Non-resident companies tax liability in Norway

Limited tax liability under the taxation act 2-3 (1) letter b, the permanent establishment and the arm's length standard – Discussion of new rules of nexus and profit allocation for businesses without physical presence.

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Preface

"In this world nothing can be said to be certain, except death and taxes"[1]. Benjamin Franklin might have been right about death and taxes in 1789, but today the situation is very different, at least for taxes. The integration of national economies and markets has increased due to the recent rapid and expansive digital transformation, putting an enormous strain on the international taxation[2]. The weaknesses in the current rules have created opportunities for BEPS[3], having led to a total loss of between 100-240 billion in lost revenues annually[4]. In the time to come, bold policy moves are required to restore the confidence in the system of international taxation, so that death and taxes, once again can be as certain as in 1789.

In the writing of this thesis, I have done my fair share of pushing the boulder up the mountain only to see it roll down again[5]. Throughout the writing process, my supervisor, helped me whenever it was needed. I would also take this opportunity to offer my gratitude to my good friend and fellow student, Baard, for the suggestions on how to structure the thesis. Not to mention the patience of my dear, Nara, without whom I would not manage the countless studies, day and night. I would also like to thank my parents for having educated me and shown me the right path in life.

What started out as an exciting topic of international taxation law, became a maze of unsolved questions, where every turn leads to a dead end. For every book, article, blog or forum post, my knowledge increased. The motto before going toe to toe with books such as "E-Commerce and source-based income taxation[6]" or the "E-commerce and the Effects of

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[1] Franklin, Benjamin in a Letter to Jean-Baptiste Le Roy 13 November 1789. Available at http://www.notable-quotes.com/f/franklin_benjamin.html [Accessed 28. May 2020]
[2] To be concise, International means in this context the "international aspects of domestic laws". Olivier and Honiball (2008) p. 1
[3] Base Erosion and Profit Shifting refers to tax planning strategies used by MNEs that exploit gaps and mismatches in tax rules to avoid paying tax. This definition is taken from the OECD website www.oecd.org/tax/beps/about [accessed the 28th of May 2020]
[4] Figures are taken from the website www.oecd.org/tax/beps/about [accessed the 28th of May 2020]
[5]Camus, The myth of Sisyphus. "Camus uses the Greek legend of Sisyphus who is condemned by the gods for eternity to repeatedly roll a boulder up a hill only to have it roll down again once he got it to the top, as a metaphor for the individual's persistent struggle against absurdity of life" www.Britannica.com/topic/The-Myth-of-Sisyphus [accessed 5 June 2020]
[6] Pinto (2003)

Technology on Taxation. Could VAT be a solution?”[7] or reading the final report of the OECD on addressing the challenges of the digitalisation of the economy or the interim report of 2018 tax challenges arising from digitalisation was something as simple as “sic parvis magna”. Any great victory starts with a small step.

In the thesis, my views on the new suggested rules on income taxation by the OECD 2020 will come forth. The over seven-years long battle[8] to ensure that profits are taxed where economic activities take place and value is created may soon be over. “Things fall apart, the centre cannot hold. [Action 1] is loosed upon the world”.[9]

Abbreviations and Acronyms

ADS - Automated Digital Service

ALS - Arm’s length standard

BEPS - Base Erosion and Profit Shifting

CFB – Consumer-facing Business

MLI – Multilateral Instrument to Implement Tax Treaty Related Measures to Prevent BEPS

MTC – Model Tax Convention of the OECD[10]

PE – Permanent establishment

R&D – Research and Development

TP – Transfer Pricing

[7] Bardopoulos (2015)
[8] The timeline starts from the release of the OECD BEPS report of 2013, in which the action plan of 15 actions was adopted. (OECD (2013), *Addressing Base Erosion and Profit Shifting*, OECD Publishing, Paris, https://doi.org/10.1787/9789264192744-en.)
[9] Adapted from “The Second Coming” by W.B. Yeats [Action 1] substituted [Mere anarchy]
[10] OECD (2017a), *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD Publishing, Paris, https://doi.org/10.1787/mtc_cond-2017-en.

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Chapter 1

1. Introduction

1.1. Topic

The topic is how the digitalisation of the economy affects the tax sphere. Latest technological developments have flaunted the shortage of international tax rules capable of tackling the new difficulties due to the digitalisation of the economy.

Recent reports by the OECD by the OECD[11], UN [12] and other scholars [13] confirm the existing rules lack the flexibility to solve these issues of nexus, data and characterisation going beyond the scope of BEPS[14]. Highly digitalised MNEs profit from large user-bases, but are not taxed accordingly. The nexus rules based on physical presence and profit allocation rules based on the ALS are incompatible. There must be established nexus and profit allocation rules that are unconstrained by these deficiencies.

The overall research topic focuses on whether the proposed solutions on nexus and profit allocation rules in the OECD (2020A)[15] mitigate these insufficiencies in the nexus and profit allocation rules of the MTC (2017).

[11] OECD (2015), OECD (2018a), OECD (2019a), OECD (2019b) and OECD (2020a)
[12] UN (2017)
[13] Kasper, Owens and Sim (2020); Avi-Yonah and Kimberly (2019)
[14] OECD (2015) Para. 245
[15] OECD (2020a) pp. 8, 9 and 10

1.2. Background

Already in the 90s economists, Grubert and Mutti[16] and Hines and Rice[17] had started researching on BEPS. During 1990-2009, BEPS purportedly increased in scope according to Lohse and Riedel[18], but as claimed by Clausing[19], it increased. Clausing's assertation was that the development of technology had permitted the increased entanglement of an MNEs corporate structure and thus opened for BEPS.[20]

The TP methods of the ALS were becoming flawed.[21] With the increasing distance between rules and reality, finding solutions became critical to ending the tax avoidance strategies by MNEs globally. The OECD took its first steps to combat BEPS in 2013.[22] In the final report,[23]the OECD emphasized the technology's facilitating role in allowing businesses to operate within the market jurisdiction without a physical presence. In 2018 the Task Force of the Digital Economy delivered an interim report, containing an in-depth analysis of the issues affiliated with the digitalisation of the economy.[24]

In January 2019, the Inclusive Framework suggested a two-pillared proposal to tackle these challenges.[25] Pillar one contained three proposals on new rules of nexus and profit allocation: The user participation, the marketing intangibles and the significant economic presence proposal (SEP). Pillar two contained a new proposal on Global anti-Base Erosion (GloBE).

The Secretariat Proposal[26] unified these proposals into a ”Unified Approach”, leading to the profit allocation rules Amount A, B and C and a new nexus proposal, primarily based on sales in the market jurisdiction. In January 2020[27]the members of the Inclusive Framework,

[16] Grubert and Mutti (1991), pp. 285-293
[17] Hines and Rice (1994), pp. 149–182
[18] Lohse and Riedel (2013) p. 17.
[19] Clausing (2009) pp. 709-710
[20] Clausing (2009) pp. 709-710
[21] Avi-Yonah (2010) pp. 3-18
[22] OECD (2013)
[23] OECD (2015) para. 246
[24] OECD (2018a) chapter 2, 3 and 5 (para. 378-401).
[25] OECD (2019a)
[26] OECD (2019b)
[27] OECD (2020a)

counting approximately 140 countries, agreed upon an outline of the design of Pillar one and expressed their ”strong support for reaching a multilateral agreement”.[28], [29]

The members are committed to continuing the work towards a consensus-based long-term solution until the end of 2020. That is if it is not postponed due to the extraordinary circumstances and the significant downswings in most markets around the world.

1.3. Purpose and scope

The mainline of the research topic revolves around the legal aspects of the new taxing right, Amount A. In chapter 2, the author will analyse the rationale for the new nexus and profit allocation rules and compare them to the existing. The scope will be discussed using existing principles of international tax law as points of reference.[30] Last, the author will mention the risk of double or multiple taxations in the interaction between Amount A, B and C.

In chapter 3, the author will discuss the existing tax liability of non-resident companies, that will be in-scope under Amount A, cf. act 26 March 1999 No. 14 relating to the taxation of net wealth and income (hereinafter the taxation act) section 2-3 (1) letter b.[31] Any country's taxing rights must derive from domestic laws. Regardless of the conclusion on tax liability cf. section 2-3(1) letter b, the proposal of Petter Stordalen (2019) will be touched upon, and the author will outline the way forward.

The scope of the thesis can be limited to these three key points:

1) The reach and scope of the internal laws in the taxation act section 2-3 (1) letter b on tax liability for non-resident automatic digital services and the current regulation of nexus and profit allocation in the existing bilateral tax treaties.[32]

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[28] OECD (2020A) para. 1
[29] See Appendix A, figure 1 to see the design of pillar one and pillar two
[30] OECD (2003)
[31] The English version is presumed to have the same content and shall be interpreted in the same way as Skatteloven 2-3(1) bokstav b. This is purely for academic reasons. (unofficial English translation by PwC)
[32] Only the tax treaties based on MTC will be in-scope

2) The legal consequences of shifting from a principle of reference of physical presence to a principle of reference of active and sustained engagement, seen from the perspective of current international taxation principles and the rationale of existing rules and the shift from a separate entity accounting based on the ALS to the formulary apportionment-method.

3) Legal issues as well as legal policy issues related to the method of implementation of the new nexus and profit allocation rules of Amount A.

1.4. Sources

In the de lege ferenda discussion of the new nexus and profit allocation rules of Amount A, the primary sources will be OECD's sources.[33] Other sources will be scholarly literature, opinions and reviews.

In the de lege lata interpretation of Norwegian taxation law, the primary source is the taxation act. Other sources are the preparatory texts[34], legislative intent, case law, tax practise, legal theory, international sources of law, other countries' law and policy considerations.[35] Standard legal method.

The MTC is the primary source of interpreting the bilateral tax treaties based on it. Since bilateral tax treaties are subject to international law cf. the Vienna Convention on the Law of Treaties of 1969 article 2: "[A] Treaty" is an "international agreement concluded between States in written form and governed by international law" and article 1 "The present Convention applies to treaties between States". Even though Norway has not ratified the treaty, most of its articles are customary international law [36] cf. ICJ-statutes article 38 letter b, such as article 31-33. Domestic laws also play a role, through the lex specialis rule in article 3 (2) of the MTC.

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[33] OECD (2020A), OECD (2019b).

[34] Ot.prp. nr. 86 (1997-1998) Ny Skattelov; Innst. O. nr. 40 (1998-1999) Innstilling fra finanskomiteen om ny skattelov ;Ot.prp. nr. 35 (1990-1991)

[35] Eckhoff/Helgesen (2001), pp. 73, 79 and 83.

[36] Or at least reflect customary international law. I.C.J Reports 1997, p. 66, para. 109 and I.C.J. Reports 1991, pp. 69-70

Chapter 2

2. Amount A – an increased taxing right to the Market State

2.1. Introduction

Amount A, B and C form a three-tier approach to allocating profits that have become significantly harder to allocate due to the digitalisation. Applied uniformly they should re-stabilise the international tax system, ensure tax rule-consistency and simplicity. The OECD (2020a) contains the following description:[37]

"**Amount A –** A share of residual profit allocated to market jurisdictions using a formulaic approach applied at an MNE group (or business line) level. This new taxing right can apply irrespective of the existence of physical presence, especially for automated digital services.".

"**Amount B –** A fixed remuneration based on the ALP for defined baseline distribution and marketing functions that take place in the market jurisdiction."

"**Amount C –** The return under Amount C covers any additional profit where in-country functions exceed the baseline activity compensated under Amount B. A further aspect of Amount C is the emphasis it gives to the need for improved dispute resolution processes."

Amount B is a floor on the return attributable to the baseline physical marketing and distribution activities. Amount C applies the current TP to allocate profit exceeding the baseline activity. Amount C complements Amount B. Amount A, on the other hand, allocates the residual profits[38] through a formulary apportionment method.

[37] OECD (2020A) para. 10

[38] Residual profits or non-routine profits is the profit that remains after Amount B (and Amount C) have been applied.

Part 2.2 will discuss the scope of Amount A, part 2.3 will analyse the nexus rule and the increased taxing right to market States, part 2.4 will analyse the formulary apportionment method and compare it to the existing ALS, part 2.5 introduces remaining considerations to Amount A, and part 2.6 holds the conclusion.

In the further, only Amount A will be treated explicitly.

2.2. Scope of Amount A[39]

2.2.1. Introduction to the scope

Businesses in the scope of Amount A can have an active and sustained engagement in the economy of a market jurisdiction, "...through activities in, or remotely directed at that jurisdiction".[40]

The MTC separates between businesses with income from business activities with a "permanent establishment" and those without a "permanent establishment". [41] The interpretation is based on the businesses and not their activities, thus no differentiation between businesses based on their degree of digitalisation or ability to operate in scale without mass.

Amount A will apply to ADSs and CFBs, based on their business activities and not their business. The author partly disagrees with these changes. The SEP-proposal of OECD 2019a might have been a more balanced approach to tackling the challenges of the digitalisation of the economy, mostly in terms of its harmony with the Ottawa Taxation Framework Conditions (OTFC). The SEP-proposal will be used as a point of reference to understand the new suggested proposal in OECD (2020a). [42]

[39] See Appendix A, figure 2 for an overview over the in-scope businesses
[40] OECD (2020A) para. 10
[41] An antithetic interpretation of Article 7 of the MTC
[42]See Appendix B, Figure 1 for a complete assessment of the proposal's compatibility with the OTFC.

2.2.2. Analysis of the scope

2.2.2.1. Automated Digital Services (ADS)

In this analysis, the question is what constitutes an ADS. The OECD defines ADSs as "businesses that generate revenue from … automated digital services that are provided on a standardised basis to a large population of customers or users across multiple jurisdictions".[43] Examples of in-scope businesses are cloud storage, online advertising and online search engines.

The ordinary meaning of "customers or users" suggests it should be applied in B2B as well as B2C relations. A customer can be a business, a purchaser of advertising services. The definition excludes C2C-relations as only "businesses" are in-scope.

The interpretation of standardised is unclear. One interpretation can mean beforehand readied services sold broadly to groups on a standardised basis. However, a focus on the standardisation of the services will undermine the value that is created by user interaction. Customers of Google cloud can, through an in-feature service add-on program called G-suite[44], customise their add-on features based on their specific preferences. Google is a highly automatized business that provides a service from a remote location, but the standardization comes at the user's initiative. If Google collects user-data to customise data that they sell to advertising companies in the jurisdiction of the user, then this is not a standardization, but customization. Where the line is drawn between standardization and customization is unclear.

The understanding of an automated digital service is that it applies a high degree of digital technology to accomplish a function or a workflow. It does not exclude partially automated

[43] OECD (2020A) para. 22
[44] See more at gsuite.google.com [Accessed 28 May 2020]

businesses, but the higher degree of human interaction the less it will be “standardized”. Non-automated digital services are out of the scope.

Businesses requiring a high degree of human intervention and judgment such as legal, accounting, engineering, architectural or consulting services fall outside of the scope.[45] If such services were to be standardized, they would fall within the scope if they apply to a” large population of customers or users across multiple jurisdictions”. Multiple means more than one and will if standardised cross-border services are offered from one country and purchased in the other - for example, through a smartphone application, where the degree of automatization and standardisation is high. To exclude them entirely would leave room for MNEs to fully automate consulting services using artificial intelligence that replaces human workload, thus obtaining an advantage over other automated businesses.

It is also unfair for sectors that already are highly regulated like the financial services sector, more specifically, the gambling sector. Social media platforms, search engines and other like-automated digital services are not as highly regulated as the gambling sector. First, the gambling sector needs to seek authorisation from a national regulator before it can operate within the jurisdiction. Second, it is already subject to sector-specific taxes. Why the OECD has included these types of services under the definition of ADS is a mystery and seems more politically than legally reasoned.

The scope can be circumvented if businesses were to de-standardize their services or allow more-user interactive features in the creation of value. The author finds the scope of the ADS too fragile, and it might fall victim to tax avoidance strategies. Due to the word limit, the scope will not be addressed more in detail.

[45] See (OECD) 2020 para. 23

2.2.2.2. Consumer-Facing Businesses (CFB)

In this analysis, the question is what constitutes a CFB. It should "[...] cover businesses that generate revenue from the sale of goods and services of a type commonly sold to consumers, i.e. individuals that are purchasing items for personal use and not for commercial or professional purposes."[46] It should also " bring into scope businesses that generate revenue from licensing rights over trademarked consumer products and businesses that generate revenue from licensing a consumer brand (and commercial know-how) such as under a franchise model".

That should include this non-exhaustive list of businesses (a few are mentioned):

"personal computing products … franchise models, such as licensing arrangements involving the restaurant and hotel sector and automobiles".[47] The author will only look at businesses generating revenue through the sale of goods and services, as there is no room to also treat franchise models.

The understanding of "[...]the sale of goods and services of a type commonly sold to consumers..." opens for both direct and indirect sales to consumers. The focus is on the "goods and services", cf. "of a type commonly sold to consumers", meaning that it is not the buyer that determines if a business is in scope, but the goods and services. What commonly is sold to consumers is not a fixed point of reference, as there can be country-based differences, region-based differences and geographically based differences. "Commonly sold" may, therefore, not be a precise reference. If understood subjectively by each interpreting taxing authority, each sale to a consumer will be subject to a discretionary assessment, where the contractual agreement between the retailer and the buyer will be decisive for whether the non-resident company becomes in-scope. The author insists on adding details on how to perform this interpretation in, for example, the OECD commentary as a business that commonly sells goods to businesses can become in-scope due to imprecisions in the definition.

[46] OECD (2020A) p. 11, para. 27
[47] OECD (2020a) para. 28

The OECD's statement that most of the B2B, extractive and commodities industry shall be carved-out,[48] is debatable from the point of view of neutrality. Oil becomes gasoline, which is sold to consumers at gas stations. Wheat becomes bread, which is sold to consumers at supermarkets. The value of the oil would diminish if there were not any market for gasoline. The idea is that extractive or commodities companies may be taxed in the market States, where they sell their products in the manufactured form. Oil (extractive) and pipelines (commodity), however, need to be manufactured before they can be useful to a consumer because in their raw form they do not constitute "goods ... that are commonly sold to consumers". The extraction of natural resources is also heavily reliant on the labour force in the source State, and the sale of it is heavily reliant on the labour force in the market State. Gasoline must be sold in gas stations. Gas stations are also taxed for the gasoline they sell, in Norway at approximately a rate of 60 per cent. Supermarkets are taxed for the bread they sell, through income tax and VAT.

Furthermore, most countries regulate the extractive industries through contractual agreements, where the State stays in control of the resources. The result of an extra tax on the manufactured product of oil (gasoline), would result in double taxation of the oil company. (taxed for the extraction in State A, and for the sale of the manufactured product in State B) The State is also heavily involved in the taxation, direct control and to a great extent the managing of the national resources.

The B2B business can only be out of scope if the goods or services are not" commonly sold to consumers". An example would be the financial services sector.

[48] See OECD (2020a) para. 30

2.2.3. SEP-proposal

The author instead favours the significant economic presence proposal (SEP) of the OECD (2019a). In-scope businesses of the SEP generate revenue by "(1) the existence of a user base and the associated data input, (2) the volume of digital content derived from the jurisdiction, (3) billing and collection in local currency or with a local form of payment, (4) the maintenance of a website in a local language, (5) the responsibility for the final delivery of goods to customers or the provision by the enterprise of other support services such as after-sales service or repairs and maintenance, or (6) sustained marketing and sales promotion activities; either online or otherwise to attract customers.[49]

SEP would be a better solution in terms of scoping more broadly, but still targeting the digital presence. It targets the presence of a business instead of specific business activities and does not differentiate between digital and non-digital activities, nor between sub-sectors of digital companies, such as online marketplaces, search engines and other digital companies. In terms of not violating the already existing principles of taxation in the OTFC, such as flexibility, neutrality, efficiency, certainty and simplicity, the significant economic proposal constitutes a more appropriate scoping rule.

2.2.4. Summary

The definitions regarding the scope of Amount A lack rationale, objectivity and clarity. Interpretations based on subjectivity, arbitrariness and country-based preferences, may increase the unclarity. The trade-off for a scope that addresses the non-routine returns are imprecise definitions.

The weakness in the definition of ADS lies in the word “standardized”, because it opens for tax avoidance strategies. It has a clear delimitation towards customised services, that might also generate revenue from a market jurisdiction. It does not adequately state the degree of human intervention that will make the business out-of-scope.

[49] OECD (2019a)

The separation of the two in-scope categories between ADS and CFB does not seem plausible. The author suggests including all businesses, apart from extractive and commodities industries and financial services sectors, limiting the differentiation and creating fewer market distortions. All businesses that are presumed to be in the same sphere shall be treated equally. The primary focus should be on the ability to operate from abroad without physical presence and have an active and sustained engagement in the market jurisdiction, more aligned with the SEP-proposal. The work is, however, still in progress and the OECD also states that "further work will be needed on the definitions of some of the key terms identified above".[50]

2.3. Nexus rule of Amount A[51]

2.3.1. Introduction

The nexus rule is different for ADS and CFB. For both, it is based on indicators of significant and sustained engagement with market jurisdictions.[52] Moreover, it shall be a stand-alone rule, applicable only to the new taxing right.

For ADSs, the only requirement for nexus is a revenue threshold based on local sales in the market jurisdiction. For CFBs, there must be a combination of the cross-border sale of tangible goods and significant and sustained engagement. The OECD states that "cross-border sale of tangible goods is not in itself enough to constitute a significant and sustained engagement in that jurisdiction."[53]

Any tax should be contrasted with the overarching principles and guidelines, such as, for example, neutrality, flexibility, inter-nation equity and efficiency. In the next parts, the author will attempt to find the rationale behind an increased taxing right to the Market State by

[50] OECD (2020) para. 29
[51] See Appendix A, figure 2 to see the threshold at different levels
[52] OECD (2020A) para. 36
[53] OECD (2020A) para. 39

looking at the origins of international tax law and the fundamental theories and principles on which it is built.

2.3.2. Increased taxing to the Market State

2.3.2.1. Historical overview

International taxation law is meant to regulate the international aspects of domestic taxation laws. Taxation remains within the fiscal sovereignty of countries, but when for example a company operates both in its residence State and another State, the countries must come together to divide the taxing rights between them in a manner that benefit each country.

There are two primary principles of international taxation law, namely the residence principle and the source principle.

The resident principle justifies a right to taxation based on a nexus between the tax subject and the State. Usually, this is regulated in the domestic laws of the country. In Norway, the regulation thereof can be found in section 2-1 (1) and 2-2. Businesses have a residence when they are" resident" cf. 2-2(7). A resident company's tax liability "applies to all wealth and income in Norway and abroad" cf. 2-2(6).

In the MTC a resident company is liable to tax" by reason of his domicile, residence, place of management".

The source principle justifies a right to taxation based on the nexus between the tax object and the State. This nexus can be economical or territorial. The source state is the "state that in some way or other is connected to the production of the income in question, to the state where value is added to a good... and the country in which the business conducts its trade and earns its income is usually referred to as the source country". [54] Others justify source taxation because the income of the MNE derives partly from its use of a State's infrastructural advantages.

[54] Pinto (2003) p. 48 - The opinions of Vogel, Klaus.

The principle of source taxation is regulated domestically in section 2-3 of the taxation act in Norway. In the OECD, it is related to PE in article 7, defined in article 5. The OECD Commentaries remark that "...it reflects the international consensus that, as a general rule, until an enterprise has an [PE] in another State, it should not properly be regarded as participating in the economic life of that other State to such an extent that the other State should have taxing rights on its profits.[55]

The underlying theories of the source taxation are the benefit theory, the entitlement theory and the principle of economic allegiance. The benefit theory is basically that the taxpayer and the State benefit from each other. The taxpayer exchanges something of value in return for something of value, because he receives benefits such as public goods and services for the tax paid. The entitlement theory is based on the source State's entitlement to exclusive taxation rights on tax income generated within its geographical borders. The economic allegiance theory builds upon the idea of an obligation toward the "origin of wealth", more specifically that a taxpayer has an obligation to the State, from where its income derives.[56]

2.3.2.2. Why should the market State be given an extended taxing right?

Why should the market State be allowed to tax the income deriving from a business that has no physical presence in the country? The benefit theory does not give any answer. The increased economic nexus to a State's economy is an argument for an extended taxing right to the Market State under the principle of "origin of wealth" and "the entitlement theory", because both underline that any business should pay taxes from the country from where the money derives.

Skaar argued that even if a business does not have a physical presence in the source country, it can still benefit substantially from its infrastructure and should contribute by way of taxation. PE is merely a piece of evidence of economic allegiance, not the reason for source-

[55] OECD Commentaries to article 7 nr. 11

[56] For a more detailed explanation: Devereux. and Vella (2014); Pinto (2003) pp. 22-23

state taxation.[57] The politically agreed insertion of the PE in both the MTC and the UN model tax conventions does not fully support the arguments of Skaar.

A critical factor in the determination of tax liability is risk-taking. Where did the company perform risk-taking economic activities? If it was in the source State, that indicates source taxation and the opposite if it was in the residence State. The question is why, should the market State be allowed to tax income if all the R&D (risk-taking) has been performed in the residence State? The highly digitalised businesses rely on the value-creation using their algorithms (intangibles), and this value can also be said to derive from the residence State. Giving the market States an extended taxing right might underestimate the value of investments and limit the company's opportunities to develop. The ability-to-pay principle should be kept in mind when distributing the overall tax burden. A company with high costs of R&D might not be capable of paying the taxes imposed on it. The ability-to-pay principle should, in those cases function as a proxy of equality.

Tax fairness is an absolute factor that must be considered in any interpretation of tax law. To impose taxes on companies must be done fairly and equitably, be it built on the principle of economic allegiance, the benefit principle, the entitlement theory or the ability-to-pay principle. All in all, it is hard to build the exact reasoning of the market State’s right to tax based on historical principles, mostly because businesses operating within a jurisdiction without any physical presence are a new phenomenon.

2.3.3. Permanent establishment

This subparagraph will discuss the de lege lata scope of the PE.

Article 5 paragraph 1 gives the general definition of the term PE, enshrined in Article 7 of the MTC: “the term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on.”

[57] Skaar (1991) p. 559-560

The definition contains the following conditions:[58]

1) There must be a "place of business", I.e. a facility such as premises or, in certain instances machinery or equipment[59] 2) "The place of business must be "fixed", I.e. it must be established at a distinct place with a certain degree of permanence"[60]3) The business of the enterprise must be carried on through this fixed place of business.

In paragraph 2 the term lists up from a-f of examples of places of business, each of which can be regarded as constituting PE under paragraph 1 if they meet the requirements.[61]

The term place of business covers any premises, facilities or installations used for carrying on the business of the enterprise whether they are used exclusively for that purpose.[62] Furthermore," a place of business may also exist where no premises are available or required for carrying on the business of the enterprise and it simply has a certain amount of space at its disposal"[63]

The MTC refers to "a place of business" within the country, harmonizing with the idea that sufficient physical presence was a threshold for tax liability. Both the ADSs and CFBs operate from a remote location without any place of business.

The main problem is that the MTCs only solution to tax digitalised businesses is to tax them using the location of the server to establish PE. [64] Under the current rules of the MTC, a company X (digital service multinational company) with a server only in Norway, will only be liable to pay taxes in Norway, even if it is subject to taxation in other countries if Norway has corresponding bilateral tax treaties.

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[58] OECD (2017)
[59] OECD Commentaries article 5, nr. 6
[60] OECD Commentaries article 5, nr. 6
[61] OECD Commentaries article 5, nr. 45
[62] OECD Commentaries article 5, nr. 10
[63] OECD Commentaries article 5, nr. 10
[64] OECD Commentaries article 5, nr. 125

There are two main problems with the definition as it is now.

First, a remotely operating MNE may not operate a server in the tax jurisdiction. Digital companies also apply a method, called load-shedding, meaning that the user request is processed through several servers, whereas the business activity will take place within many jurisdictions. Not consistent nor long enough to constitute PE in the respective case. Should Norway be able to tax Google (the parent company) for value that went through maybe six different sub-sections of a firm, or somewhat independent ones and six servers in six different jurisdictions? Under the current PE, the answer is a definite no.

Second, if it does operate from a server within the country, a digital service company can quickly shift its server from country A to country B, then from country B to country C, before it amounts to being " fixed". Often users may also be directed to other servers through a function called load-balancing if the Norwegian server was under a heavy workload at the time of the transaction. Then the operation will be performed by a server in Germany, and if the contract is concluded in Germany, then Germany would have the taxing right under current rules.

The traditional income tax provisions dismally lack the flexibility to be applied effectively. The concept of physical presence and the virtual world are two opposites. The changes that were effectuated by action 7 were modest, reducing the ability to use the preparatory or auxiliary exception to the PE rule or enforcing regulations on the agent rule. Businesses can avoid this by re-routing the core activities to servers in low-tax jurisdictions and keep the auxiliary activities on servers in high-tax jurisdictions.

In the next paragraph, the author will analyse the new nexus rule from the perspective of ADS and CFB. The author has a proposal based on the significant economic presence proposal in OECD (2019a) as a solution for the CFB nexus.

2.3.4. Analysis of the nexus rules of Amount A

2.3.4.1. Automated digital services

A threshold test on the sale of automated digital services on a standardised basis to a large population of customers or users across multiple jurisdictions is the nexus rule for ADS. The nexus threshold is suggested at a gross revenue of EUR750M, avoiding unnecessary compliance costs for smaller businesses. The OECD also states in paragraph 35 of OECD (2020a) that even for in-scope MNE groups a further carve-out may be considered for businesses "where the total aggregated in-scope revenues are less than a certain threshold". There will also be additional local thresholds.

The use of a sales-nexus is not a new concept. In several US states, they have collected taxes from remote sellers with no physical presence within the specific State. The U.S Supreme Court in South Dakota v. Wayfair, Inc.[65] even upheld the constitutionality of a South Dakota statute requiring remote sellers to register, collect and remit sales taxes if they met the threshold of either $ 100.000 in South Dakota sales or 200 transactions with South Dakota customers.[66]

However, there are several issues with a sales-based threshold as a nexus rule. First, several points of transaction will be hard to identify. At some of these points, one might encounter independent enterprises that are in a contractual relationship with the provider of a service. Will the rules be applied bilaterally between the country that issues the initial transaction and the end-client in the receiving State or will the ADS be required to report the actual amount of revenue, which is sourced from jurisdiction A or B, minus what went to the intermediate enterprise (out-of-scope third party distributor)? The details of this cannot be fully assessed. A solution might be to add the total amount of sales in the jurisdiction to the threshold and solve it through a deduction in the residence State, at least simplifying the nexus test.

[65] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018)
[66] See Zaiken (2020) et. al.., for a thorough analogy review vis-à-vis Pillar 1

It is manageable for most tax authorities to identify the primary points of distribution within a given supply chain. It becomes increasingly complex, however, to identify the activities conducted by third parties. According to the OECD (2020A), there should be a global threshold test and a local nexus test, but how the revenue-sourcing principles will differ from the conventional ones is still unclear. In the case of Virtual Private Networks, the information will be inaccurate, since the IP will be different from the actual one[67].

Applying only a sales-formula will, on the other hand, give a consistent approach that will provide predictability for the business, instead of several factors of nexus, such as assets and payroll. Such nexuses may lead to MNEs diverting their workforce to low-income countries.

Another question relates to where the sale is concluded. In Norway, because the user is in Norway, or where the contract is "signed”? The digital advertising is offered by Google (from a server abroad) and accepted by a customer in Norway. The conclusion of a contract is the agreement, which automatically occurs when the customer in Norway has paid his amount or agreed to being charged based on cost per click (CPC) on advertising services or cost per thousand impressions (CPM). All these services are brought to Norwegian customers, and the value of the advertisement is based on the user-data collected on Norwegian end-users of search engines or digital platforms. If a location-based sales threshold is to be applied, the risk of VPN-use is still high. Rules on revenue sourcing must be clear, especially in terms of sale of advertisement, so that companies cannot increase the sales in low-tax jurisdictions.

If businesses are required to collect data on the non-paying users' location, this might violate GDPR[68] or data privacy regulations in domestic laws. Users would, in this case, need to consent to effectively being tracked and located for identification. It is uncertain exactly how the OECD will do it, but the author suggests an allocation to the country of the advertiser if

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[67] This is important since the IP provides information on whether the customer performed the transaction from State A, B or C.

[68] See EU General Data Protection Regulation GPDR article 5 letter e

that is the first third party customer. That seems better than tracking the "eyeballs" suggested by the OECD. [69]

Another problem is if a company is both CFB and ADS. The OECD distinguishes between the nexus requirements for each. For ADS, the only nexus is that they reach a threshold based on sales, and the nexus of the CFB is still being developed. The author suggests that such a company becomes wholly considered as a CFB for taxing purposes, providing a clear and consistent rule. Another solution would be to split the revenue and apply it to two different thresholds. Such an approach would be inefficient, inconsistent and burdensome, contrary to the OTFC.

2.3.4.2. Consumer-facing businesses

A CFB will have a nexus if it reaches a sales threshold and if it has an active and sustained engagement in that jurisdiction. Since the OECD has not published a final design, the evaluation of the rules is difficult.

Some starting points would be that tax should be levied on profits/losses, not on revenue. VAT applies to revenue. The revenue is the total amount of earnings before all expenses are calculated. If taxpaying jurisdictions can separate taxes subject to VAT and the new amount A, however, there will be no problems of collision.[70]

Furthermore, another problem of sales-nexus is to drill through the layers of systems in order to identify the final customer. A puma shoe is sold through a third-party reseller first from Germany to France to Algerie. Is the system supposed to be applied at every step throughout the supply chain like VAT is or will it be more like a retail sale, that is applied at the final point of sale, between France and Algerie.

[69] See OECD (2020A) p. 13, para. 41

[70] If similar changes are done to the domestic laws to accommodate the changes of Amount A.

Is the German company legally bound by tax authorities to track their goods being sold? This would depend on the contractual relationship between the German and the French company, but such an approach will prove very challenging as the goods will change hands multiple times before it ends up in the consumer's hands. This might even lead to the use of unaudited figures to ascertain the sales allocation key, which is unrealistic. A solution can be to follow the VAT-regime.[71]

Can the SEP solve the nexus problematics?

Initially, the significant economic presence proposal was a mixed nexus and profit allocation proposal. In this regard, the author will attempt only to display the nexus and threshold parts of the SEP.

Since it will only be applied to the CFBs in this essence, we must reform its nexus. The author suggests that there should be similar factors that will make the presence of a CFB significantly enough to create a nexus. If we keep the sales approach and add the following six alternatives for a sustained engagement, the CFB will have to comply with what was outlined in the OECD 2020.

The consequence will be that more businesses in the ADS will fall in under the CFB-scope and thus be subject to the CFB-nexus, but the author notes that this is a better approach. Not only does it harmonize better with the Ottawa Taxation Framework in terms of neutrality and flexibility, but since the leap from the principle of reference to physical presence will be less, reaching a consensus might prove less difficult.[84]

The SEP has significant advantages in terms of neutrality, because it targets the presence of a business instead of specific business activities, proving a balancing factor of the taxation system. Such a non-discriminative approach is preferred by the author.

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[71] See for example, OECD (2017) See the definition of consumer and customer status, as well as the simplified VAT registration regime for foreign vendors supplying B2C digital services cross-border.

Its broad scope might, however, lead to businesses being tax liable in jurisdictions, in which they have not decided to operate, which will be the case for many digitalised companies. Uber has support centres that are in countries, where they do not engage in the daily business, such as Uber Eats and the ridesharing. The local revenue thereof will be calculated into the total revenue sum, even though this may seem very unreasonable.

One might risk having a considerable amount of users and customers in a local jurisdiction providing for a certain amount of value creation, disregarding the costs of development and the negative consequences of returns, tax compliance and other determinative factors that may result in negative value creation, albeit, that the threshold is reached. In other words, would it be fair if the market State taxed a company with high research and development costs in the parent country, without deducting costs and expenses? The answer to that must be no because it will increase the overall tax burden of those companies.

The SEP operates different thresholds, and it is highly suitable for the diversified number of contributions by users, customers and consumers in the digitalised economy. One of its strengths is that it first defines the presence and then seeks to attribute profits. It can be based on existing legal tools, and instead of breaking with the concept of PE establishment, a bending of the rules seems possible.

The proposal applies to a vast number of non-resident countries with a digital PE establishment concept that can achieve equal taxing rights and non-discrimination between the digital companies and the brick and mortar economy. The proposal can also be implementable in developing countries that have a weaker tax administration. An expansion of the PE establishment concept makes it flexible in terms of changes in the structure of the digital multi-sided business models. In terms of (intra-nation)fairness, it gives the taxing powers to the jurisdiction where the company has the user-base, performs the sales or the contracts. It does also fully consider the mentioned multi-sided business model's use of algorithms and artificial intelligence in the value creation of a non-resident company.

2.3.5. Summary

Amount A will give the taxing powers to the jurisdiction where the sales are registered for ADS or where there is a sales nexus and active and sustainable engagement for CFB. For ADS, VPN-distortions may give inaccurate results, due to the insecurity of the user's actual location. For CFB, the primary issue is to achieve fairness when using intermediaries. If the first company should be tax liable for the second company's interactions with the third parties (customers), it will not harmonize well with the OTFC. A material threshold on global and local revenues can enhance the efficiency in the collection of taxes. The PE-concept is flawed as it is now, but the SEP might offer a better solution through the expansion of the PE concept, making it able to address constant changes in the business models of MNEs. The problem of distancing the rule from the principles of the OTFC to creating a nexus rule that will scope more income is not suggestable.

2.4. Profit allocation rules of Amount A

2.4.1. Introduction to formulary apportionment

Amount A is based on a formula that will identify the portion of residual profits, which should be allocated to "eligible" market jurisdiction.

The quantum of Amount A will in contrast to the separate entity approach of the traditional TP rules based on the ALS, be based on a calculation of the tax base on a measure of profit (before tax – PBT) derived from the consolidated group financial accounts.[72],[73]

[72] OECD (2020A) paragraph 43

[73] A consolidated financial statement in this regard, is basically only a financial statement of the entire group earnings.

The profit apportionment is performed through four steps, where the profit margin is z %, the non-routine profits are y %, the profit attributable to the eligible market jurisdictions are w %, and other factors such as trade intangibles will be v %.

The first step is to calculate the whole tax base (PBT), which is derived from the consolidated group financial accounts - z %. Second, through an analysis of routine and non-routine profits, the total amount is split into x %, the deemed routine profit and y %, the deemed non-routine profit. The third step is to distinguish between different profits; one distinction is, for example, between trade and marketing intangibles. The market jurisdiction profits w % is then separated from the total deemed non-routine profits, v %. Last, the remaining amount is what constitutes the new taxing right of Amount A, and this can be allocated to market jurisdiction by an allocation key, based on the number of sales of an MNE in the given market jurisdiction.

Therefore, the author would like to be very precise in the interpretation of the newly introduced formulary apportionment and that the ALS will still be applied, but for the Amount A. The historic background will be given in 2.4.2. In 2.4.3, the advantages and disadvantages will be discussed. In 2.4.4 the author will analyse the new formulary apportionment-rule from a legal point of view. The summary will be given in 2.4.5

2.4.2. History of profit allocation rules

Researchers have traced the origins of ALS to the 1920s. With time the ALS was manifested in article 9(1) of the OECD model tax Convention.

The ALS was drafted in 1963 and adopted by the OECD Council on 11 April 1977 as article 9(1) in the MTC. Now the ALS states that: “...Where conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions,

have not so accrued, may be included in the profits of that enterprise and taxed accordingly."[74]

The application of the ALS depends on determining the conditions that independent parties would have agreed in comparable transactions in comparable circumstances. Such comparable factors can be the contractual terms of the transaction, the risk taken, or assets used, in-market economic circumstances or the business strategies pursued by the parties.

OECD has already made changes to the understanding of PE (action 7) with article 5.4(1) and added according explanations in the commentary. As a part of action 8,[75] the mandate of the BEPS released additional guidelines to approach Hard-to-Value Intangibles more appropriately. Under action 10,[76] the OECD added further guidance on when the profit split method may be relevant. Under action 10, guidance on when to apply the profit split if business operations cannot be evaluated in isolation from each other. A new TP Guidance on financial transactions on Actions 4 and 8-10 was newly published in February 2020[77]. The changes did not strengthen the ALS enough to allocate the non-routine profits, as there are no comparable relations to apply the TP methods.

Nevertheless, neither formulary apportionment nor ALS is infallible. The OECD has wanted to introduce the formulary apportionment, but also keep the ALS for situations where it is still useful. As mentioned before, the new system will create two systems for taxation. One that follows the three-tier system applying formulary apportionment for Amount A and the ALS for Amount B and C, and one that follows the rules of the old TP guidelines based on the ALS, if none of the Amounts are applicable.

[74] Letter a and b are cut out as they are anyway consumed by the add-on, cf. "in either cases .."
[75] OECD (2018b)
[76] OECD (2018c)
[77] OECD (2020b)

2.4.3. Advantages and disadvantages of formulary apportionment

The new profit allocation rule is the formulary apportionment, which often was criticised for its arbitrariness. Some believe it would tilt revenues away from developing countries toward countries with vibrant markets, that it completely abandons the ALS on which the tax system has been based for almost a decade and that it would usually lead to a disproportional administrative burden in comparison to the revenue tax that States get.[78] The author finds this criticism too extreme in this situation, as the formulary apportionment only will be applied for Amount A.

Those who advocate for the use of formulary apportionment acknowledge that it is inherently arbitrary, but not to a greater extent than the ALS because formulary apportionment is, I.e. less susceptible to manipulation by intra-MNE contractual arrangements.[79]

Since the formulary apportionment applies a global revenue threshold, MNEs would need only to file the detailed returns on which the calculation shall be based. This will reduce the tax system's complexity because a country-by-country based income allocation would not be relevant anymore.

Due to lack of space, the author stops here but recognizes that there are many more arguments pro and contra for the application of formulary apportionment. One can be its clear effect on the transparency and consistency with respect to **sensitive issues** in tax administrations.[80]

[78] See more Avi-Yonah and Clausing (2019)
[79] See Avi-Yonah (2010) p. 14
[80] See more in Avi-Yonah (2010) pp. 6,19 and 22.

2.4.4. Analysis and discussion of Amount A

The first step is to calculate the whole tax base (PBT), which is derived from the consolidated group financial accounts z %. Amount A is a separate reallocation mechanism that does not change existing calculation methodologies and TP. The author suggests that the parent jurisdiction calculates and files detailed returns. If a tax authority would like an estimate of the tax base, simplified returns can be filed in the relevant local market State. Information exchange on request should be mandatory, provided that a detailed calculation addresses the tax base adequately.

The starting point is the whole tax base (PBT). The PBT is the preferred profit measure to compute Amount A. Operating with different accounting standards is not preferable. The OECD has also stated that it will implement loss carry-forward rules. A company that had a negative net operating income one year will be able to reduce its tax liability in the following years since they "carry their loss forward".

Second, through an analysis of routine and non-routine profits, the total amount is split into x %, the deemed routine profit and y %, the deemed non-routine profit. The OECD has said that the residual profit used for Amount A will be the result of simplifying conventions agreed on a consensual basis.[81]The routine activities fall under the scope of Amount B and C based on the existing TP guidelines. The completion of step two shall not disturb the existing framework and shall function only as an overlay.

The third step is to distinguish between different profits, for example, between trade and marketing intangibles. The legal difficulties in separating marketing intangibles from trade intangibles should not be underestimated. The definition of trade intangibles is "commercial assets other than a marketing intangible"[82]. A marketing intangible is" an asset used in

[81] OECD (2020A) para. 10, footnote 10.

[82] The definition is from International Tax Review; Tax Reference Library No. 86 on the Intangibles 2nd edition

business operations that is customer-facing"[83] or as referred to in the TP guidelines "an intangible … that relates to marketing activities, aids in the commercial exploitation of a product or service and has an important promotional value for the product concerned. Depending on the context, marketing intangibles may include, for example, trademarks, trade names, customer lists, customer relationships and proprietary market and customer data that is used or aids in marketing and selling goods or services to customers."

The nature of the twining together of the trade and marketing intangibles may cause an array of disputes. It is, therefore, crucial that the MLI attempts to clarify the definition thereon. An example could be factors such as workforce and MNE synergies that could fall outside the definition of marketing intangibles because it could also include trade intangibles. In terms of the legal process of profit attribution, one will first have to split the income between trade and marketing intangibles and then amongst the different jurisdictions in which the entity operates.

The last step within the FA method involves the separation of the market jurisdiction profits w % from the total deemed non-routine profits, v %. The allocation key (the nexus) allocates the profit to the eligible market jurisdiction percentual according to the number of sales. The nexus has already been discussed above.

2.4.5. Summary

There is still work left to be done concerning the profit allocation, regarding the tax base determinations, the quantum and the revenue sourcing under amount A. The OECD emphasizes the need to understand differences in accounting standards and business line and regional segmentation for the purposes of computing Amount A.[84]

The four steps may prove to be complex for tax administrations and taxpayers, especially in determining the tax base and the OECD, therefore, wants to apply simplification measures in

[83] Op. Cit. p. 8

[84] See OECD (2020a) page 22

this regard. The use of simplified returns filing could be a solution in most cases, where a more comprehensive report at any time may be requested by the tax administration.
The formulary apportionment is not a new concept, but a highly criticised one. Limiting it to only a small segment might improve the overall efficiency of the system.[85]

2.5. Other considerations concerning amount A.

Amount A will also affect multiple jurisdictions, and often there will be no bilateral double taxation treaties. Since a company will have to adhere to two different systems, it is essential to avoid double or multiple taxations. In both cases, the most logical rule would be that the parent country is the primary tax authority responsible for auditing and raising enquiries and thus responsible for hindering double or multiple taxations. In both cases, the most logical rule, would be that the parent country is the primary tax authority responsible for auditing and raising enquiries and thus responsible for hindering double or multiple taxations.

However, the credit-method might prove complex if an MNE has a broad tax profile. The traditional system was not established for Amount A; hence a solution could be to negotiate multilateral APAs. APAs provide solutions, but they are also quite complicated. The author notes that one must find a method where the surrendering State can get a deduction of the Amount A profit allocated to other jurisdictions, allowing for a deduction, that is more adapted to the new taxing rights. The exemption of taxes seems easier than applying the credit-method, since the surrendering company can merely reduce its taxable profits to be reallocated, and the Market States can increase their profits accordingly.

The problem of the credit-method is that it is determined by domestic law rules on nexus and sourcing, with many domestic limitations. [86] If one is to apply the credit-method, the relieving countries must ensure that the market county tax allocated to a taxpayer in the country is eligible for credit.

[85] See Avi-Yonah (2010); (2019) for the same opinion.
[86] Section 16-20 of the taxation act

There will also most likely be disputes on what the routine functions to be remunerated under the first two steps of the calculation. If countries apply different benchmarks, some countries might get more of Amount A than what they are entitled to. Amount C may interfere with A because as mentioned above, it is meant to complement Amount B, thus the scope is broader. Binding dispute resolutions are needed, but countries may look at this as a violation of their sovereignty. Any bilateral binding dispute resolution may also be treaty-based and not apply international law contrary to systems like, for example, the EUs, where an arbitration court able to interpret EU law, would be violating its autonomy.[87]

2.6. Conclusion

The new nexus rules will shift the principle of reference from physical presence to the principle of reference of active and sustained engagement. For ADSs the nexus will largely be based on sales, with a global and local threshold. For CFBs the nexus has not been clearly defined, but it is likely to also be on sales. The author suggests the VAT-system, as it has many advantages in terms of familiar practice and clear and consistent rules, especially when they are trading in goods. And the significant economic proposal, because it complies to a high degree with the Ottawa Taxation Framework Conditions.

If the OECD manages to clarify the nexus of the CFBs, create a stand-alone nexus rule that does not cause confusion, design clear and administrable sourcing rules and fix the overlapping possibility between CFBs and ADSs by defining at least which nexus rule that should be applied, the project might have success.

There remains work on the legal parameters, more specific on the differences between CFBs and ADS. The revenue and profit threshold must be so to avoid the problematic issues of businesses that have a negative net income, but a sizeable gross income, still having to pay taxes. Then there are the new nexus rules and treaties that must be harmonised. Last, there is the requirement of revenue-sourcing rules.

[87] See Eckes (2018) https://europeanlawblog.eu/2018/03/13/dont-lead-with-your-chin-if-member-states-continue-with-the-ratification-of-ceta-they-violate-european-union-law/ [accessed the 1st of June]

Chapter 3

3. Limited tax liability – foreign enterprises tax liability to Norway

3.1. The taxation act 2-3 (1) letter b

3.1.1. Interpretation of Taxation Act 2-3 (1) letter b

According to section 2-3 (1) letter b, non-resident companies in Norway may still be liable to pay taxes on "wealth in, and income from, business activities, which... it is engaged or participates, and which take place in this country or are managed from this country...".

The paragraph is built on the source taxation principle, with the purpose of taxing income with nexus to Norway.[88]

There are three conditions that cumulatively amount to tax liability. First, the non-resident company's activity in Norway must constitute a "...business activity". Second, the business activity must be one in which the non-resident company is "engaged or participates". Last, the business activity must "take place [in Norway]."

3.1.1.1. "Business activity."

In the taxation act, there is no legal definition of "...business activity". The supreme court applies the understanding of the wording of section of 5-1(1) cf. 5-30(1) in an array of cases. It is also widely believed by many authors, including Zimmer[89] and Berg-Rolness[90] and by the ministry of finance's interpretation statement[91].

[88] Ot.prp. Nr. 86 (1997-1998) p. 34
[89] Zimmer (2017) p. 192
[90] Berg-Rolness (2009) p. 413
[91] UFIN-2006-38A

In the interpretation of the taxation act, all former case law linked to the understanding of section 2-3 (1) letter b is relevant, since the taxation act of 1999 is meant to have the same content of the old section 15-1 letter c.[92]

In the preparatory text, it is written that "one must perform a discretionary assessment of whether these economic activities have been performed over a period and had a certain extent, been performed at the risk of the taxpayer himself and objectively considered as profitable".[93] The preparatory texts state that the period and extent cannot be constituted by individual transactions.[94] Furthermore, it must be performed at the taxpayer' risk. The taxpayer must bear the risk of winning or losing, and the business activity must be performed by himself or others that can be identified with him.

As the last requirement, they must have an economic character and objectively be capable of generating a positive net income. The wording of this excludes subjective motivations. It does not exclude a temporary negative income, but it must be capable of generating a positive net income in the long run.[95]

Economic activity must also be delimited towards activities that are non-economic (recreational activities). The activity does not have to be entirely economic in its entirety because most activities will have shared purposes. If the importance of economic activity is disproportionally less than the importance of non-economic activity, it should not be deemed an economic activity.

3.1.1.2. "Engaged [in]."

The wording of "......engaged [in]" relates to who is performing the activities connected to the business activity. It requires a nexus between the activity and the engagement of the

[92] Ot.prp. Nr. 86 (1997-1998) p. 34
[93] Ot.prp. Nr. 86 (1997-1998) p. 38
[94] Ot.prp. Nr. 86 (1997-1998) p. 48
[95] The same interpretation is confirmed in Rt. 1985 p. 319 (UTV-1985-386). See: Tjomsland (1985) pp. 207-220

company, for example, through the employees or anyone that can be identified with the company.

It distinguishes between those who are engaged and those who are not engaged, functioning as an extension of the risk condition explained in 1.1.1. Those who take the risk will in most cases also be those that are “...engaged [in]”.

3.1.1.3. “Take place”

The wording of "...take place" only states a requirement of nexus between the business activity and Norway. Neither the preparatory texts nor case law gives a definite answer to the full scope of the ordinary meaning.

The purpose behind section 2-3 (1) letter b[96], was to collect taxes on all income with a nexus to the business activity herein. All income from Norwegian sources should be taxed domestically. Even though there is a nexus between income and Norway, there must also be a business here. [97] However, the preparatory texts are from the beginning of the 20th century, and all form of physical cross-border related business activity was scale with mass.

No cases have explicitly assessed the tax liability of a company that operates from a server abroad providing services to Norwegian users. Case law is limited in scope.

In one of the more relevant cases, HR-2015-2488-A, the question was whether the income of a leasing contract on a drilling rig was subject to taxation under section 2-3(1) letter b. The question was if the non-resident enterprise operated the leasing contract to such an extent that they should be tax liable for the income thereof in Norway.

The management company had performed all the activities concerning the leasing business, but the foreign company had taken all the decisions regarding entering into a leasing contract.

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[96] Ot.prp. Nr.5 (1909) p. 37
[97] Ot.prp. Nr. 86 (1997-1998) p. 38

The majority concluded that since the management company only had performed auxiliary functions in order to manage the leasing, and the actual value was created by the signing of the agreement, the business activities had "[not] taken place" here. [98]

The author does not find any support to the interpretation of whether a business activity on a server abroad amounts to the fulfilment of the condition "...take place" in Norway in the case HR-2015-2488-A.First, the case HR-2015-2488-A has been criticised for its weak and inconsistent approach to the interpretation of whether a business activity "[took] place herein".

The author finds that the dissenting opinion argues more precise, as the majority seem to mix the condition of "managed" and "...take place". The main reason to not find the company tax liable is that decisions at a superior level were taken abroad. But still vital functions in the managing of the business took place in Norway, through the management company.

Furthermore, the majority used case law that did not directly support its arguments. The case of HR-2000-327"Safe Services" did not directly concern the condition" take place", but rather the condition "engaged [in]". In HR-2011-1309-A the question was rather whether some of the income on the Norwegian continental shelf should be re-allocated to the head office in Switzerland, thus be exempted from Norwegian taxation cf. the petroleum taxation act section 2, cf. section 1.

The supreme court in HR-2015-2488-A draws a line between core and auxiliary activities.[99]This distinction is also found in the MTC, to separate activities which amount to a business having PE and those that do not. A core activity is understood as an activity that is essential for the income itself, whereas an auxiliary function relates to supporting activities that do not directly lead to the income. Sales would be understood as core activities, whereas

[98] HR-2015-2488-A paras. 63 and 69
[99] HR-2015-2488-A para. 56

mere storing of data information would not.[100] The same distinction was also used in the case HR-2011-1309-A[101].

The OECD Commentary in paragraph 4.1 also adds to the fact that if the totality of preparatory activities amounts to core activities, they should be regarded as core activities.

The MTCs distinction can be used a basis for further interpretation as it has some support in case law, although little weight for our question. However, with a careful approach, as Zimmer[102] points out that the auxiliary functions do not represent a known tax term. If taxpayers are liable to pay taxes due to diffuse terminology, this will not harmonize well with underlying fundamental principles of taxation like predictability and certainty. The purpose of the Norwegian internal laws is to regulate the taxation of, for example, wealth and income of domestic taxpayers, whereas the double taxation treaties shall regulate the relations between taxpayers who are resident in one or both countries. The purpose of the double taxation treaties and the purpose of the Norwegian Taxation Act are, therefore, different.

In part two and part three, the tax liability regarding non-resident companies in the form an ADS and a CFB that entire operate from a remote location will be discussed. Above, the author has explained that for business without a physical presence in Norway, that do not have a representative or management company herein, as in the case of HR-2011-2245-A (Dell) or HR-2015-2488-A (Odfjell), there is no answer given in case law. The ordinary meaning does not make precise the scope of the tax liability under section 2-3(1) letter b. The preparatory text states that an underlying principle is to keep the income in Norway, that is derived from a source in Norway.

According to Eckhoff/Helgesen[103], policy considerations/decision are important when the preparatory text is clear, but the ordinary meaning is vague or cannot be interpreted clearly. The principle of legality on the field of taxation limits the scope of extensive interpretations, but less of specifying interpretations. This is directly linked to the principle of predictability

[100] OECD Art 5(4)
[101] HR-2011-1309-A para. 42
[102] Zimmer (2017) p. 245
[103] Eckhoff/Helgesen (2001), pp. 73, 79 and 83

and that a company shall be able to understand his tax liability by reading the law, in coherence with the preparatory text, to which it is subject.[104]

3.1.2. Limitations imposed on the taxation act 2-3(1) letter b

The most critical limitation to the Taxation act is the double taxation treaties. Also, the EEA-agreement can limit the scope of the Norwegian taxation law on a governmental level. Due to the dualistic principle, the limitations imposed on the Norwegian taxation act binds the legislative powers of the Norwegian authorities so that they must avoid legislation that violates these regulations. Any violation of the EEA-agreement, on the other hand, can lead to several issues. 1) The EFTA surveillance authority (ESA) can initiate a treaty lawsuit based on the violation. 2) Citizens can plead a case by applying the EEA-agreement directly.

In GATS 1995, the principles of national treatment (NF) and most-favoured-nation treatment (MFN) restrict a too-far-reaching liberal tax policy. The two latter restrictions mostly exist at a governmental level, as the availability to plead for a citizen is limited.[105]

3.2. Automated digital services tax liability under 2-3 (1) letter b.

The overall question is if non-resident ADSs are liable to pay taxes in Norway for income earned herein, when they have no physical presence here cf. section 2-3 (1) letter b.

More specifically, if the ADS that operate remotely from abroad is liable to pay taxes on "income from, business activities, in which [...] it is engaged or participates, and which take place in this country or are managed from this country" cf. section 2.3 (1) letter b.

The business activity of an ADS takes place on a server, installed with programs of algorithms that process requests such as transactions and other user-operations, that collect

[104] HR-1990-142-A, p. 1297 in UTV-1991-153.
[105] See Folkvord, Furuseth, Ferdowsi, and Gjems-Onstad (2018)

data from platform-interacting users. Based on this stored information, the ADSs provide a standardised service to a large population of customers or users in the jurisdiction based on demand.

The author will focus on the sale of services through a server that is not located in Norway.

As mentioned above, there are three conditions that cumulatively lead to tax liability for a non-resident company. In the following part 3.2.1, 3.2.2 and 3.2.3, the author will discuss if the income of an automated digital service derives from "business activities, in which the [automated digital service] is engaged […] and which take place in this country".

3.2.1. "Business activity"

The first question is whether the sale of services through the remote server constitutes a "...business activity" cf. section 2-3 (1) letter b.

The different possible business incomes are found in section 5-1 (1) cf. 5-30 (1) of the taxation act. Section 5-30 (1) states that "benefits gained from business activities include, inter alia, benefits gained from sales of goods or services".

Section 5-30 (1) explicitly states that the sales of services are a business activity. If we look at section 5-1 (1), "taxable income shall include any benefit gained from … business activities".

When an ADSs sells advertisement or cloud services to a customer in Norway, this is a business activity according to section 5-30 (1) and cf. section 5-1 (1) any benefit which is gained from business activities constitute taxable income. The preparatory texts, of section 5-1 (1) state that the economic activities must have been performed over period and had a certain extent, been performed by the taxpayer himself and objectively be considered as profitable.

The author understands over period and certain extent as a reference to the size of the business' operation. According to the preparatory text, "individual transactions … in general, do not constitute a business activity". [106] The sale of services fulfil both the conditions to the size of the business operation, as it normally is performed over a long period of time through a formula of standardization, where consumers in Norway can, for example, buy ads by offering Facebook or Google an amount and they advertise within the frame of the consumers' budget.

Moreover, it must be performed at the taxpayer's risk. This is understood as to who carries eventual losses for contractual disagreements or failed sales. Other risk-related activities such as marketing are replaced using data collected by platform-interacting users. The algorithm performing this service is created through R&D activities of the company. Part of the risk has, therefore, already been taken during the development of the algorithms.

Third, the activities performed must objectively be considered as profitable and be of an economic character. The sale of advertising or other services provided through algorithms or some human interaction is more than capable of generating profit. The business conduct of the ADS relates to activities such as contract signing, payment transfer, R&D development of the algorithms and the collection and exploitation of data and user information. Even though some of these activities can be regarded as having another end-purpose, such as improving the platform or using the data information to tailor the user experience, they also have an economic purpose.

Since the sale of services online is being performed over a period and has a certain extent, is a risk taken by the ADS and may be considered as profitable and of an economic character, the conclusion is that the sale of digitalised service through the server constitutes a "...business activity" cf. section 2-3(1) letter b, cf. 5-1(1), cf. 5-30(1).

[106] Ot.prp. Nr. 86 (1997-1998) p. 48

3.2.2. “...engaged [in]”

The next question is whether the ADS is “...engaged [in]” the sale of services from the remote server(s).

There must be a nexus between the sale of services and the ADS, for example, if the sale is performed by the company’s employers constituting a direct and clear link. However, in other cases, it can be performed by algorithms that are directly linked to the R&D development of the parent company, but only indirectly linked to the company placed in Europe, that normally leases the IP property.

Since the risk is taken by the company, also when it uses algorithms to perform transactions, there is a nexus between the activity and the engagement of the company that performs the sale. If a company could develop an algorithm, lease it a third party and the third party could claim that it does not engage in the activities performed by the software because all the risk was taken in the parent country under the research and development of the algorithm, this would be a way to avoid taxes in every country, but the residence country.

Since the sale of services are performed direct or indirectly by the company, that interacts with customers in Norway, the ADS performing such activities is “...engaged [in]” the sale of services from the remote server(s).

3.2.3. “which take[s] place”

The last question is if the sale of services to customers in Norway from a remote server “take[s] place” in Norway cf. section 2-3 (1) letter b.

The above-defined scope of section 2-3 (1) letter b in part 1.1 under the subparagraph “...take place”, concluded that this condition requires a certain amount of physical presence to fall under the scope. This will make all non-resident enterprises operating from a server abroad not liable to pay taxes in Norway, because the only nexus between them and the customers in Norway, is the transactions or contracts concluded in another jurisdiction.

The ordinary meaning of “take place” is vague and does not offer any solution to the problems of whether sales of services from a server located abroad shall be considered to “...take place” here.

The business income of the ADS has a direct source in Norway, as it is derived from customers residing in Norway. The legislator’s intention manifested in the preparatory text of 1997-1998[107] and the old preparatory text of 1909[108] both underline the importance to collect taxes of all income with a nexus to any business activity here.

The purpose behind section 2-3 (1) letter b calls for an interpretation, where the focus is on the value creation, according to “all income with a nexus to the business activity here”. With such a clear statement in the preparatory text, it could be understood as such that source deriving from Norway stays in Norway, regardless of its physical presence.

Since neither the ordinary meaning nor the preparatory texts strictly disapprove of such an understanding, that digital sales activity from abroad is to be excluded, the question is whether to follow the preparatory texts that seem to legitimate the taxation of all income with a source herein or the case law and scholarly opinions that seem to gather around the notion of physical presence? The author will here attempt to find the rule with the best material content, that complies with the “underlying” purpose of the taxation act, and that harmonises best with the system.

The question in the further is we can specify the interpretation of the taxation act section 2-3 (1) letter b to make non-resident companies selling services from abroad tax liable. There must be a proportionality between goals and means, and the security under the law of the citizens must be safeguarded.

[107] Ot.prp. Nr. 86 (1997-1998) p. 38
[108] Ot.prp. Nr. 5 (1909) p. 37

First, it is reasonable that a business that generates high values on their substantial userbases in a jurisdiction should pay for the infrastructure that allows them to earn this amount of money. The value is created in Norway, through the end-users interacting on platforms or initiating a transaction to conclude a sale.

On the other hand, it might be unpredictable and cause tax uncertainty if a country has vague tax rules that are not entirely clarified by the laws and the preparatory texts, and the case law offers no elaboration of the existence of an absolute requirement of physical presence. The principles of taxation, such as certainty and predictability, resist such a specifying interpretation.

If the rule is understood so that all businesses with income from Norway are tax liable to Norway without also changing the double taxation treaties as such, this might create conflicts where Norwegian tax authorities will claim that a business is tax liable, but where the double taxation treaties are still applying the PE nexus. This is what has happened in Australia, the UK and other countries where they introduced digital profits taxes with nexus and profit allocation rules that deviated from the bilateral agreements of the countries.

The interpretation of "take place" to also scope the non-resident businesses that operate from abroad without a physical presence here is not a good rule. The laws should be changed and not interpreted evolutionarily.

Sale of automated digital services by a non-resident company without any physical presence in Norway does not fulfil the condition of "...tak[ing] place...".

The conclusion is that non-resident automated digital services are not liable to pay taxes in Norway for income earned in Norway, when they have no physical presence here cf. section 2-3(1) letter b.

3.3. The need for changes of Norwegian law

3.3.1. Introduction

If the in-scope businesses are not tax liable under the domestic law, the tax treaty cannot repair this. In many countries such as the UK, Hungary, India, Australia and Italy, they implemented domestic laws to scope the profits from businesses without a physical presence. Norway did not want to partake on this wave of unilateral measures and stayed calm, but the political parties have expressed their will to establish a committee that will review the Norwegian tax rules to find a solution. Others that have attempted to find a solution is Petter Stordalen. The suggestions cannot be treated in full, so the author will try to give a brief overview. In part 3.3.2 the author will look at the suggestions on how to formulate the laws so that ADS and CFBs become in-scope, in 3.4 the author will summarize, in 3.5 a general conclusion in terms of what to expect from OECD till the end of 2020 and which position Norway should take.

3.3.2. Petter Stordalen's amendment bill

Petter Stordalen has proposed to the committee of finance that:[109]

I) There should be a two to five per cent fee on the revenue income of online advertisements, sharing economy websites and exploitation of data and information. The threshold is at 50 million kroner. There should also be exceptions for companies with a negative revenue income.

II) A 25 per cent tax on income from real estate in Norway with the possibility of registering and decreasing the tax to a net value of 22 per cent. This will make companies as Airbnb tax liable in Norway. Companies should be able to demand tax exemption in their own home country to avoid double taxation.

If we look at I, this can give Norway a right to tax businesses without physical presence that operate from a remote server abroad, but that have a large user base in Norway.

If we look at II, it is supposed to make businesses like Airbnb tax liable.

The author has the following questions regarding the proposal: 1) What will be the condition for tax liability? Is it only based on a sales threshold, like in some US states? If the nexus is

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[109] See: E24 - HeidiNordbyLundeMenerPetterStordalenTarFeilOmDigitalskatt [accessed 7 june]

based on sales, Norway can have similar rules as in the tax treaty and, therethrough, it can benefit to a great extent of the large potential it has.

2) How should this law interact with the already existing 2-3 (1) letter b? If it functions as a stand-alone rule, what if a company also is liable to pay taxes under 2-3 (1) letter b? If the suggestion relates to the residual profits, what about the non-residual profits?

How will they calculate that Company X has earned 50 million kroners in Norway? In any event, there must be filed simplified returns to assess the sales amount. Shall the companies track users? Then there might be GDPR issues if the information is stored, cf. article 5-1 of the GDPR.

Regarding the second part, relating to the sharing economy, the author understands that Airbnb that offers a service connecting supply and demand on the market should have to pay 25 per cent tax on income from real estate. This will scope booking.com, Airbnb and other like companies that connect the hotel with the customer. Proposal II might create overregulation concerning the bilateral tax treaties because if the tax is subject to taxation on different terms in Norway than in their home country, and the double taxation convention only approves the deduction of taxes based on what is derived from the double taxation treaty, it can lead to double taxation.

In a sense, the proposal lacks a few elements and needs clarification, but is a step in the right direction. A similar amendment to domestic laws will need to be made because as shown above, the ADSs and CFBs do not fall under the scope of the taxation act section 2-3 (1) letter b. Due to lack of space, the proposal cannot be further scrutinised.

3.4. Summary

The discussions above concluded that neither the sale of advertisement from a remote a server placed abroad nor the sale of goods in a market jurisdiction through the licensing of a franchise is liable to pay taxes cf. Section 2-3 (1) letter b of the Norwegian taxation act. The primary issue is linked to the notion of physical presence, found in the ordinary meaning of section 2-3(1) letter b cf. "...take place in this country...", the preparatory text[110], case law such as HR-2015-2488-A, HR-2000-327 and HR-2011-1309-A and scholarly literature

[110] Ot.prp. Nr.86 (1997-1998) p. 38

dealing with section 2-3(1) letter b. The purpose of taxing all the income from the source country, also found in the preparatory texts[111], does not remedy the notion of a strong connection to physical presence through a presence that can forward the goods or services that come from abroad.

3.5. Conclusion

The government should not implement interim measures such as the many digital services taxes (DSTs) that were implemented globally. These intended temporary measures pose impediments to international trade and barriers to international consensus, and the author believe it was correct of Norway to await the outcome of the solution. A problem with the (DSTs) is that many of them do not include a firm sunset clause, meaning that unless they are forced to remove them, they may uphold them. That may interfere with the consensus-based long-term solution regarding Amount A, B and C. Other alternative nexus rules to allocate additional profits to the market country, such as the UK diverted profits tax or the Australian multinational anti-avoidance law are examples of attempts to create nexus rules operating outside the tax treaty framework, challenging the stability and cooperative intentions of the international tax framework. The OECD has also identified unilateral measures as DSTs such as Indias' equalisation levy [112], France's turnover tax [113] and Italy's levy on digital transactions LDT[114].

Once a consensus on the matters has been achieved, DSTs may be implemented in accordance with the design of the framework. The international tax system must be based on cooperation, coherence, harmonisation and justified policies that do not lead to burdens on multinationals companies and that increases the tax allocations of the market States. The OTFC-framework conditions lay restrictions on the principles on which one can found the international framework, but indirectly also on how Norway must develop its tax system. If the OECD framework fails, this should not lead to unilateral measures but rather as an incentive to continue the work towards standard solutions based on founded principles, instead of the need to increase the tax income. Principles of source and residence taxation

[111] Ot.prp. Nr.86 (1997-1998) p. 38
[112] See OECD (2018a) Box 4.3
[113] See OECD (2018a) box 4.6, para. 360
[114] See OECD (2018a) box 4.4, para 366

would still offer guidance on the way forward, as they are the principles on which our system today is built.

The author, however, does not believe that the members reach a consensus, even though there was strong support given on the design of pillar one in OECD 2020.[115] Whatever the outcome may be, there is still a possibility of developing pillar two into a global solution to achieve a minimum's tax. Pillar two has the advantage that it can be applied without any specific digital triggers. However, if States perceive these measures as a threat to their tax policies, then there will be no chance of reaching a unanimous agreement on this proposal. Norway, remaining the biggest challenge in the time to come. Before any domestic law legislations are implemented, the MLI must be signed and ratified by countries such as Ireland, Sweden, the Netherlands et al., that might not be in favour of reimbursing companies for the tax, which they paid to other jurisdictions under the new rules of the MLI.

The US Treasury Secretary Mnuchin suggested that the implementation of pillar one should be applied at a safe harbour basis, in which an electing MNE group would agree to subject so Pillar one on a global basis. This proposal is currently being reviewed, with a focus on administrative and legal questions related to the approach. [116] The new pillar would, therefore, only be applied at an MNE to see the legal effects, increased or decreased revenues in a jurisdiction and so forth. The suggestion might have a positive effect on countries that are afraid of the consequences that pillar one would have on their tax revenues.

Even though there are many considerations to consider, it would also be wise to draft legislation while awaiting the consensus solution. The new changes should be made effective both at a treaty level and a domestic level at the same time in order to make the MLI effective. The problem is, however, that there are vital interests in determining how tax MNEs. The States in which, the highly digitalised companies are located, are afraid of losing tax revenue if they agree to targeted taxation of this income in the Market State. States with

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[115] See (OECD 2020) para. 1
[116] OECD (2020a) para. 90

substantial user masses, but few or fewer digital enterprises, are hesitant to let go of the same taxable income.

The structural changes of international tax law and the shift of taxing rights from the residence State to the market State are drastic. Amount A will scope the highly digitalised businesses models without physical presence, introducing a new phenomenon and a gamechanger in International tax law.

For Norway it is vital to remember that we are facing something new in the discussion of the new era of digitalisation and how it affects the tax income of some States. The reforms are not about increasing the taxable base, but allocating better the taxable base, to where the value is created. Whatever the developments are, it is critical that a business must be taxed once and only once. The nexus and the profit allocation rules, that will ensure this must also be in the spirit of the foundation laid down by the Ottawa taxation Framework and general principles of taxation.

Appendix A

Figure 1

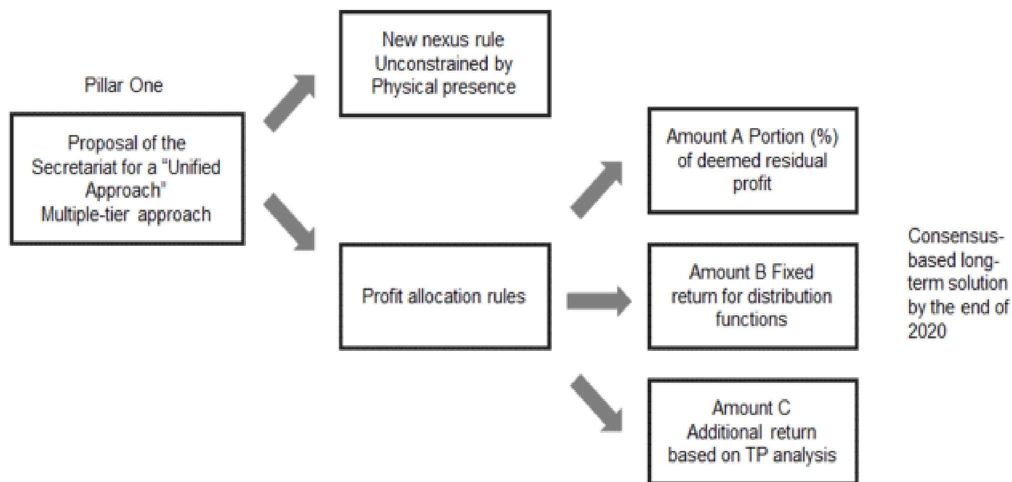
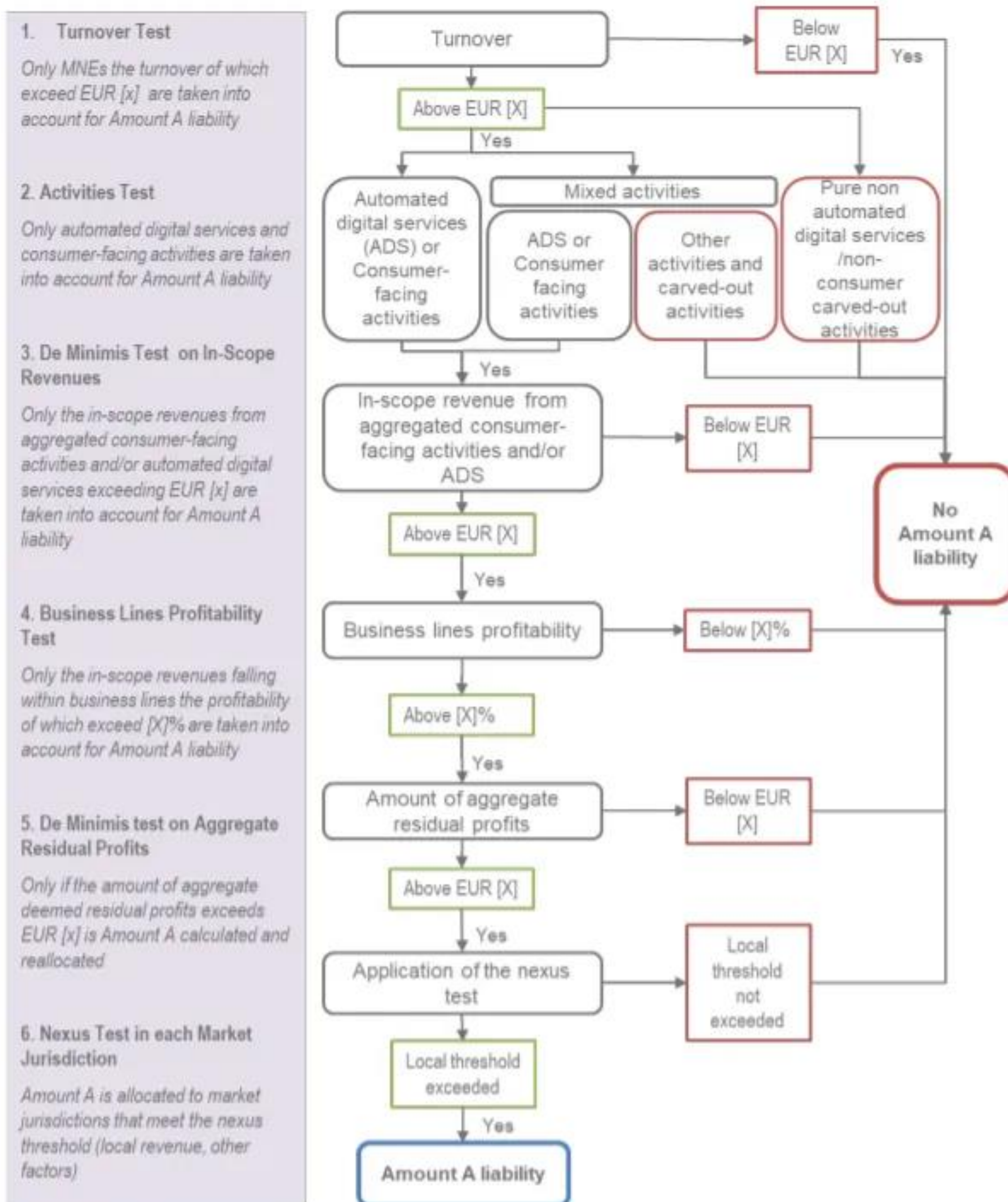


Figure 2

Figure 3



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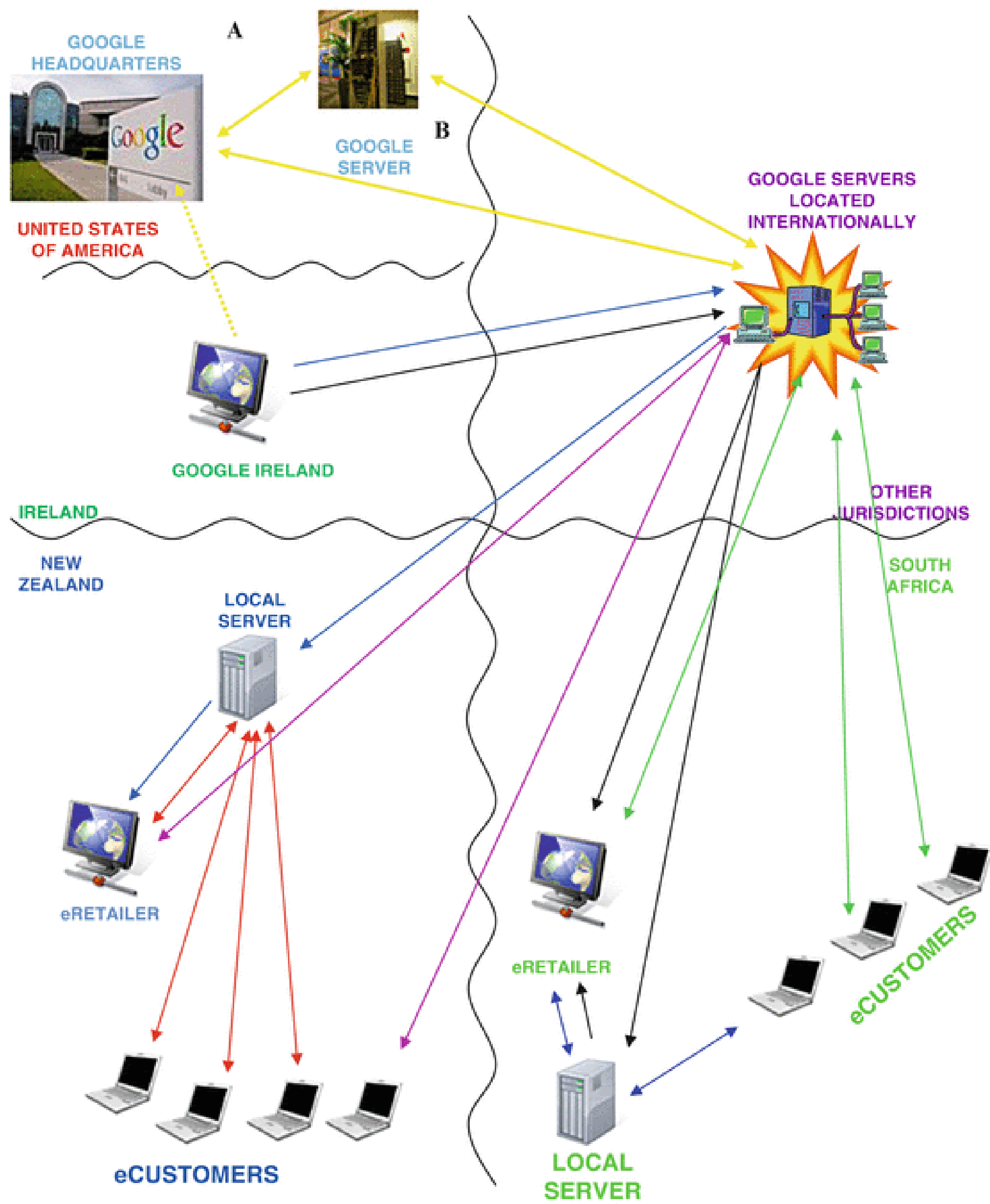
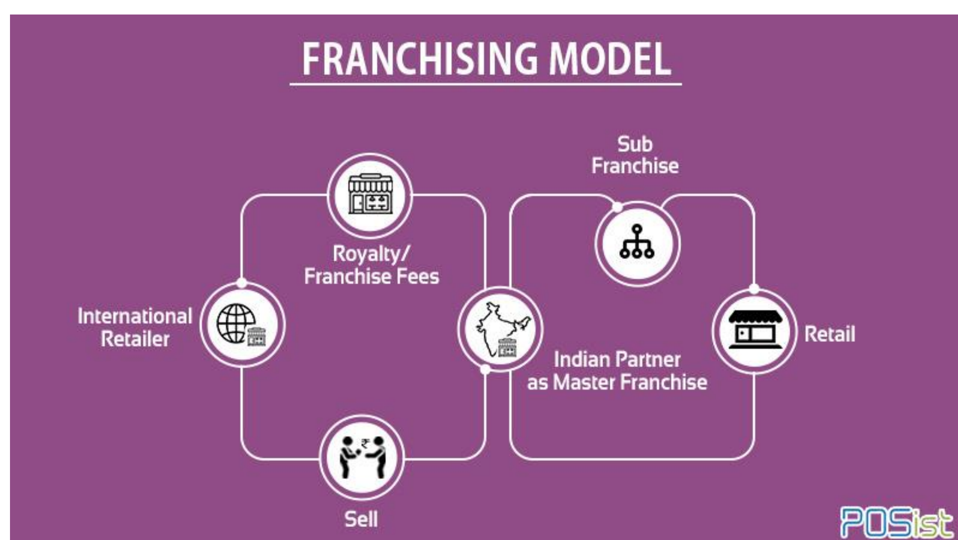

GOOGLE
HEADQUARTERS
A
B
GOOGLE
SERVER
UNITED STATES
OF AMERICA
GOOGLE SERVERS
LOCATED
INTERNATIONALLY
GOOGLE IRELAND
IRELAND
OTHER
JURISDICTIONS
NEW
ZEALAND
SOUTH
AFRICA
LOCAL
SERVER
eRETAILER
eRETAILER
eCUSTOMERS
eCUSTOMERS
LOCAL
SERVER

Figure 4[117]



Appendix B

Figure 1

The degree of compliance of the user participation (USP), marketing intangibles proposal (MIP) and significant economic presence (SEP with the Ottawa taxation framework, as an overview of what the OECD has managed to achieve, and its current status. The USP and MIP are mentioned as a reference to understand better the balances that have been made and how the OTFC must be an underlying principle. One minor weakness in the figure, is that it only looks at Amount A and not at Amount B and Amount C as a whole. The reason for this is that Amount B and Amount C are meant to scope baseline activities, whereas Amount A, USP, MIP and SEP are meant to tax the profits of non-resident companies without physical presence in the Market State.

[117] Taken from https://francity.com/about-franchising/types-of-franchises/ [Accessed 7 of June]

The idea to make such a diagram of arguments giving them weight came from a document that was written by the IBFD (International Bureau of Fiscal Documentation) to the public consultation document of 2019b). They divided the categories in to three, based on USP, MIP and SEP. I have worked on my arguments and developed the diagram to also include Amount A.

There are 4 degrees of compliance.

Green = Compliance with the Ottawa Taxation Framework Conditions

Yellow = Possible compliance with the OTFC

Orange = Possible non-compliance with the OTFC

Red = Non-compliance with the OTFC.

Both colours mean that they are in-between two categories!

OTFC	Amount A	USP	"MIP"	SEP
Neutrality	Applies to all businesses that can have an active and sustainable engagement in a market jurisdiction without physical presence. (Targets business activities) High level of neutrality between digital businesses. Low level of neutrality between brick and mortar economy and the digitalized economy. (Amount A functions as an overlay to the existing tax system).	Ring-fences the digital sector (only affecting social media platforms, social engines and online marketplaces), because it only applies to business with user-bases. Only a sub-sector of the digital businesses is in-scope. May severely restrict a company's competitive possibilities and violate different regimes of competition law and other principles of fair and equitable treatment of similar companies.	Applies to a wider range of businesses than the user participation proposal. Ring-fencing the digital sector relying on the exploitation of IP.	Applies to a huge number of businesses, but uncertainty as to the effect of a change in the nexus concept. Targets businesses instead of business activities Levelled playing field between the brick and mortar economy and the digitalized economy.
Efficiency	May be complex and involve high compliance and administrative costs VPN-distortions may lead to extra measures being taken to mitigate such risks. A material threshold on global and local revenues can enhance efficiency in the collection of taxes.	May be complex and involve high compliance and administrative costs VPN-distortions may lead to extra measures being taken to mitigate such risks. A material threshold on global and local revenues can enhance efficiency in the collection of taxes.	A material threshold on global and local revenues can enhance efficiency in the collection of taxes. May be complex and involve high compliance and administrative costs.	A material threshold on global and local revenues can enhance efficiency in the collection of taxes.

Certainty and simplicity	Holds a nexus open to diverging interpretations. Routine vs non-routine profits, marketing intangibles vs trade intangibles in the allocation process. The application of a second layer of the system may prove hard, applying the existing PE-concept, the ALS and the new formulary apportionment in the three-tier test. This can lead to inaccurate results and end in double taxation (Interaction between Amount A and C)	Holds a nexus open to diverging interpretations. Routine vs non-routine profits, marketing intangibles vs trade intangibles in the allocation process. May lead to double taxation or double-non taxation.	Same as for the USP, a use of interpretable definitions that may be subject to the qualifications of the tax authority in question and may lead to different results concerning its competence. Latest transfer pricing has improved the practical implementation of the MI.	Equal tax treatment between traditional and digitalised businesses using already existing nexus rules based on a digital concept. No differentiation between routine and non-routine profits or marketing and trade intangibles in the allocation process. Implementable in developing countries with weaker tax administrations.
Effectiveness and fairness	Unpredictable and complex boundary issues up to a subjective judgment, where automated digital services and consumer-facing businesses may or may not be in-scope, based on the interpretation of vague rules. This proposal might lead to disputes between the residence states and the market states, where each country will want to secure the highest level of tax income, by, for example, inflation of routine or inflation of non-routine profits. Withholding of taxes may pose issues if applied in the EU, unless it applies to both non-resident entities as well as resident entities.	Unpredictable and complex boundary issues up to a subjective judgment. This might trigger double or multiple taxation issues and may lead to unfair results of taxation.	This proposal might lead to disputes between the residence states and the market states, where each country will want to secure the highest level of tax income, by, for example, inflation of routine or inflation of non-routine profits.	May lead to businesses being present in a jurisdiction in which they have not taken to operate. Withholding of taxes may pose issues if applied in the EU, unless it applies to both non-resident entities as well as resident entities.
Flexibility	Focuses on defining a nexus to where the profit should be allocated based on sales. A sale's nexus is more flexible than, for example, a	The narrow focus on defining a sub-sector of the digital sector, online marketplaces,	Based on where the marketing intangibles are "used". This give a flexible approach,	An expansion of the PE concept may make it able to address constant

	nexus on user base or if a marketing intangible is" used", because it can be properly accounted for through detailed or simplified filed returns. Its separation between physical and non-physical, might lead to businesses finding a way to change their business to fall in between two regulations – namely the regulation after the PE-concept and new nexus based on sales.	search engines and social media platforms, might lead to the definitions becoming obsolete to new ways of benefitting from active user-participation User-participation must be defined to restrict passive users to fall under the base of active user.	until the marketing intangibles no longer are "used" under the current understanding of that.	changes in the business models of MNEs.
Intra-nation fairness	Amount A gives the taxing powers to the jurisdiction where their sales are registered (customer is located for automated digital businesses) or where they have a sales nexus and active and sustainable engagement for Consumer-facing businesses. Problems concerning deduction and credit-method, where the impact of losses on the residual profit may lead to a substantial reduction in the taxable base. The residence country may be not so willing to credit to such an extent the taxes paid in the market State.	Gives the taxing powers to the jurisdiction where the company has the user-base, irrespective of physical presence. Problems concerning deduction and credit-method, where the impact of losses on the residual profit may lead to a substantial reduction in the taxable base. The residence country may be not so willing to credit to such an extent the taxes paid in the market State.	Gives the taxing powers to the jurisdiction where marketing intangibles are "used". Problems concerning deduction and credit-method, where the impact of losses on the residual profit may lead to a substantial reduction in the taxable base. The residence country may be not so willing to credit to such an extent the taxes paid in the market State.	Gives the taxing powers to the jurisdiction where the company has the user-base, performs the sales or the contracts. Does fully consider the mentioned the multi-sided business model's use of algorithms and artificial intelligence in the value creation of a non-resident company.
Total score:				

1. Bibliography:

1.1. Cited literature (in alphabetical order)

Author	Reference
Agarwal	*Agarwal, V. (2020). The architecture of the unified approach to tax the digital economy.* International Tax Review, Retrieved from https://proxylibrary.hse.ru:2078/docview/2381358605?accountid=45451
Avi-Yonah Clausing Durst	Avi-Yonah, Reuven S., Clausing, Kimberly A., Durst, Michael S, *Allocation business profits for tax purposes: A proposal to adopt a formulary profit split,* working paper No. 138 (December 2008)
Avi-Yonah	Avi-Yonah, Reuven S. *"Formulary Apportionment: Myths and Prospects - Promoting Better International Policy and Utilizing the Misunderstood and Under-Theorized Formulary* ." Ilan Benshalom, co-author. World Tax J. 3, no. 3 (2011): 371-98.
	Avi-Yonah, Reuven S. "*Between Formulary Apportionment and the OECD Guidelines: A Proposal for Reconciliation.*" World Tax J. 2, no. 1 (2010): 3-18.
	Avi-Yonah, Reuven S. *Advanced introduction to International tax* law, 2nd edition, 2019
	Avi-Yonah, Reuven S. *“The rise and fall Arm’s length: A study in the evolution of U.S international taxation*, Law & Alternative Economics working papers Archie: 2003-2009 (2007) http://repository.law.umich.edu/law econ archive/art73
Bardoupolous	Bardopoulous, Anne Michèle, *Ecommerce and the effects of technology on taxation; Could VAT be the eTax solution?* Springer Volume 22 (2015)

Basu	Basu, Subhajt, *Global perspectives on ecommerce taxation law,* Ashgate Publishing (2007)
Bauer Fritz Schanz Sixt	Bauer, Georg and Fritz, Jil and Schanz, Deborah and Sixt, Michael, *Corporate income tax challenges arising from digitalised business models* (March 7, 2019). Available at SSRN: https://ssrn.com/abstract=3348544 or http://dx.doi.org/10.2139/ssrn.3348544
Becker Englisch	Becker, Johannes and Englisch, Joachim, *Taxing where value is created: What's 'user involvement' got to do with it?* (October 1, 2018). Available at SSRN: https://ssrn.com/abstract=3258387 or http://dx.doi.org/10.2139/ssrn.3258387
Becker, Englisch Schanz	Becker, Johannes and Englisch, Joachim and Schanz, Deborah, *Re-allocation of taxing rights for big data business models* (August 7, 2019). Available at SSRN: https://ssrn.com/abstract=3433715 or http://dx.doi.org/10.2139/ssrn.3433715
Beer	Beer, Sebastian et al.., *Exploring residual profit allocation,* IMF working paper (2020)
Berg-Rolnes	Berg-rolnes, Gregar, *Inntekt av virksomhet – virksomhetsbegrepet I skatteretten* (2009), 1. utgave
Bird	Bird, R. M. (2018). *Are global taxes feasible? International Tax and Public Finance, 25*(5), 1372-1400. doi:http://proxylibrary.hse.ru:2112/10.1007/s10797-018-9487-2
Brown	Brown, Catherine A., *Non-discrimination and trade services; The role of tax treaties* (2017), http://
Cockfield	Cockfield, Arthur, *Taxing global digital commerce in a post-BEPS world* (February 2018). in Ricardo Maitto da Silveira, Alexandre Luiz Moraes do Rêgo Monteiro and Renato Vilela Faria, eds., Tributação da Economia Digital – Desafios no Brasil, experiência internacional e novas perspectivas (Editora Saraiva, Brazil; Forthcoming); Queen's

	University Legal Research Paper No. 2018-096. Available at SSRN: https://ssrn.com/abstract=3130218 or http://dx.doi.org/10.2139/ssrn.3130218
Cockfield Hellerstein Lamensch	Cockfield, Arthur, Hellerstein, Walter and Lamensch, Marie, *Taxing Global Digital Commerce,* 2nd edition, Wolters Kluwer (2019)
Christians	Christians, Allison, *Taxation of the digital economy, preliminary analysis of OECD pillar 1 impact assessment + kpmg transfer pricing study of amounts B and C March 2020*
Dharmapala	Dharmapala, Dammika, *What do we know about base erosion and profit shifting? A review of the empirical literature* (CoaseSandor Institute for Law & Economics Working Paper No. 702, 2014).
Eckhoff Helgesen	Eckhoff, Torstein, Helgesen, Jan E., *Rettskildelære*, 5.utg, Universitetsforlaget, Oslo, 2017
Folkvord, Furuseth, Ferdowsi and Gjems-Onstad	Folkvord, Benn, Furuseth Eivind, Ferdowsi, Sanaz Ormaz and Gjems-Onstad, Ole, *Norsk bedriftsskatterett* (2018), 10. Utgave
Greil	Greil, Stefan, *The arm's length principle in the 21st Century – alive and kicking?* (September 5, 2019). Available at SSRN: https://ssrn.com/abstract=3379092 or http://dx.doi.org/10.2139/ssrn.3379092
Гулкова **Карп** **Типалина**	Gulkova, E. & Karp, M. & Tipalina, M.. (2019). *Tax challenges of the digital economy*. Vestnik Universiteta. 89-95. 10.26425/1816-4277-2019-4-89-95.
Haufler	Haufler, Andreas, *Taxation in a global economy; Theory and evidence* (2001), 1st Edition.

Hongler Pistone	Hongler, Peter, Pistone, Pasquale, *Blueprints for a new PE nexus to tax business income in the era of the digital economy*, working paper 20 january 2015, IBFD (https://www.ibfd.org/sites/ibfd.org/files/content/pdf/Redefining_the_PE_concept-whitepaper.pdf)
Horner	Horner, Frances M., *International Cooperation and Understanding: What's New About The OECD's Transfer Pricing Guidelines*, 50 U. Miami L. Rev. 577 (1996) Available at: http://repository.law.miami.edu/umlr/vol50/iss3/8
Kimball Stas Merck	Kimball, K., Stas, S., & Merck, S. (2020). *Digital tax. Tax Executive, 72*(1), 68-71. Retrieved from https://proxylibrary.hse.ru:2078/docview/2354879941?accountid=45451
Li, Yinyuan Bao LI, Huaning	Li, Yinyan, Bao, Nathan Jin, Li, Huaning (Christina), *A constant Principle in a Changing World of International Taxation*, in the Canadian Tax Journal / Revue Fiscale Canadienne (2019) 67:4, 1107 - 34 https://doi.org/10.32721/ctj.2019.67.4.sym.li
Lohse Riedel	Lohse, Theresa and Riedel Nadine, *Do transfer pricing laws limit international income shifting? Evidence from European multinationals.* CESifo working paper No. 4404 September 2013 (https://www.ifo.de/DocDL/cesifo1_wp4404.pdf)
Majmudar Jalan Misquith-Tigdi	Majmudar, S., Jalan, N., & Misquith-Tigdi, E. (2019). Digital economy: *New profit allocation and nexus approach. Journal of International Taxation, 30*(10), 42-43,64. Retrieved from https://proxylibrary.hse.ru:2078/docview/2327304280?accountid=45451
Markham	Markham, Michelle, *The Transfer Pricing of Intangibles* (2005)
	Pinto, Dale, *E-Commerce and Source-based Income Taxation* (2002), submitted in total fulfilment of the requirements of the degree of

Pinto	Doctor of Philosophy, Volume 6, Doctoral Series International Bureau of Fiscal Documentation Academic Council.
Richelle Schön Traversa	Richelle, Isabelle, Schon Wolfgang, Traversa, Edoardo, *Allocating Taxing Powers within the European Union,* volume 2, Springer-Verlag Berlin Heidelberg 2013 (2013) DOI: https://proxylibrary.hse.ru:2120/10.1007/978-3-642-34919-5
Schön	Schön, Wolfgang, *Ten questions about why and how to tax the digitalized economy* (December 21, 2017). Working Paper of the Max Planck Institute for Tax Law and Public Finance No. 2017-11. Available at SSRN: https://ssrn.com/abstract=3091496 or http://dx.doi.org/10.2139/ssrn.3091496
Skaar	Skaar, Arvid Aage: *Permanent Establishment, Erosion of a tax treaty principle,* Dever: Kluwer law and taxation publishers pp. 22-24 111-112, 284, 559-560
Spencer	Spencer, D. E. (2020). *Tax challenges of the digitalization of the economy. Journal of International Taxation, 31*(1), 24-37. Retrieved from https://proxylibrary.hse.ru:2078/docview/2376669232?accountid=45451
	Spencer, David E., *BEPS and the allocation of taxing rights* (part 4), 29 J. INT'L TAX'n 34 (Apr. 2018)
Zaiken et al..	Zaiken, D., C.P.A., Wrappe, Steven,J.D., L.L.M., Smith, A., C.P.A., Yesnowitz, J., J.D., Leaman, M. C., C.P.A., & Dirks, Yasmin,J.D., L.L.M. (2020). *Update on OECD's proposals: Pillars 1 and 2. The Tax Adviser, 51*(2), 88-91. Retrieved from https://proxylibrary.hse.ru:2078/docview/2363886471?accountid=45451
	Zimmer, Fredrik, *Internasjonal inntektsskatterett*, 5. Utgave, Oslo: Universitetsforlaget, 2017

Zimmer	Zimmer, Fredrik, *Lærebok i skatterett*, 7. utgave, Oslo: Universitetsforlaget, 2014

1.2. Cited policy and legislative documents (in reversed chronological order):

(OECD 2020a)	Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy – January 2020, OECD/G20 Inclusive Framework on BEPS, OECD, Paris. http://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf
(OECD 2020b)	Transfer Pricing Guidance on Financial Transactions: Inclusive Framework on BEPS Actions 4, 8-10, OECD, Paris, www.oecd.org/tax/beps/transfer-pricing-guidance-on-financial-transactions-inclusive-framework-on-beps-actions-4-8-10.htm.
OECD (2020c)	OECD Update on Economic Analysis and Impact Assessment (2020), at http://www.oecd.org/tax/beps/webcast-economic-analysis-impact-assessment-february- 2020.htm
(OECD 2019a)	Public Consultation Document, Addressing the Tax Challenges of the Digitalization of the Economy. https://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf
OECD (2019b)	OECD (2019b), Public Consultation Document, Secretariat Proposal for a "Unified Approach" under Pillar one. https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf

OECD (2019c)	OECD, Addressing Challenges of the Digitalization of the Economy – Policy Note (23 January 2019) https://www.oecd.org/tax/beps/policy-note-beps-inclusive-framework-addressing-tax-challenges-digitalisation.pdf
OECD (2019d)	Interview with Mr Brian Jenn, Deputy International Chief Counsel: https://mnetax.com/marketing-intangibles-solution-to-digital-tax-dispute-should-apply-only-to-consumer-facing-businesses-us-official-says-32441
OECD (2018a)	Revised Guidance on the Application of the Transactional Profit Split Method: Inclusive Framework on BEPS: Action 10, OECD/G20 Base Erosion and Profit Shifting Project, OECD Paris. www.oecd.org/tax/beps/revised-guidance-on-the-application-of-the-transactional-profitsplit-method-beps-action-10.pdf
OECD (2018b)	Guidance for Tax Administrations on the Application of the Approach to Hard-toValue Intangibles - BEPS Actions 8-10, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris. www.oecd.org/tax/beps/guidance-for-tax-administrations-on-the-application-of-the-approach-tohard-to-value-intangibles-BEPS-action-8.pdf
OECD (2018c)	*Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264293083-en.
EU (2018a)	European Commission, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM (2018) 147 final (21 March 2018)
EU (2018b)	European Parliament legislative resolution of 15 March 2018 on the proposal for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2016)0683- C8 – 0471 /2016v
UN (2017)	Committee of Experts on International Cooperation in Tax Matters Fifteenth Session, E/C.18/2017/CRP.22, Tax Challenges in the Digitalized Economy (2017)

OECD (2017a)	OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD Publishing, Paris, https://doi.org/10.1787/mtc_cond-2017-en
OECD (2017b)	OECD (2017), *International VAT/GST Guidelines*, OECD Publishing, Paris, https://doi.org/10.1787/9789264271401-en.
OECD (2015a)	*Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241046-en.
OECD (2015b)	*Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241046-en.
OECD (2015c)	OECD. Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 - 2015 Final Report, Paris: OECD Publishing, 2015.
OECD (2014)	OECD (2014), *Addressing the Tax Challenges of the Digital Economy*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264218789-en.
OECD (2013)	OECD (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing. http://dx.doi.org/10.1787/9789264202719-en
OECD (2003)	Mise en œuvre des conditions cadres d'Ottawa sur la fiscalite, RAPPORT 2003
OECD (2001a)	OECD (2001), *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions*, OECD Publishing, Paris, https://doi.org/10.1787/9789264189799-en.
OECD (2001b)	OECD/ Technical Advisory Group. Attribution of Profit to PErmanent Establishment involved in Electronic Commerce Transactions, A Discussion Paper from the technical advisory group on monitoring the application of existing treaty norms for the Taxation of Business Profits. OECD, February 2001.

1.3. Norwegian legal sources

1.3.1. Laws

1911	Lov 18. august 1911 nr. 8 om skatt av formue og inntekt (skatteloven-1911)
1999	Lov 26. mars 1999 nr. 14 om skatt av formue og inntekt (skatteloven – skl.)

1.3.2. Preparatory texts and public documents

Skattelovkomiteens innstilling av 1904	Indstilling til I Almindelig skattelov for landet. II. Almindelig skattelov for byerne. III. Lov om adgang for kommunerne til at paalægge visse nærings- og bevillingsafgifter. IV. Lov om regnskabshold, Afgivet af den af finansdepartementet i september 1899 nedsatte skattelovkomite, Kristiania: Johannes Bjørnstads bog- 55 trykkeri, 1904.
Ot.prp. nr. 5 (1909)	Angaaende utfærdigelse av skattelove for landet og for byerne
Innst. O. nr. 40	Innst. O. Nr. 40 (1998-1999) Innstilling fra finanskomiteen om ny skattelov
Ot.prp. nr. 86 (1997-1998)	Ny skattelov
Representantforslag 69 S (2017– 2018).	Representantforslag fra stortingsrepresentant Une Bastholm om å utrede en norsk skatt for selskaper med digitale inntektsmodeller – en «Google-skatt».

1.3.3. Case law and statements

HR-2015-2488-A	HR-1990-142-A
HR-2011-2245-A	UFIN-2006-38A
HR-2000-327	UTV-1991-153
HR-2011-1309-A	South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018)

1.4. International sources of law

VCLT	The Vienna Convention on the Law of Treaties of 1969
OECD MTC 2017 Condensed version with commentaries	OECD Model Tax Convention on Income and on Capital: Condensed Version 2017, 21. November 2017, OECD Publishing. http://dx.doi.org/10.1787/mtc_cond-2017-en
GDPR	*EU General Data Protection Regulation (GDPR):* Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.