus"* (*France v Turkey*) (1927) P.C.I.J. Series A.-No. 10, Judgement No. 9.
[148] *The Case of the S.S: "Lotus"* (n 147) 18, 19.
[149] See Englisch and Others, 'The financial transaction tax proposal under the enhanced cooperation procedure: legal and practical considerations' (n 145) 237; Gadžo, 'The

declared to not be possible outside the territory, on the other hand, legislation was declared to be possible. The PCIJ reasoned that judgement under the fact that international law in 1927 had no provision that would forbid a state to legislate on cases outside of its territory.[150] In other words the PCIJ stated that there is no principle against extra territoriality.

The issue to be examined now, is whether that is still the accepted definition of the territoriality principle. Since the case is almost one hundred years old, one might suspect a development of the principle's definition. According to *Englisch*, *Vella* and *Yevgenyeva* extraterritorial legislation has been limited after the second world war.[151] For that conclusion they rely, among other sources, on a Grand Chamber decision of the European Court of Human Rights (ECtHR), where the Court stated that extraterritorial jurisdiction of a State is "defined and limited by the sovereign territorial rights of other relevant States".[152] For this to be the case, the legislation must have a substantial link to the territory of the legislating state.[153]

From this, a general definition of the principle of territoriality, in its prescriptive expression, can be derived. It follows the one used by *Gadžo* and contains, that a state, or in this case the EU, has legislative powers in a field, if it can establish a link between its territory and the matter it strives to regulate.[154]

4.2.3. Territoriality in the field of tax law

4.2.3.1. Introductory remarks

After considering the principle of territoriality in general, the next section deals with the principle in the field of tax law. Thereby, the link needed for jurisdiction is referred to under the term nexus.[155] This subsection follows the outline used for the principle of territoriality in general. First, the question of whether the nexus requirement amounts to international public law is

Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145) 196,197.

[150] *The Case of the S.S: "Lotus"* (n 147) 19.

[151] Englisch and Others, 'The financial transaction tax proposal under the enhanced cooperation procedure: legal and practical considerations' (n 145) 237.

[152] *Banković and Others v Belgium and 16 Other Contracting States* App no 52207/99 (ECtHR, 12 December 2001) para 59; Englisch and Others, 'The financial transaction tax proposal under the enhanced cooperation procedure: legal and practical considerations' (n 145) 237, 238; See also Crawford, *Brownlie`s Principles of Public International Law* (n 145) 441.

[153] Frederick Alexander Mann, 'The Doctrine of Jurisdiction in International Law (Volume 111)', Collected Courses of the Hague Academy of International Law, 46, <https://referenceworks-brillonline-com.ludwig.lub.lu.se/entries/the-hague-academy-collected-courses/*A9789028614826_01#A9789028614826_01-9> last accessed 25 May 2023; Englisch and Others, 'The financial transaction tax proposal under the enhanced cooperation procedure: legal and practical considerations' (n 145) 238; Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145) 194, 195.

[154] Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145) 197.

[155] Kokott, 'Public International Law and Taxation: Nexus and Territoriality', *Tax Nexus and Jurisdiction in International and EU Law* (n 145) 1.

examined. If that succeeds, afterwards the goal is to set out a definition of what the nexus requirement demands under customary international law. The last step would be to check whether an EU DST would violate the benchmark of a customary nexus.

4.2.3.2. Nexus as customary international law

The question of whether the nexus requirement amounts to international public law is not an easy one to answer. Contrary to the principle of territoriality in general, at this point the analysis has to elaborate into more detail. As stated above, to qualify as customary international law, a principle may not only be settled practice, but it must also be accepted by states as a matter of their legislative practice.[156]

Therefore, the first step is to examine whether the reliance on some kind of nexus is settled practice in international tax law. For this, the current framework of Double Tax Treaties (DTTs) can be used.[157] A limitation to their use is set out by the fact that they are not granting any taxing rights on their own, but merely function as a tool to avoid double taxation, and set out which of the concurring states is allowed to tax an income.[158] Nevertheless a look at what is regulated, and more importantly, what is not regulated in them, can enable a conclusion on how states would tax without them.[159] From this a settled practice could be derivable. As *Gadžo* points out, all of the more than 3000 DTTs never regulate the case where there is no nexus between the person or its income, and both states that are party of the treaty.[160] DTTs always demand a nexus to both states. This shows that states see no need to regulate potential taxation without a nexus in between them.[161] The only reasonable explanation for this is that all states, when agreeing on a DTT, come from the background of assuming that, without a nexus, there will be no double taxation, and therefore, there is no need to sign an agreement to avoid it. This leads to the conclusion that the demand of a nexus requirement amounts to a settled practice in international tax law.[162]

The next point to examine is, whether states accept the settled practice of a nexus as a matter of their legislative practice. This second requirement is also known as opinio juris and is described as a subjective element, or in other words the belief of states that they must oblige to a certain practice.[163] As above, one could, try to use DTTs as evidence. However, if a state acts in a

---

[156] See 4.2.1..
[157] Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145) 202.
[158] Céline Braumann, 'Taxes and Custom: Tax Treaties as Evidence for Customary International Law' (2020) vol 23, Journal of International Economic Law 747, 751.
[159] Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145) 201.
[160] Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145) 203.
[161] Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145) 203.
[162] Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145) 203.
[163] Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145) 200; Braumann, 'Taxes and Custom: Tax Treaties as Evidence for Customary International Law' (n 158) 764.

certain way because it is bound by a DTT, it is nearly impossible to conclude out of its action that it acts like this because it believes to be bound by customary international law.[164] The reason for this lies within the very nature of international treaties. By signing a treaty, like a DTT, states accept a limitation to their power, which they would otherwise execute.[165] Therefore, if anything, what is regulated in DTTs can be used as an argument against opinio juris, and not as evidence in favour of it.[166] In addition, the technique of using what is not regulated as an argument is insufficient here. The mere fact of non-inclusion, of a matter into the treaties, is not enough to prove a belief in an obligation of the states to that extent. Hence, a potential opinio juris regarding a nexus requirement needs to be discovered somewhere else.

It could be found in the domestic laws of the states.[167] In this regard previous research has been carried out by *Gadžo*.[168] He points out that, from the very beginning, states used some sort of nexus as justification of their taxation.[169] But, as *Gadžo* admits himself, this could be explained by the consideration of enforcement difficulties, too.[170] What cannot be explained by enforcement though, are various judgements of domestic Courts around the world which acknowledged the nexus requirement as settled international law.[171] In addition to that, the general literature on international tax law strengthens this notion. Various authors, without going into a detailed explanation of its origins, take a nexus requirement for granted.[172] Moreover, in its failed Financial Transaction Tax (FTT) proposal, the Commission explicitly stated, in the explanatory memorandum, that the tax would have a sufficient link.[173] The only logical explanation for this statement is, that the Commission feels

[164]Braumann, 'Taxes and Custom: Tax Treaties as Evidence for Customary International Law' (n 158) 764.
[165] Tullio Treves, 'Customary International Law', *Max Planck Encyclopedia of Public International Law* (2006) para 48, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1393> last accessed 01 Mai 2023.
[166] Braumann, 'Taxes and Custom: Tax Treaties as Evidence for Customary International Law' (n 158) 766.
[167] Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145) 203.
[168] See Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145).
[169] See Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145) 203, 204.
[170] Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145) 204.
[171] See for judgements and summary Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145) 206-208.
[172] Brokelind, 'An Overview of Legal Issues Arising from the Implementation in the European Union of the OECD's Pillar One and Pillar Two Blueprint' (n 54) 214; Englisch and Others, 'The financial transaction tax proposal under the enhanced cooperation procedure: legal and practical considerations' (n 145) 238, 239; Kingston, 'Territoriality in EU (Tax) Law: A Sacred Principle, or Dépassé?', *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism* (n 137) chp.2 p.14, 15, 17; Kofler and Sinnig, 'Equalization Taxes and the EU's 'Digital Services Tax'' (n 15) 200; Kokott, 'Public International Law and Taxation: Nexus and Territoriality', *Tax Nexus and Jurisdiction in International and EU Law* (n 145) 4,5.
[173] European Commission, Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (2013) COM(2013) 71 final (FTT proposal), 11.

the need to comply with a nexus requirement, too. All of this leads to the conclusion that there is sufficient belief of states that they must oblige to a nexus requirement within their tax laws.

As a result, the requirement of a nexus amounts to international customary law.

4.2.3.3. Nexus definition in the field of direct tax law

4.2.3.3.1. Introductory remarks

After establishing the status as international customary law, the next step is to examine the common definition of the nexus requirement. Once again breaking this term down to one relatively simple definition is not an easy task. As a starting point *Baker's* thoughts are important.[174] According to him, the nexus is different depending on the type of tax.[175] In other words, direct and indirect taxes do not share the same nexus.[176] The latter form of taxes are levied at the place of consumption. Nevertheless, as previously established, a DST in the form of the 2018 proposal would be a direct tax. In that area the matter is more complicated.

According to *Kokott*, traditionally two types of nexuses are known.[177] First, the unlimited jurisdiction over residence, domiciles and nationality, and second, the limited jurisdiction in the case of source taxation.[178] Not problematic is to create the nexus between income of a company that can be connected to a physical presence within one Member State of the EU. However, the goal of a DST would be to tax large multinationals, in order to make them pay more taxes within the EU. The crux is that the targeted services are digitally provided. They do not require any type of physical presence within the state that they are offered in. Therefore, the relevant area for a DST is the nexus requirement in the case of source taxation. Hence, a common nexus definition in this area, is what that part needs to examine.

4.2.3.3.2. Concrete nexus definition for source taxation

The basic idea of source taxation, is to tax where the value is created.[179] Usually, the factors for this are business parts or properties located in a state, or transactions with some sort of substantial connection to the territory of a state.[180] In general, this means that the relevant factor is an economic

---

[174] Philip Baker, 'Some Thoughts on Jurisdiction and Nexus' in Guglielmo Maisto (ed), *Current Tax Treaty Issues 50th Anniversary of the International Tax Group* (EC and International Tax Law Series vol 18, IBFD 2020) 453, 454.
[175] Baker, Some Thoughts on Jurisdiction and Nexus', *Current Tax Treaty Issues 50th Anniversary of the International Tax Group* (n 174) 453, 454.
[176] Kokott, 'Public International Law and Taxation: Nexus and Territoriality', *Tax Nexus and Jurisdiction in International and EU Law* (n 145) 10.
[177] Kokott, 'The 'Genuine Link' Requirement for Source Taxation in Public International Law', *Tax and the Digital Economy* (n 9) 15.
[178] Kokott, 'The 'Genuine Link' Requirement for Source Taxation in Public International Law', *Tax and the Digital Economy* (n 9) 15.
[179] Kokott, 'The 'Genuine Link' Requirement for Source Taxation in Public International Law', *Tax and the Digital Economy* (n 9) 16.
[180] Kokott, 'The 'Genuine Link' Requirement for Source Taxation in Public International Law', *Tax and the Digital Economy* (n 9) 16.

attachment.[181] But is there a concrete customary international law definition included in it?

The mere existence of DTTs could be seen as prima facie evidence against that fact. If all states would apply the same criteria for source taxation, one could argue that there would be little use for DTTs. However, arguing in this manner means entering a slippery slope. Even if source taxation would be identically defined, there would still be a conflict with residence taxation on a worldwide income basis. Therefore, DTTs are of no use in identifying a concrete nexus definition.

What could be of use though, is domestic law. If national tax laws would use the same nexus definition it could be established as settled practice, with opinion juris, and hence, as customary international law. [182] Regarding this previous research has been carried out by *Gadžo*.[183] He conducted a comparative analysis of differences in between source nexus within tax treaties and domestic law.[184] The result of his research is, that apart from the area of income generated through immovable property, every other examined income type or area has at least two different nexus definitions within the state's domestic law.[185] Therefore, states cannot agree on a settled practice and a concrete nexus definition, for source taxation, in the category of customary international law.

4.2.3.3.3. Basic nexus definition for source taxation

Since a concrete definition cannot be established, the next step is to examine a basic definition of nexus for source taxation. Keeping in mind that the nexus requirement in general qualifies as customary international law,[186] it seems that some common denominator must exist.

In tax literature, multiple terms are used to describe the content of a nexus. Used are for instance, "legitimate link",[187] "relevant and definite link",[188] "genuine link"[189] and "reasonable connection".[190] What all of them have in common is that none of them has a specific and tangible definition. In addition, they are linguistically alike to an extent, that they are synonyms.

---

[181] Arnold A. Knechtle, *Basic Problems in International Fiscal Law* (HFL (Publishers) Ltd.) 35, 36.
[182] Stjepan Gadžo, *Nexus Requirements for Taxation of Non-Residents' Business Income: A Normative Evaluation in the Context of the Global Economy* (IBFD 2018) 85.
[183] See Gadžo, *Nexus Requirements for Taxation of Non-Residents' Business Income* (n 182) 81-91.
[184] See Gadžo, *Nexus Requirements for Taxation of Non-Residents' Business Income* (n 182) 86, 87.
[185] Gadžo, *Nexus Requirements for Taxation of Non-Residents' Business Income* (n 182) 86-88.
[186] See 4.2.3.2..
[187] See Brokelind, 'An Overview of Legal Issues Arising from the Implementation in the European Union of the OECD's Pillar One and Pillar Two Blueprint' (n 54) 214.
[188] See Englisch and Others, 'The financial transaction tax proposal under the enhanced cooperation procedure: legal and practical considerations' (n 145) 239.
[189] See Kingston, 'Territoriality in EU (Tax) Law: A Sacred Principle, or Dépassé?', *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism* (n 137) chp.2 p.17; Kokott, 'The 'Genuine Link' Requirement for Source Taxation in Public International Law', *Tax and the Digital Economy* (n 9) 23.
[190] Gadžo, *Nexus Requirements for Taxation of Non-Residents' Business Income* (n 182) 91.

Moreover, the next striking feature is their comparability to the general definition of the principle of territoriality. For that, according to the common definition, a link between the territory and the regulated matter is required.[191] Putting "legitimate", "relevant and definite", "genuine" or "reasonable" before the word link (or connection) does not give more precision to the matter. Therefore, the 'definition' of the specific nexus requirement under customary international law is basically a pale imitation of the general territoriality requirement. The only addition needed to transform the general definition of the principle into the tax nexus is one of the synonymously used terms stated above.

For the matter of simplification this thesis will continue with the term genuine link as the definition.

4.2.3.3.4. What is a genuine link?

While establishing the definition is a step in the right direction, it is not the end of the road. The term genuine link alone is extraordinarily broad and could mean anything. Therefore, the next step, which might feel like a step backwards to the earlier parts of this sub-chapter, is to examine whether there is some concrete content or boundary that exists. Otherwise genuine link would not be more than an empty shell without any truly tangible meaning.

In 1952 *Albrecht* wrote that the taxation of an alien is dependent upon a physical presence within the taxing state's territory.[192] This included property or interest which could be taxed.[193] He also acknowledged economic activity as grounds for taxation.[194] In that regard it is important to note, that he did not classify it as an independent ground.[195] According to *Albrecht*, economic activity always had to be based upon physical presence or property location within a state's territory.[196]

The same line was followed by *Martha* in 1989, as he declares that states are entitled to tax anybody who is present within it, resident or not.[197] Regarding juristic persons, he notes that non-resident companies are generally taxed upon a permanent establishment (PE), which supposably was commonly understood as a fixed place of business.[198] *Martha* defines this alongside the UN and the OECD as "a place of management, a branch, an office, or a workshop" within a state of non-residency.[199]

What both authors show is that at least during the second half of the last century it seems that a genuine link was seen in connection to an actual physical presence within the state that wanted to tax an income. But was that customary international law and is that still true today?

---

[191] See 4.2.2..
[192] Arthur R. Albrecht, 'The Taxation of Aliens under International Law' (1952) vol 29, British Year Book of International Law 145, 153.
[193] Albrecht, 'The Taxation of Aliens under International Law' (n 192) 153.
[194] Albrecht, 'The Taxation of Aliens under International Law' (n 192) 154.
[195] Albrecht, 'The Taxation of Aliens under International Law' (n 192) 166.
[196] Albrecht, 'The Taxation of Aliens under International Law' (n 192) 166.
[197] Rutsel Silvestre J. Martha, *The Jurisdiction to Tax in International Law: Theory and Practice of Legislative Fiscal Jurisdiction* (Kluwer Law and Taxation Publishers 1989) 94.
[198] Martha, *The Jurisdiction to Tax in International Law* (n 197) 95.
[199] Martha, *The Jurisdiction to Tax in International Law* (n 197) 95.

Initially, one could try to look at the CJEU's case law. Unfortunately, there is no answer given within the case law on the stand of the CJEU regarding the genuine link.[200] In its case law dealing with the proposed FTT directive the Court successfully avoided to take a position on the matter.[201] Therefore, scholarly literature again provides the right path. While writing about the FTT proposal *Brokelind* at least doubted that a genuine link can be established without a physical presence.[202] An opposing view is represented by *Christians* and *Magalhães*.[203] The two authors state that in theory there is an unlimited scope to define the nexus.[204] What they are missing though, in the author's view, is a legal argument supporting their case. Their main argument seems to be that the nexus requirement, with the inclusion of a physical presence, is merely a political compromise agreed upon a hundred years ago and that it does not solve the problems of today's digital economy.[205] It is unclear how economical and political thoughts about the origin and the structure of today's economy are supposed to substantially shape the legal definition of a genuine link. Additionally, thereby they question the entire status of the nexus as customary international law, for which they give only practical experience as a reason.[206] Contrary to their arguments, they even acknowledge themselves that the customary status, as presented above,[207] is conceptually coherent.[208] Thus, there is not only no legal argument presented for the view of *Christians* and *Magalhães*, regarding the unlimited scope of the nexus, their statement also lacks a sufficient basis within international law. One cannot simply neglect customary international law in the field of tax law, through a mere statement of practical experience speaking against it. Hence, the position of an unlimited nexus definition, as represented by *Christians* and *Magalhães*, is not justifiable.

Nonetheless, the search for the genuine link definition, which at this point might start to feel like a hunt, needs to continue. *Kokott* reasons that, in the field of income taxation, traditionally a presence within the state that wishes to tax is needed.[209] The new idea which she adds to this discussion is that this presence also includes an intangible presence.[210] She bases this argument on the decisions of various courts of EU Member States which, according to her,

---

[200] Brokelind, 'An Overview of Legal Issues Arising from the Implementation in the European Union of the OECD's Pillar One and Pillar Two Blueprint' (n 54) 214.
[201] See Case C-209/13 - *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, EU:C:2014:283; FTT proposal (n 173).
[202] Brokelind, 'An Overview of Legal Issues Arising from the Implementation in the European Union of the OECD's Pillar One and Pillar Two Blueprint' (n 54) 214.
[203] Allison Christians and Diniz Magalhães, 'A New Global Tax Deal for the Digital Age' (2019) vol 67 Canadian Tax Journal/Revue fiscal canadienne 1153.
[204] Christians and Magalhães, 'A New Global Tax Deal for the Digital Age' (n 203) 1165, 1166.
[205] Christians and Magalhães, 'A New Global Tax Deal for the Digital Age' (n 203) 1164.
[206] See Christians and Magalhães, 'A New Global Tax Deal for the Digital Age' (n 203) 1165, 1166.
[207] See 4.2.3.2..
[208] Christians and Magalhães, 'A New Global Tax Deal for the Digital Age' (n 203) 1165.
[209] Kokott, 'The 'Genuine Link' Requirement for Source Taxation in Public International Law', *Tax and the Digital Economy* (n 9) 18.
[210] Kokott, 'The 'Genuine Link' Requirement for Source Taxation in Public International Law', *Tax and the Digital Economy* (n 9) 18.

have ruled that a presence does not have to be physical and tangible.[211] Another important part of her work is the statement that sales and turnover are not sufficiently recognized as a genuine link within income taxation.[212]

According to *Gadžo*, however, a market-based taxation could be done.[213] As reason for this, he states that this thought is relevant and discussed for a long time and has not been excluded through the creation of the traditional PE concept.[214] Although it might seem differently at first glance, this does not contradict *Kokott's* last statement. One could tax income earned on a market-based approach without relying on sales or turnover as the genuine link to enable the taxation.

Moreover, *Gadžo* states that nations are free in deciding the proxy which they use for determining the territorial source for income.[215] He bases this conclusion on his above-mentioned research about the source nexus definitions in domestic law.[216] Based on the fact that they are different, he concludes that there is no truly tangible definition of the genuine link.[217] The only argument he mentions that has some sort of substance is that a source rule needs to establish the genuine link "between the substance of the economic activity giving rise to income and the state's territory."[218]

Following from *Kokott* and her statement about courts of EU Member States, as well as *Gadžo's* analysis of domestic law, it can be derived that an actual physical presence was never, and at least not is now, part of the customary international law definition of a genuine link.

In conclusion, the genuine link can be established, if there exists a real connection between the territory and the income a state wants to tax. In other words, the reality is that any connection, that is not purely fictious, is enough to fulfil the genuine link requirement under customary international law. The definition is indeed merely a pale imitation of the general territoriality requirement.

4.2.3.4. Compatibility of a DST and the nexus requirement

4.2.3.4.1. Introductory remarks

The final step missing in the analysis of the territoriality principle, is the examination of the comparability, of its expression in the relevant area of direct taxation, and a potential DST. Hence, the following part deals with the

---

[211] Kokott, 'The 'Genuine Link' Requirement for Source Taxation in Public International Law', *Tax and the Digital Economy* (n 9) 18.
[212] Kokott, 'The 'Genuine Link' Requirement for Source Taxation in Public International Law', *Tax and the Digital Economy* (n 9) 21.
[213] Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145) 25, 26.
[214] Gadžo, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (n 145) 36.
[215] Gadžo, *Nexus Requirements for Taxation of Non-Residents' Business Income* (n 182) 295, 296.
[216] See 4.2.3.3.2..
[217] Gadžo, *Nexus Requirements for Taxation of Non-Residents' Business Income* (n 182) 90, 91.
[218] Gadžo, *Nexus Requirements for Taxation of Non-Residents' Business Income* (n 182) 91.

issue whether a DST would fulfil the nexus requirement in the area of source taxation. In other words the question is if, in the case of a DST, a genuine link between the EU's territory and the income it wishes to tax exists. Therefore, a real connection, that is not purely fictious between the taxed income and the territory of the EU would be needed. Important to keep in mind, is the limitation set out by the CJEU. The Court limits the review to the question of a manifest error of assessment through the adoption of a legal act.[219]

As previously explained, a DST targets digital services. Important to mention is that the goal is not to tax the user's participation but to tax the revenues that stem from earnings through input of the users. The place of taxation would be the location of the user. [220] For simplification matters, the following analysis will use the 2018 proposal as a starting point and will examine for each of its listed services whether a genuine link exists.

4.2.3.4.2. Digital advertisement

The first targeted service listed in Art. 3 (1) (a) DST proposal is "the placing on a digital interface of advertising targeted at users of that interface".[221] Those services shall be taxed where "the advertising in question appears on the user's device at a time when the device is being used in that Member State in that tax period to access a digital interface".[222]

A problematic case one can think of here involves three states. For explanation purposes a fictious example of that case will be drawn up. First, an EU Member State, in our case Sweden, in which the advertisement is displayed on the user's device. Second, the state in which the company running the digital interface is located. In this example a social media platform located in the United States. Third, the state of the company that places the ad on the platform, for instance a manufacturing company from South Korea trying to promote its products in Sweden. In this case two out of the three states involved are non-EU states. The payment will occur from the manufacturer in South Korea to the social media platform in the United States and might never get into any contact with Sweden or the EU. Nevertheless, what a DST, on targeted advertisement, would cause in this example is, that Sweden would tax the gross revenue of the payment between South Korea and the United States. The social media platform would be mandated to pay DST to Sweden.

The question to be answered now, is whether the location of the user, that sees the ad in Sweden, is a genuine link to the payment from South Korea to the United States. It must be enough to be classified as a real connection between the taxed income and the territory of the taxing state, that is not purely fictious.

On first sight, taxing a payment that occurs completely outside of the relevant Member State and even outside of the EU's territory seems farfetched. Eventually the first thought one might have in mind here, is the issue of enforcement of such a tax. However, as previously clarified, the purpose of

[219] See 4.1..
[220] See 2.1.; DST proposal (n 1) Art. 5 (1).
[221] DST proposal (n 1) Art. 3 (1) (a).
[222] DST proposal (n 1) Art. 5 (2) (a).

this thesis is to establish whether the tax could be legally enacted and not if it is enforceable.[223] While one would hope that the politicians enacting a tax do factor in enforceability, it is not part of the issue at this point. Beyond that, one might wonder about the lack of an actual physical presence of the taxpayer itself, the United States platform, or the paying customer, the South Korean manufacturer within Sweden. However, as shown above, an actual physical presence is not needed for a real connection.[224] Moreover, the non-paying customer of the taxpayer, the Swedish person seeing the advertisement, is physically present in Sweden. In connection with the research of *Gadžo*, that points towards the allowance of taxing rights to the market state, one might be tempted to accept a real connection, at this point.[225] Especially considering the low standards of the customary international law genuine link requirement itself and the high threshold that the CJEU demands for a violation of the EU's duty to respect customary international law.

However, this is only the case, if all three, the platform, the producer, and the person seeing the ad, are considered part of the same process. Through another lens, the scenario could be seen different. One could split it up into two different processes. First, the interaction between the platform and the manufacturer, and second, the interaction between the platform and its user located in Sweden. With this lens the payment between the manufacturer and the platform, would be separated from the place where the bought service, the advertisement, is displayed. The showing of the advertisement would be part of the second process between the platform and its non-paying customer, e.g. its user, that accepts the showing of ads as part of the use of the social media. Separated like this the payment for the advertisement service, between South Korea and the United States, could not be connected to the location where the advertisement is shown on a device, because it would be no part of the process. Hence, the gross revenue generated from the advertisement service would have no connection to Sweden and levying a DST on it would lack a genuine link. The place of showing of the advertisement would only be part of the second process between the user and the platform. In this second process there is no money paid and therefore no gross revenue generated. Without gross revenue involved, a DST could generate no tax revenue and a tax without revenue would lead taxation ad absurdum.

The core question to be answered now, is which of the two views is the more convincing one. The first view must be the one enacted by the EU legislator, since otherwise the inclusion of advertisements into a DST would make no sense. In favour of the first solution speaks that the buying of the advertisement service, from the viewpoint of the South Korean company, is connected to the place where the advertisement is shown. An advertisement for the Swedish market is likely to be in Swedish and, apart from eventually the western parts of Finland, there is no other place where an ad in Swedish would make sense. Therefore, disconnecting the interaction between the platform in the United States and the manufacturer in South Korea, from the

[223] See 1.4.; 4.1..
[224] See 4.2.3.3.4..
[225] See 4.2.3.3.4..

place where the user is located, for whom the ad is produced, might seem artificial.

However, if one strictly follows the cash flow, the fact remains, that the platform is not paid by the user located in Sweden. When strictly following this view, the income earned of the United States company is generated from South Korea. But is it logical to follow that view? It is undeniable that the platform would not have generated the gross revenue from advertisement for the Swedish market, without the Swedish market. For this it does not matter where the company paying for the ad comes from. The South Korean manufacturer would not pay for an advertisement for the Swedish market, without that market.

Apart from that the last paragraphs argumentations rely heavily on the paying customer, the South Korean manufacturer. However, this is not the taxable person. The taxable person is the platform on which the advertisement is shown. From the point of view of that platform the connection to the place of showing becomes undeniable. Without the market where the ad is shown, the platform could generate no income with advertisement displayed in that market.[226] The market essentially functions as a conditio sine qua non for the income. Denying a connection between the generated gross revenue and a conditio sine qua non for its existence would be illogical. Especially since the requirements for the genuine link connection are abysmally low. Under these circumstances it seems impossible to argue that the connection to the market is purely fictious and not a real one.

Therefore, the genuine link definition in the case of user targeted advertisement is fulfilled.

4.2.3.4.3. Intermediation services

4.2.3.4.3.1. Introductory remarks

The second targeted type of service listed in Art. 3 (1) (b) DST proposal is "the making available to users of a multi-sided digital interface which allows users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users".[227]

In the case of intermediation services Art. 5 (2) (b) DST proposal differentiates between two different ways of determining the location of the user.[228] Hence, this subsection needs to do the same.

4.2.3.4.3.2. Intermediation services with an underlying supply of goods or services

According to Art. 5 (2) (b) (i) DST proposal, a user location, in the case of the use of a "multi-sided digital interface that facilitates the provision of underlying supplies of goods or services directly between users," is deemed

[226] Wei Cui, 'The Digital Services Tax: A Conceptual Defense' (2019) vol 73, Tax Law Review 69, 87.
[227] DST proposal (n 1) Art. 3 (1) (b).
[228] DST proposal (n 1) Art. 5 (2) (b).

to be in the Member State, where "the user uses a device […] in that tax period to access the digital interface and concludes an underlying transaction on that interface in that tax period".[229] Important to note is that it is supposed to not make a difference whether the user is the buyer or the seller, as the proposal deems both participants of the underlying transaction to be equally important for the creation of value to the digital interface.[230]

Essentially, digital marketplaces are targeted here. In this case, once again, three participants are needed. It requires a provider of a digital marketplace, a person selling something on the marketplace and a person buying the good or service through the marketplace from the seller.

For better clarification another short example is drawn up. The marketplace could be located and operating out of the United States. The seller of a tangible good is a consumer located in Turkey and the buyer is a consumer living in Sweden. The marketplace charges a fee for enabling the sale. In our case the fee is charged from the Turkish seller. Under this scenario, a DST would allow Sweden to tax the fees that the United States marketplace receives from the seller in Turkey.

Once more, at first glance, it might seem difficult to assume a real connection between the payment from Turkey to the United States, and Sweden. In the previous example it was argued that Sweden is a conditio sine qua non for the earnings and therefore, it would be illogical to deny a genuine link.[231] That could be different in this category. One could argue that Sweden and its market is not essential for the sale of the good because eventually the seller could sell to another person, in another country. However, this would mean changing the facts. The inner logic of the conditio argument is not based on the impossibility of other scenarios. It is based on the set of facts of every individual scenario specifically. For the specific sale in question, of the example scenario, the buyer in Sweden is essential. Without the buyer the concrete sale would not happen in this way. Therefore, the Swedish market is essential, too. This applies also to general abstract scenarios. Without the market in which a buyer is located, a specific sale manufactured through a digital marketplace could not happen. Hence, there is a real connection between the fee and the place of location of the buyer.

In case the seller's state is the EU Member State, this argumentation logically applies to it, too.

Therefore, in the case of intermediation services with an underlying sale of goods or services the genuine link requirement of international customary law is fulfilled, as the conditio argument applies, too.

4.2.3.4.3.3. Other intermediation services

According to Art. 5 (2) (b) (ii) DST proposal, "if the service involves a multi-sided digital interface of a kind not covered by point (i)," the location is deemed to be the Member State in which "the user has an account for all or part of that tax period allowing the user to access the digital interface and that

[229] DST proposal (n 1) Art. 5 (2) (b) (i).
[230] DST proposal (n 1) 12; See also Kofler and Sinnig, 'Equalization Taxes and the EU's Digital Services Tax', *Tax and the Digital Economy* (n 9) 131.
[231] See 4.2.3.4.2..

account was opened using a device in that Member State".[232] With this type of intermediation services revenues are typically generated through a subscription fee.[233]

An example for this type of multi-sided digital interface is dating portals that demand a subscription fee.[234] This subscription fee is essentially what a DST would target.

In this case only two states can be involved. The one where the interface is located and the one where the paying user is located. Once again, without the user, that is part of the market of one state, the interface could not earn the subscription fee. Hence, there is a real and not purely fictious connection.

Therefore, in the case of other intermediation services a genuine link exists.

4.2.3.4.4. User data

The last targeted service listed in Art. 3 (1) (c) DST proposal is "the transmission of data collected about users and generated from users' activities on digital interfaces."[235] This shall be taxed where "data generated from the user having used a device in that Member State to access a digital interface, whether during that tax period or any previous one, is transmitted in that tax period."[236] What this essentially means is that, in the case of the selling of user data, through a digital interface, the state in which the user was located at the time of the collection of the data, would be enabled to apply DST on the revenue generated through the sale of the data.[237]

This requires three parties. A digital interface, a user, and a third party acquiring the data from the digital interface. Once again, a difficult case one can think of involves three different states and only the user would be located in an EU Member State. Regarding a real and not purely fictious connection what has already been argued applies analogously in that case, too. Without the user and hence, the market of the user, there could be no data collected and therefore, no data sold, too. The argument of the conditio sine qua non thus applies here as well.

Therefore, in the case of user data, a genuine link exists.

4.2.3.4.5. Conclusion compatibility of a DST and the nexus requirement

In the shape of the DST proposal from 2018 a DST would have a genuine link, as one can be established for all of its listed services. Hence, it would fulfil the nexus requirement in the area of source taxation.

4.2.4. Conclusion territoriality

A DST would not violate the customary international law principle of territoriality.

---

[232] DST proposal (n 1) Art. 5 (2) (b) (ii).
[233] DST proposal (n 1) 12.
[234] Kofler and Sinnig, 'Equalization Taxes and the EU's Digital Services Tax', *Tax and the Digital Economy* (n 9) 131, footnote 210.
[235] DST proposal (n 1) Art. 3 (1) (c).
[236] DST proposal (n 1) Art. 5 (2) (c).
[237] Kofler and Sinnig, 'Equalization Taxes and the EU's Digital Services Tax', *Tax and the Digital Economy* (n 9) 131.

4.3. Nationality

The second principle examined is the principle of nationality. It can be classified as customary international law.[238] Additionally, nationality in general is accepted as an elementary component within international taxation.[239] However, the matter is more complicated when looking at corporations. The nationality of a corporate entity is more difficult to define than it is of a natural person.[240] Legal persons cannot have a citizenship in the classic form of a passport. Therefore, not many countries use the nationality of legal persons to determine their direct taxation.[241] Nevertheless, taxation based on, for example, the place of incorporation, the place of registration, or the seat of a company, could be seen as an expression of the nationality principle.[242]

However, that needs no detailed examination for the purposes of this thesis. As seen in the previous section, all the services targeted by a DST would aim at legal persons that do not have any nationality like connection to the EU and one of its Member States.[243] The objective would be to tax corporations without this connection and the factor relied upon is the location of the user and not a connection to the taxed corporation.

Therefore, the nationality principle is not relied upon as a connecting factor and subsequently, cannot be violated. It is simply out of scope in the case of a DST.

4.4. Conclusion violation of the EU's duty to respect international law

A DST would neither violate the principle of territoriality nor the principle of nationality under customary international law. Hence, it would be no violation of the EU's duty to respect international law.

5. Conclusion

The aim of this thesis was to in depth analyse the two potential legal issues for a DST of whether there is a legal basis for it under EU law and whether its implementation would violate the EU's duty to respect international law. The proposed aim was to find obstacles or boundaries in that regard. In conclusion, the analysis conducted in this thesis shows that, for a DST, there is a boundary, which it cannot overcome, independently of whether it would be enacted according to the DST proposal from 2018 or as an own EU resource. Hence, in the eyes of the author, it is impossible to implement a DST in compliance with EU law at its current level. The EU does not have a sufficient legal basis under which a DST could be implemented. Art. 113 TFEU is, contrary to the Commission's view, not the correct legal basis because a DST qualifies as a direct tax under EU law. For Art. 115 TFEU the

[238] Gadžo, *Nexus Requirements for Taxation of Non-Residents' Business Income* (n 182) 48.
[239] Martha, *The Jurisdiction to Tax in International Law* (n 197) 47.
[240] Gadžo, *Nexus Requirements for Taxation of Non-Residents' Business Income* (n 182) 70.
[241] Gadžo, *Nexus Requirements for Taxation of Non-Residents' Business Income* (n 182) 70.
[242] Gadžo, *Nexus Requirements for Taxation of Non-Residents' Business Income* (n 182) 71.
[243] See 4.2.3.4..

material requirement and the principles of subsidiarity and proportionality are not fulfilled. Especially, the principle of conferral would essentially be eliminated through using Art. 115 TFEU. Art. 116 TFEU does not work, too. Nevertheless, a more detailed analysis of Art. 116 TFEU as a legal basis could be an area for future researchers to carry light into the shadow of whether the Article could be used as a legal basis for any legislation in the field of tax law. Contrary to that, there would be no issue with the EU's duty to respect international law because the customary international law principle of territoriality, the nexus requirement in the field of tax law, simply does not set a high bar. Nevertheless, as an area for future research a closer analysis of the CJEU's case law regarding the principle of territoriality could be an asset to the legal community.

As last words, the author wishes to express, addressed at the EU legislator, to recommend the continuing of the search for other ways of taxing the digital economy, as a DST seems impossible.

Bibliography

EU Sources

EU Primary Law

Consolidated version of the Treaty on European Union [2012] OJ C326/13.

Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

EU Secondary Law

Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States [2003] OJ L 157/49.

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1.

Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States [2009] OJ L 310/34.

Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [2011] OJ L345/8.

Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L 193/1.

Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union [2022] OJ L 328/1 (Pillar Two Directive).

Other EU Sources

‘Digital Taxation, Timeline’ <https://www.consilium.europa.eu/en/policies/digital-taxation/> (last accessed 25 May 2023).

European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Double Taxation in the Single Market (2011) COM(2011) 712 final.

European Commission, 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, Commission Staff working Document (2018) SWD (2018) 81 final.

European Commission, Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (2013) COM(2013) 71 final (FTT proposal).

European Commission, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence (2018) COM(2018) 147 final (SDP proposal).

European Commission, Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services (2018) COM(2018) 148 final (DST proposal).

European Parliament Committee on Budgets, Opinion on Digital taxation: OECD negotiations, tax residency of digital companies and a possible European Digital Tax (2021) 2021/2010(INI).

'Fair Taxation of the Digital Economy' < https://taxation-customs.ec.europa.eu/fair-taxation-digital-economy_en> last accessed 25 May 2023.

'Questions and Answers on a Fair and Efficient Tax System in the EU for the Digital Single Market' <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_2141> last accessed 25 May 2023.

Books

Chalmers D, Davies G, Monti G, *European Union Law: Text and Materials* (Fourth edition, Cambridge University Press 2019).

Crawford J, *Brownlie`s Principles of Public International Law* (Ninth edition, Oxford University Press 2019).

Douma SCW, *Legal Research in International and EU Tax Law* (Kluwer 2014).

Englisch J, *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism* (IBFD 2016).

Gadžo S, *Nexus Requirements for Taxation of Non-Residents' Business Income: A Normative Evaluation in the Context of the Global Economy* (IBFD 2018).

Haslehner W, Kofler G, Pantazatou A, Rust A, *Tax and the Digital Economy: Challenges and Proposals for Reform* (Series on International Taxation vol 69, Kluwer Law International B.V. 2019).

Hultqvist A, Lindholm J, *The Power to Tax in Europe* (Swedish Studies in European Law vol 14, Hart Publishing 2023).

Knechtle A A, *Basic Problems in International Fiscal Law* (HFL (Publishers) Ltd.).

Maduro M P, Azoulai L, *The Past and Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010).

Maisto G, *Current Tax Treaty Issues 50th Anniversary of the International Tax Group* (EC and International Tax Law Series vol 18, IBFD 2020).

Martha R S J, *The Jurisdiction to Tax in International Law: Theory and Practice of Legislative Fiscal Jurisdiction* (Kluwer Law and Taxation Publishers 1989).

Panayi C HJI, Haslehner W, Traversa E, *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing Limited 2020).

Schenk A, Oldman O, *Value Added Tax: A Comparative Approach* (Cambridge University Press 2007).

Terra BJM, Kajus J, *Introduction to European VAT* (IBFD 2023).

Traversa E, *Tax Nexus and Jurisdiction in International and EU Law* (IBFD 2022).

Wattel P J, Marres O, Vermeulen H, *Terra/Wattel - European Tax Law* (vol 1, 7th edition, Kluwer Law International B.V., 2019).

Scholarly Publications

Albrecht A R, 'The Taxation of Aliens under International Law' (1952) vol 29, British Year Book of International Law 145.

Braumann C, 'Taxes and Custom: Tax Treaties as Evidence for Customary International Law' (2020) vol 23, Journal of International Economic Law 747.

Brokelind C, 'An Overview of Legal Issues Arising from the Implementation in the European Union of the OECD's Pillar One and Pillar Two Blueprint' (2021) vol 75, Bulletin for International Taxation 212.

Christians A, Magalhães D, 'A New Global Tax Deal for the Digital Age' (2019) vol 67 Canadian Tax Journal/Revue fiscal canadienne 1153.

Cui W, 'The Digital Services Tax: A Conceptual Defense' (2019) vol 73, Tax Law Review 69.

Dimitropoulou C, 'The Proposed EU Digital Services Tax: An Anti-Protectionist Appraisal Under EU Primary Law' (2019) vol 47, Intertax 268.

Englisch J, Vella J, Yevgenyeva A, 'The financial transaction tax proposal under the enhanced cooperation procedure: legal and practical considerations' (2013) British Tax Review 223.

Gadžo S, 'The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal' (2018) vol 46, Intertax 194.

Kaźmierczak M, 'EU Proposal on Digital Service Tax in View of EU State Aid Law' (2022) Financial Law Review 93.

Kofler G, Sinnig J, 'Equalization Taxes and the EU's 'Digital Services Tax'' (2019) vol 47, Intertax 176.

Lips W, 'The EU Commission's digital tax proposals and its cross-platform impact in the EU and the OECD' (2020) vol 42, Journal of European Integration 975.

Maduro M P, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’ (2008) issue 1, European Journal of Legal Studies 137.

Mann F A, ‘The Doctrine of Jurisdiction in International Law (Volume 111)’, Collected Courses of the Hague Academy of International Law, < https://referenceworks-brillonline-com.ludwig.lub.lu.se/entries/the-hague-academy-collected-courses/*A9789028614826_01#A9789028614826_01-9> last accessed 25 May 2023.

Nogueira J F P, ‘The Compatibility of the EU Digital Services Tax with EU and WTO Law: Requiem Aeternam Donate Nascenti Tributo’ (2019) issue 1, International Tax Studies 3.

Szudoczky R, Károlyi B, ‘Progressive Turnover Taxes under the Prism of the State Aid Rules: Effective Tools to Tax High Financial Capacity or Inconsistent Tax Design Granting Advantages?’ (2020) European State Aid Law Quarterly 251.

Newspaper Articles

Horobin W, ‘France Says EU Must Prepare Digital Tax as Global Deal Blocked’, *Bloomberg* (20 February 2023) <https://www.bloomberg.com/news/articles/2023-02-20/france-says-eu-must-prepare-digital-tax-as-global-deal-blocked> last accessed 25 May 2023.

Paez S, ‘EU Will Propose Digital Levy Regardless of OECD Tax Deal’ *Tax Notes* (2 September 2021).

Other Sources

‘Digital Services Taxes in Europe’ <https://taxfoundation.org/digital-tax-europe-2022/> last accessed 25 May 2023.

OECD (2020), Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/beba0634-en> last accessed 25 May 2023.

Treves T, ‘Customary International Law’, *Max Planck Encyclopedia of Public International Law* (2006), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1393> last accessed 01 Mai 2023.

Table of Cases

CJEU

C-209/13, United Kingdom of Great Britain and Northern Ireland v Council of the European Union, EU:C:2014:283.

C-122/15, C, EU:C:2016:391.

C-475/17, Viking Motors AS and Others v Tallinna linn and Maksu- ja Tolliamet, EU:C:2018:636.

C-75/18, Vodafone Magyarország Mobil Távközlési Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, EU:C:2020:139.

C-403/19, Société Générale SA v Ministre de l'Action and des Comptes publics, EU:C:2021:136.

C-649/20, Orde van Vlaamse Balies and Others v Vlaamse Regering, EU:C:2022:963.

AG Opinions

C-475/03, Banca popolare di Cremona Soc. coop. arl v Agenzia Entrate Ufficio Cremona, Opinion of AG Jacobs, EU:C:2005:183.

C-366/10, Air Transport Association of America and Others v Secretary of State for Energy and Climate Change (AATA), Opinion of AG Kokott, EU:C:2011:637.

C-122/15, *C*, Opinion of AG Kokott, EU:C:2016:65.

ECtHR

Banković and Others v Belgium and 16 Other Contracting States App no 52207/99 (ECtHR, 12 December 2001).

ICJ

North Sea Continental Shelf, Judgement, I.C.J. Reports 1969, p.3.

PCIJ

The Case of the S.S: "Lotus" (France v Turkey) (1927) P.C.I.J. Series A.- No. 10, Judgement No. 9.