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## CORPORATE TAX: RENEWED FISCAL FEDERALISM IN THE USA, THE EU, AND GLOBALLY FOR THE 21ST CENTURY

*Tracy A. Kaye & Michel De Wolf*



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CORPORATE TAX: RENEWED FISCAL FEDERALISM IN THE USA,  
THE EU, AND GLOBALLY FOR THE 21ST CENTURY<sup>†</sup>

*Tracy A. Kaye*<sup>\*</sup> & *Michel De Wolf*<sup>\*\*</sup>

The Times They Are A-Changin’—Bob Dylan<sup>1</sup>

Plus ça change, Plus c’est la même chose

I. INTRODUCTION

The underpinnings of the architecture of our global international tax regime were devised by four economists tasked by the Financial Committee of the League of Nations in the 1920s to create a way to avoid double taxation as cross-border trade accelerated after World War I.<sup>2</sup> It is an understatement to say that the world looks different in 2021, almost 100 years later. The first model bilateral tax treaty drafted in 1928 by the League of Nations contemplated physical establishments in countries that would then be allowed to tax the resulting profits.<sup>3</sup> Since 1991, the internet has changed the landscape in that it is no longer necessary to have any physical presence to sell into another country, to another country’s customers or, in the case of the United States or European Union (EU), into another state or Member State.

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<sup>\*</sup> Professor of Law, Eric Byrne Research Fellow, Seton Hall University School of Law. BS, University of Illinois; MST, DePaul University; JD, Georgetown University Law Center.

<sup>\*\*</sup> Professor of Law and Management Sciences, UCLouvain & ULiège (Belgium). PhD, UCLouvain; MBA, KULeuven.

<sup>1</sup> BOB DYLAN, THE TIMES THEY ARE A-CHANGIN’ (Columbia 1964).

<sup>2</sup> *Report on Double Taxation Submitted to the Fin. Comm.*, League of Nations Doc. E.F.S.73. F.19 (1923).

<sup>3</sup> *Report Presented by General Meeting of Government Experts on Double Taxation and Tax Evasion*, League of Nations Doc. C. 562. M. 178 (1928).

How has that previously negotiated tax deal worked out? Is the current division of the global tax base fair?

E-commerce or digital commerce enables retail globalization, allowing online retailers and service providers to essentially target markets worldwide.<sup>4</sup> The COVID-19 pandemic with the accompanying necessity of social distancing has accelerated the growth of (global) e-commerce. In the United States, e-commerce increased to 16.1% of total retail by the second quarter of 2020 while previously only increasing from 9.6% in the first quarter of 2018 to 11.8% in the first quarter of 2020.<sup>5</sup> In the EU in April 2020, internet and mail-order sales “increased by 30% compared to April 2019, while total retail sales” decreased by 17.9%.<sup>6</sup> Although approximately 100,000 brick and mortar retail companies will not survive, Amazon, with 38% of the e-commerce market, has thrived as its “total e-commerce sales nearly doubled in May [2020].”<sup>7</sup> These internet habits will continue after the pandemic with predictions “that by 2025, e-commerce will” comprise 25% of total retail sales, an increase from 15% in 2019.<sup>8</sup>

This globalization has led to increased tax competition between taxing jurisdictions as multinational enterprises (MNEs) have attempted to minimize their taxes. For example, the Joint Committee on Taxation (JCT) determined that the average tax rate of U.S. controlled foreign corporations

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<sup>4</sup> This phenomenon “has established international trade through the sale of related goods and services and brought traders and consumers from around the world together in a virtual marketplace.” Phet Sengpunya, *Online Dispute Resolution Scheme for E-Commerce: The ASEAN Perspectives*, 2020 PECS J. INT’L & EUR. L. 58, 58 (2020). Global e-commerce had been projected to increase twelve percent annually from 2015 on whereas “bricks-and-mortar-based retailing will only grow at the rate of two percent over the same period.” *Id.* (citing Amanda Bourlier & Gustavo Gomez, *Strategies for Expanding into Emerging Markets with E-Commerce*, EUROMONITOR INT’L 1 (Nov. 18, 2019)).

<sup>5</sup> OECD, E-COMMERCE IN THE TIMES OF COVID-19, at 1, 3 (2020), [https://read.oecd-ilibrary.org/view/?ref=137\\_137212-t0fjgnerdb&title=E-commerce-in-the-time-of-COVID-19](https://read.oecd-ilibrary.org/view/?ref=137_137212-t0fjgnerdb&title=E-commerce-in-the-time-of-COVID-19).

<sup>6</sup> *Id.* at 3. The United Kingdom and China have similar results with respect to the share of e-commerce in retail (31.3% and 24.6% respectively). *Id.*

<sup>7</sup> Alana Semuels, *Many Companies Won’t Survive the Pandemic. Amazon Will Emerge Stronger Than Ever*, TIME (July 28, 2020, 4:01 PM), <https://time.com/5870826/amazon-coronavirus-jeff-bezos-congress/>.

<sup>8</sup> *Id.*

declined from 26% in 1998 to 10.6% in 2012.<sup>9</sup> Professor Allison Christians claims that the current international tax system is marred by “opportunistic self-dealing, and ruthless competition.”<sup>10</sup> Professor Kimberly Clausing estimated that profit shifting cost the U.S. government between \$77 and \$111 billion in 2012.<sup>11</sup> Furthermore, a 2013 Congressional Research Service study noted that U.S. MNEs claimed they “earn[ed] 43% of their overseas profits in . . . Bermuda, Ireland, Luxembourg, the Netherlands, and Switzerland” in 2008, while only 4% of their foreign employees and 7% of their foreign investment was located in those tax havens or low-tax jurisdictions.<sup>12</sup> The press coverage of these phenomena alerted the U.S. Congress that the public was becoming increasingly aware of the corporate tax avoidance issue.<sup>13</sup> In fact, there was global concern that U.S. MNEs were using transfer-pricing rules and other techniques to shift reported income to low-tax countries without actually changing where they invest their resources.<sup>14</sup>

The OECD’s July 2020 release of 2016 country-by-country reporting (CbCR) data suggest “a misalignment between the location where profits are reported and the location where economic activities occur” among 4,000

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<sup>9</sup> STAFF OF THE JOINT COMM. ON TAX’N, 114TH CONG., BACKGROUND, SUMMARY, AND IMPLICATIONS OF THE OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT 33 (2015) [hereinafter SUMMARY OF BEPS].

<sup>10</sup> Allison Christians, *BEPS and the Power to Tax*, in TAX SOVEREIGNTY IN THE BEPS ERA 4 (Sergio Andre Rocha & Allison Christians eds., 2017).

<sup>11</sup> Kimberly Clausing, *The Effect of Profit Shifting on the Corporate Tax Base in the United States and Beyond*, 69 NAT’L TAX J. 905, 906 (2016).

<sup>12</sup> MARK P. KEIGHTLEY, CONG. RSCH. SERV., R42927, AN ANALYSIS OF WHERE AMERICAN COMPANIES REPORT PROFITS: INDICATIONS OF PROFIT SHIFTING 4–6 (2013). Australia, Canada, Germany, Mexico and the United Kingdom only accounted for fourteen percent of their overseas profits, yet forty percent of foreign employees and thirty-four percent of foreign investment was located in these jurisdictions. *Id.*

<sup>13</sup> Tracy A. Kaye, *The Offshore Shell Game: U.S. Corporate Tax Avoidance Through Profit Shifting*, 18 CHAP. L. REV. 185, 185 (2014). Before the Tax Cuts Jobs Act of 2017, foreign profits of U.S. MNEs were only taxable once repatriated to the United States. *Id.*

<sup>14</sup> See CONG. BUDGET OFF., PUB. NO. 4150, OPTIONS FOR TAXING U.S. MULTINATIONAL CORPORATIONS 2 (2013). Profit shifting allows MNEs to maintain their actual investments in high-tax countries with the infrastructure and labor forces necessary for actual business operations but to report their profits in low-tax jurisdictions. This tax avoidance can be accomplished by transfers of intangibles to low-tax jurisdictions, the allocation of debt to high-tax jurisdictions, or transfer-pricing strategies with respect to goods. JANE G. GRAVELLE, CONG. RSCH. SERV., R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION 8–11 (2015).

MNEs.<sup>15</sup> For example, high-income jurisdictions account for 32% of total employees and 35% of total tangible assets while only 28% of the profits.<sup>16</sup> In contrast, in investment hubs, on average MNEs report a 25% share of the profits while only reporting a 4% share of employees and an 11% share of tangible assets.<sup>17</sup> Approximately 50% of these MNEs are headquartered in the United States or Japan.<sup>18</sup> The late 2019 release by the United States of 2017 U.S. MNE data showed the magnitude of the profit shifting with “\$4.2 trillion in offshore accumulated earnings, \$3 trillion of which is in tax havens.”<sup>19</sup> U.S. MNEs reported 56% of all their foreign profits, \$355 billion, in eleven tax haven countries, implying “that between \$320 billion and \$397 billion is misallocated” and a revenue loss of between \$75 and \$93 billion.<sup>20</sup> Within the EU, various studies have estimated losses between €50 and €190 billion.<sup>21</sup>

Similar issues over appropriate taxing systems have surfaced over time in the federal systems of the United States and the EU. Both the United States and the EU were partly founded over a need for economic unity.<sup>22</sup> The U.S.

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<sup>15</sup> OECD, CORPORATE TAX STATISTICS 44 (2d ed. 2020). “[A]ll large MNEs (i.e., with consolidated revenues above €750 million) file CbCRs, typically with the tax administration” where headquartered. *Id.* at 35.

<sup>16</sup> *Id.* at 41.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 39.

<sup>19</sup> Kimberly A. Clausing, *5 Lessons on Profit Shifting from U.S. Country-by-Country Data*, 169 TAX NOTES FED. 925, 927 (2020) (Ireland, Luxembourg, the Netherlands, Switzerland, Bermuda, Jersey, the Cayman Islands, Puerto Rico, and Singapore accounted for \$2.8 trillion of the \$3 trillion).

<sup>20</sup> *Id.* at 933. In these eleven tax havens, the U.S. MNEs only have 5.6% of their foreign employees and 24% of their foreign assets, yielding an average profit per employee of \$488,000. *Id.* at 929.

<sup>21</sup> See *Parliamentary Question E-004736:2020*, EUR. PARLIAMENT (Sept. 1, 2020), [https://www.europarl.europa.eu/doceo/document/E-9-2020-004736\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-004736_EN.html); *Answer by Commissioner Gentiloni on Behalf of the European Commission*, EUR. PARLIAMENT (Nov. 11, 2020), [https://www.europarl.europa.eu/doceo/document/E-9-2020-004736-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-004736-ASW_EN.html).

<sup>22</sup> See generally Tracy A. Kaye, *Tax Discrimination: A Comparative Analysis of U.S. and EU Approaches*, 7 FLA. TAX REV. 47 (2005); MICHEL DE WOLF, SOUVERAINETÉ FISCALE ET PRINCIPE DE NON DISCRIMINATION DANS LA JURISPRUDENCE DE LA COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES ET DE LA COUR SUPRÊME DES ÉTATS-UNIS (2005). The United States was formed in 1787 in hopes of a solution to the mutual jealousies and aggressions of the states, taking form in customs barriers and other economic retaliation. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935). See generally 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 308 (Max Farrand ed., 1911); 3 *id.* at 547–48; THE FEDERALIST NO. 42 (James Madison); see Treaty Establishing the European Economic

Constitution establishes the dual sovereignty of the states and the federal government and reserves to the states the power to define their own tax systems.<sup>23</sup> The U.S. Congress, however, clearly has the power to regulate commerce between the states under the Commerce Clause,<sup>24</sup> including the power to regulate cross-border transactions and prohibit certain state taxes.<sup>25</sup> Yet, there has been a historic reluctance on the part of Congress to intervene in state taxation.<sup>26</sup> Nevertheless, regardless of this congressional inaction, under the Dormant Commerce Clause doctrine a state law “can be challenged on the ground that it excessively burdens commerce among the states.”<sup>27</sup> Thus, the Supreme Court has needed to examine issues of fairness and efficiency with respect to state taxes similar to those confronting the EU.<sup>28</sup>

In general, the Treaty on the Functioning of the European Union (TFEU) reserves the power to tax to the Member States and requires a unanimous

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Community art. 2 (as in effect 1958) [hereinafter EEC Treaty]. The EEC Treaty established the European Economic Community as of January 1, 1958. *Treaty of Rome (EEC)*, EUR. PARLIAMENT, <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-rome> (last visited Mar. 12, 2021). The objective of the EEC Treaty was to create a single common market that would increase trade between the Member States. EEC Treaty, art. 2.

<sup>23</sup> See PAUL J. HARTMAN & CHARLES A. TROST, *FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION* § 1:1, at 4 (2d ed. 2003).

<sup>24</sup> U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause grants Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” *Id.*

<sup>25</sup> Charles E. McLure, Jr. & Walter Hellerstein, *Congressional Intervention in State Taxation: A Normative Analysis of Three Proposals*, 31 *STATE TAX NOTES* 721 (2004).

<sup>26</sup> Kathryn Moore, *State and Local Taxation: When Will Congress Intervene*, 23 *J. LEGIS.* 171, 182 (1997). One notable intervention occurred in 1959 when Congress passed a law preventing states from taxing corporations if the corporation’s only nexus was personal property sales solicitations conducted in the state. See Act of Sept. 14, 1959, Pub. L. No. 86-272, 73 Stat. 555–56 (codified as amended at 15 U.S.C. §§ 381–384 (1976)).

<sup>27</sup> ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 401 (2d ed. 2002).

<sup>28</sup> For more than two hundred years, there has been a stream of cases involving state taxation of interstate commerce. See generally Walter Hellerstein, *State Taxation of International Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 *TAX LAW.* 37 (1987). The Supreme Court has had to interpret “constitutional provisions directed to concerns far broader than taxation alone,” thus creating virtually all of the federal restraints that exist on the states’ taxing power. Walter Hellerstein, *Federal Limitations on State Taxation of Interstate Commerce*, in *COURTS AND FREE MARKETS* 431, 431 (Terrence Sandalow & Eric Stein eds., 1982).

vote with respect to any fiscal matters.<sup>29</sup> While it is understood that the EU and the Member States share competencies such that both have the right to legislate, there has been a “legislative vacuum in the income tax area”<sup>30</sup> due to this unanimity requirement for tax legislation.<sup>31</sup> Nevertheless, to create its economic union, the TFEU (and all prior treaties) contemplated the removal of obstacles to the free movement of goods, persons, services, and capital between the Member States.<sup>32</sup> Like the U.S. Supreme Court, the Court of Justice of the European Union (CJEU) has had to fulfill this role.<sup>33</sup> This “negative integration,” court action upholding the respective limitations of the U.S. Constitution and the EU Treaty, has had a profound influence on state taxation and Member State direct-tax measures.<sup>34</sup> However, saying what has to be removed from the individual states’ laws as contrary to the Constitution or the Treaty but not enacting comprehensive and detailed

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<sup>29</sup> Michel De Wolf, *The Power of Taxation in the European Union and in the United States*, 3 EC TAX REV. 124 (1995). “[T]he Council shall, acting unanimously . . . , issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.” Consolidated Version of the Treaty on the Functioning of the European Union art. 115, Oct. 26, 2012, 2012 O.J. (C 326) 91 [hereinafter TFEU]. Indeed, the more workable procedure of article 114 of the TFEU “shall not apply to fiscal provisions.” *Id.* art. 114, par. 2.

<sup>30</sup> SERVAAS VAN THIEL, EU CASE LAW ON INCOME TAX PART I 425 (2001).

<sup>31</sup> There have been some exceptions to this legislative vacuum, for example in 1990, when two directives, related respectively to mergers of companies from different Member States and the circulation of dividends between subsidiaries and their parent companies in other Member States were adopted. *See* Council Directive 90/434/EEC, art. 1, 1990 O.J. (L 225) 1 (directing the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States); Council Directive 90/435/EEC, art. 100, 1990 O.J. (L 225) 6 (directing the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States).

<sup>32</sup> SERVAAS VAN THIEL, FREE MOVEMENT OF PERSONS AND INCOME TAX LAW: THE EUROPEAN COURT IN SEARCH OF PRINCIPLES 12 (2002). These Treaty provisions are known as the four freedoms and, together with the freedom of establishment, they constitute the fundamental rules of the EU. The EU can exercise its legislative powers to eliminate any income tax obstacles to the intra-Union flow of goods, persons, services and capital. *Id.* at 13.

<sup>33</sup> For a broader comparison of both systems and the contribution of the respective highest courts, see DE WOLF, *supra* note 22.

<sup>34</sup> *See* CARLO PINTO, TAX COMPETITION AND EU LAW 56 (2003). “By contrast, ‘positive’ integration is brought about by the adoption of [EU] legislation . . . such as regulations and directives.” *Id.*

legislation that would be in accordance with the Treaty or the Constitution, has its limitations.

Tax law and jurisprudence must ensure a fair and efficient way of levying taxes in federal systems like the United States and the EU. Each of these federal systems is struggling to balance the sovereignty of their states/Member States and the goal of a harmonized internal market.<sup>35</sup>

Part II of this Article will briefly examine some cross-border taxing disputes that have been tackled by the judicial branches of the EU and the United States before returning to the global tax issue in Part III with a discussion of the OECD BEPS project and the EU's CCCTB project. Part IV proposes a transatlantic solution to the fair tax dilemma if global consensus cannot be reached.

## II. THE JUDICIAL RESPONSE TO UNFAIR TAX SYSTEMS

The CJEU and the U.S. Supreme Court have from time to time been called upon to determine the fairness of the tax systems of the sovereign Member States of the EU and the sovereign states of the United States. A discussion of some of the relevant cases will demonstrate the limitations of using the judiciary to resolve cross-border taxing disputes.

### A. *Unfair Tax Systems Within the EU*

Due to the dearth of positive integration, unfair tax systems within the EU have been dealt with through the strong and remarkable decisions of the CJEU.<sup>36</sup> More than one hundred direct tax cases have come before the CJEU, testing the compatibility of various national tax provisions with the TFEU provisions on the four freedoms.<sup>37</sup> As pointed out by the former Commissioner for Taxation and Customs, “[t]he European Court of Justice

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<sup>35</sup> See Tracy A. Kaye, *Europe's Balancing Act: Trends in Taxation*, 62 TAX L. REV. 193, 193 (2008).

<sup>36</sup> “While European Union governments do their best to avoid harmonising taxation, the EU’s court of justice is busy doing it for them.” *Taxing Judgments*, ECONOMIST, Aug. 2004, at 67.

<sup>37</sup> See generally EUR. COMM’N, CJEU COURT CASES IN THE FIELD OF, OR OF PARTICULAR INTEREST FOR, DIRECT TAXATION I, 1–26 (2019), [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/20191212\\_court\\_cases\\_direct\\_taxation\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/20191212_court_cases_direct_taxation_en.pdf).

case law has illustrated how the tax treatment of losses in cross-border situations, exit taxation, taxes on transfer of assets, withholding taxes on cross-border income, anti-abuse rules as well as inheritance taxes can all constitute tax obstacles to the internal market.”<sup>38</sup> The TFEU provides for different bases to justify such judicial intervention. In the field of corporate tax, there are mainly two bases for such intervention: the right of establishment<sup>39</sup> and the regulation of state aid.<sup>40</sup>

The right of establishment is the freedom of a business established in one Member State to establish itself in another Member State.<sup>41</sup> The applicability of the right of establishment to corporate taxation was duly recognized by the CJEU in 1986 with its famous *Avoir Fiscal* judgment.<sup>42</sup> The European Commission had instituted infringement proceedings against France with respect to its imputation system for the taxation of distributed company profits.<sup>43</sup> Because French tax law granted imputation credits (i.e.,

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<sup>38</sup> Kaye, *supra* note 35, at 195 (citing László Kovács, Eur. Comm’r for Tax’n & Customs, Internal Market Without Direct Tax Obstacles: The Commission’s Proposals to Help Cross Border Activities in the European Union (Nov. 23, 2006)).

<sup>39</sup> Article 49 bars the Member States from limiting the freedom of establishment, setting up an agency, branch or subsidiary of one Member State in the territory of another Member State. TFEU, *supra* note 29, art. 49. Article 54 confirms that article 49 is fully applicable to companies, stating that companies “formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union” must “be treated in the same way as natural persons who are nationals of Member States.” *Id.* art. 54.

<sup>40</sup> *Id.* art. 107(1) (stating that “any aid granted by a Member State or through State resources *in any form whatsoever* which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”) (emphasis added). *See generally* Christiana Hji Panayi, *State Aid and Tax: The Third Way?*, 32 INTERTAX 283 (2004).

<sup>41</sup> TFEU, *supra* note 29, art. 49 (“Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms . . . under the conditions laid down for its own nationals by the law of the country where such establishment is effected . . .”).

<sup>42</sup> Case T-270/83, Comm’n v. France, 1986 E.C.R. 285 (“*Avoir Fiscal*”).

<sup>43</sup> The Commission as Guardian of the Treaties continues to play an important role in enforcing EU law with respect to direct taxation through its use of the infringement procedure. TFEU, *supra* note 29, art. 258. Whenever a Member State has domestic tax provisions that are incompatible with EU law, the Commission is obligated to notify the offending Member State of the issue and, after receiving its observations, to send a reasoned opinion to that Member State. If no satisfactory response is received within two months, the Commission may bring an action before the CJEU. *Id.*; *see* Lukasz Adamczyk,

*avoir fiscal*) only to resident shareholders, the French branches of German insurers were denied the credit.<sup>44</sup> If the German insurers had invested by locally incorporating subsidiaries in France, these local subsidiaries, as French residents, would have been eligible for this *avoir fiscal*.<sup>45</sup> The Court held that this was not a legitimate reason to justify denial of the credit to the branches because such a holding would coerce foreign investors into incorporating subsidiaries.<sup>46</sup> France was discriminating on the grounds of nationality, as it is understood that the location of the registered office of a company is equivalent to its nationality.<sup>47</sup> To comply with this judgment, many Member States in addition to France had to amend their corporate tax laws to grant the same benefit to branches or permanent establishments.<sup>48</sup>

The judgment contains the following dicta:

[T]he fact that the laws of the Member States on corporation tax have not been harmonized cannot justify the difference of treatment in this case. Although it is true that in the absence of such harmonization, a company's tax position depends on the national law applied to it, Article 52 of the EEC Treaty [now Article 49 of the TFEU] prohibits the Member States from laying down in their laws conditions for the pursuit of activities by persons exercising their right of establishment which differ from those laid down for its own nationals.<sup>49</sup>

Similarly, “the rights conferred by Article 52 of the Treaty [now Article 49 of the TFEU] are unconditional and a Member State cannot make respect for

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*The Sources of EU Law Relevant for Direct Taxation*, in INTRODUCTION TO EUROPEAN TAX LAW: DIRECT TAXATION 17–18 (Michael Lang et al. eds., 2d ed. 2010).

<sup>44</sup> Case T-270/83, 1986 E.C.R. 285, ¶¶ 4–6.

<sup>45</sup> *Id.* ¶ 10.

<sup>46</sup> *Id.* ¶ 22 (Article 49 expressly allows foreign investors the right to choose the legal form they deem appropriate for operating in another Member State.).

<sup>47</sup> Richard Lyal, *Non-Discrimination and Direct Tax in Community Law*, 12 EC TAX REV. 68, 69 (2003).

<sup>48</sup> Georg Kofler, *Austria*, in TOWARDS A HOMOGENEOUS EC DIRECT TAX LAW 79 (Cecile Brokelind ed., 2007) (an example of this negative integration is the Austrian participation exemption that had to be “granted to Austrian permanent establishments of companies resident in an EU Member State”); Kristin Aima, *Finland*, in TOWARDS A HOMOGENEOUS EC DIRECT TAX LAW, *supra*, at 189 (other Member States like Finland changed their system of corporate taxation to avoid this issue).

<sup>49</sup> Case T-270/83, 1986 E.C.R. 285, ¶ 24.

them subject to the contents of an agreement concluded with another Member State.”<sup>50</sup>

Unlike the United States, the EU also prohibits any state aid through a Member State’s tax system.<sup>51</sup> The principle of state aid restrictions as set forth in the TFEU prohibits the Member States from granting any advantage that distorts or has the potential to distort competition or trade between the Member States.<sup>52</sup> In general, state aid is financial support given by a government to a certain business sector, enterprise, or geographic region through either the direct or indirect transfer of resources.<sup>53</sup> Therefore, state aid selectively favors certain enterprises for the production of certain goods, while general aid assists all sectors or industries. The former measure is prohibited; the latter is not.<sup>54</sup> The ability to use the regulation of state aid in the field of taxation has been recognized by the CJEU for at least two decades.<sup>55</sup> For instance, the 2001 judgment in *Adria-Wien Pipeline*<sup>56</sup> applies the state aid rules to an Austrian rebate of tax that favors manufacturing enterprises but not service providers.

The CJEU, however, may only dismantle inappropriate conduct by the Member States. Most of the tax coordination thus far in the field of direct taxation has resulted from the effects of these CJEU judgments regarding discrimination in what has been termed “negative integration.”<sup>57</sup> This use of the judiciary in the EU discloses several disadvantages. It does not create a

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<sup>50</sup> *Id.* ¶ 26.

<sup>51</sup> Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation, 1998 O.J. (C 384) 3, 4 (describing the Commission’s approach to tax incentives).

<sup>52</sup> TFEU, *supra* note 29, art. 107(1).

<sup>53</sup> PINTO, *supra* note 34, at 100.

<sup>54</sup> Tracy A. Kaye, *The Gentle Art of Corporate Seduction: Tax Incentives in the United States and the European Union*, 57 U. KAN. L. REV. 93, 100 (2008).

<sup>55</sup> See generally Wolfgang Schön, *State Aid in the Area of Taxation*, in EC STATE AIDS 241 (Leigh Hancher et al. eds., 3d ed. 2006).

<sup>56</sup> Case C-143/99, *Adria-Wien Pipeline GmbH v. Finanzlandesdirektion für Kärnten*, 2001 E.C.R. I-8365, ¶ 54 (clarifying that tax measures are specific if they differentiate between enterprises that are in legally and factually comparable situations).

<sup>57</sup> Servaas van Thiel, *The Direct Income Tax Case Law of the European Court of Justice: Past Trends and Future Developments*, 62 TAX L. REV. 143, 168–69 (2008).

fair and balanced system, but just a kaleidoscopic system where some “steps too far” are forbidden as judicial harmonization is purely negative. “There is an element of arbitrariness in that the cases are of course subject to the vagaries of who decides to sue” in which Member State.<sup>58</sup> The judicial path is also slow and has caused upheaval with respect to the Member States’ national tax laws,<sup>59</sup> in particular their anti-tax-avoidance regimes.<sup>60</sup>

Furthermore, the inappropriate conduct by the Member States must be clearly illegal from a European law point of view, not just against what is opportune or desirable. The recent judgment by the lower General Court of the European Union in the so-called Apple cases,<sup>61</sup> even if it is not a final judgment, is interesting to illustrate that last point.<sup>62</sup>

Two subsidiaries of the multinational Apple Inc., Apple Sales International (ASI) and Apple Operations Europe (AOE), were found by the European Commission to have received forbidden state aid from Ireland in the form of a special tax regime leading to an avoidance of €13 billion of taxes (approximately \$15 billion).<sup>63</sup> Apple had assigned to its Ireland subsidiary its intellectual property rights for manufacture and sales outside of North and South America and these profits were taxed at very low rates pursuant to the transfer-pricing rulings received from the Irish tax authorities.<sup>64</sup> In its decision, the European Commission had instructed the

<sup>58</sup> Tracy A. Kaye, *Direct Taxation in the European Union: From Maastricht to Lisbon*, 35 *FORDHAM INT’L L.J.* 1231, 1235 (2017).

<sup>59</sup> See Lee Sheppard, *Dowdy Retailer Set to Destroy European Corporate Tax*, 35 *TAX NOTES INT’L* 132 (2004).

<sup>60</sup> See, e.g., Case C-324/00, *Lankhorst-Hohorst GmbH v. FA Steinfurt*, 2002 E.C.R. I-11779, ¶ 34 (noting that thin capitalization rules, such as those of Germany, are widely used by governments to prevent excessive interest deductions).

<sup>61</sup> Joined Cases T-788 & 892/16, *Ireland & Others v. Comm’n*, ECLI:EU:T:2020:338, ¶ 319 (July 15, 2020) [hereinafter *GCEU Apple Cases*].

<sup>62</sup> General Court judgments can be appealed to the Court of Justice (the highest court of the CJEU). See *TFEU*, *supra* note 29, arts. 251–81, for information regarding the court system of the EU.

<sup>63</sup> See Comm’n Decision 2017/1283 of Aug. 30, 2016 on State Aid Implemented by Ireland to Apple, 2017 O.J. (L 187) 1, 109 [hereinafter *Apple Decision*]. The Commission has the primary responsibility to enforce the state aid restrictions in the treaty. *TFEU*, *supra* note 29, art. 108.

<sup>64</sup> *Apple Decision* ¶ 120.

Irish government to require Apple to repay the unpaid taxes.<sup>65</sup> Ireland appealed this decision to the General Court of the European Union.<sup>66</sup>

In its judgment of July 17, 2020, the General Court recognized that “the Commission may classify a tax measure as State aid, [but] it may do so only in so far as the conditions for such a classification are satisfied.”<sup>67</sup> Tax measures are state aid if the state grants the recipients a fiscal advantage that affects competition and trade between the Member States.<sup>68</sup> The fiscal advantage must also be specific or selective and not a part of the general overall tax system.<sup>69</sup> In other words, in this case the tax measure had to be compared to “the ordinary rules of taxation of corporate profit in Ireland”<sup>70</sup> in order to determine whether the alleged state aid is selective and granting an advantage.<sup>71</sup> And in the Apple cases, the General Court decided that “the Commission did not succeed in showing to the requisite legal standard that there was a selective advantage for the purposes of Article 107(1) TFEU.”<sup>72</sup> Thus, the Commission’s “contested decision must be annulled in its entirety without it being necessary to examine the other pleas in law raised by Ireland and ASI and AOE.”<sup>73</sup> Even if this interpretation of the notion of selectivity of an aid may be reversed by the CJEU, the judgment of the General Court already demonstrates that the judicial way to fight against MNEs’ structuration designed to reduce, even radically, their tax burden, is insufficient.

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<sup>65</sup> *Id.* ¶ 432. If the Commission decides that the unlawful aid is contrary to the single market, the Commission will order the Member State in violation to recover all the aid from the recipient. Council Regulation 659/99, 1999 O.J. (L 83), art. 14(1).

<sup>66</sup> GCEU Apple Cases ¶¶ 60, 76, 88.

<sup>67</sup> *Id.* ¶ 506.

<sup>68</sup> Kaye, *supra* note 54, at 102.

<sup>69</sup> Pierpaolo Rossi-Maccanico, *A Review of State Aid in Multinational Tax Regimes*, 46 TAX NOTES INT’L 941, 943 (2007) (“Selectivity may derive from a legislative, regulatory, or administrative provision, or from a discretionary practice on the part of the tax authorities.”).

<sup>70</sup> GCEU Apple Cases ¶¶ 33, 200.

<sup>71</sup> *Id.* ¶ 110 (citing Case C-88/03, Portugal v. Comm’n, 2006 E.C.R. I-7115, ¶ 56) (“[T]he very existence of an advantage may be established only when compared with ‘normal’ taxation.”).

<sup>72</sup> GCEU Apple Cases ¶ 507.

<sup>73</sup> *Id.*

### B. Unfair Tax Systems Within the USA

Similarly, the U.S. Supreme Court may only opine on the constitutionality of state tax laws, leading to negative integration instead of preferred harmonizing legislation that could be enacted by the U.S. Congress. Although the Commerce Clause is phrased as an affirmative grant of power to Congress, the Commerce Clause has long been interpreted by the Supreme Court as also denying the states the ability to tax or regulate in any manner that would unduly burden interstate commerce.<sup>74</sup> Thus, this Dormant Commerce Clause doctrine limits a state's ability to interfere with interstate commerce<sup>75</sup> and implicitly prohibits state discrimination against interstate commerce.<sup>76</sup>

As compared to the CJEU, there is an even greater amount of arbitrariness in the U.S. judicial system in that the selection of Supreme Court cases are subject to the vagaries of the certiorari procedure.<sup>77</sup> The *Wayfair* case discussed below illustrates another disadvantage in using the judiciary to police fairness. Note the length of time that it took to resolve the nexus issue discussed below—with cases spanning from 1967 to 2018. It was not until June 21, 2018 in the *Wayfair* case, that the U.S. Supreme Court finally overruled the physical presence requirement deemed necessary by prior case law for a state to require an out-of-state seller to collect sales or use tax.<sup>78</sup>

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<sup>74</sup> LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-2, at 1030 (3d ed. 2000). It is now established beyond dispute that “the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States . . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.” *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 328 (1977) (citing *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)).

<sup>75</sup> See generally TRIBE, *supra* note 74, § 6-2, at 1030.

<sup>76</sup> See Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 130–31 (“Beyond the proscription of purposeful discrimination, the commerce clause has been held to authorize judicial invalidation of state laws that unduly burden interstate commerce.”).

<sup>77</sup> “Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.” SUP. CT. R. 10.

<sup>78</sup> *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2099 (2018). In the United States, there is no value-added tax or federal sales tax. Instead forty-five states and the District of Columbia tax the sales of goods and services in their state. Most sellers are required to collect and remit the tax charged to consumers at the point of sale. U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-114, SALES TAXES: STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESSES ARE LIKELY TO EXPERIENCE COMPLIANCE

Under previous Supreme Court jurisprudence, a state was not permitted to impose tax collection obligations on an out-of-state seller unless that seller had a physical presence in the state.<sup>79</sup> According to the Court, this nexus requirement satisfied the notions of fundamental fairness found in the Due Process Clause of the U.S. Constitution,<sup>80</sup> and advanced the Commerce Clause's underlying objective of promoting a free market without discriminatory advantages.<sup>81</sup> This physical presence rule had remained the standard under the Commerce Clause<sup>82</sup> even though in 1967,<sup>83</sup> the U.S. Supreme Court's focus of the due process nexus requirement shifted from a seller's physical presence in the state to a more flexible approach based on the seller's "minimum contacts" with the state.<sup>84</sup>

In 1992, the *Quill* majority rejected the state's argument of "economic presence" and retained the bright-line rule of "physical presence" for determining whether "substantial nexus" is satisfied under the Dormant Commerce Clause.<sup>85</sup> The Court held that substantial nexus requires more than a de minimis physical presence before the out-of-state seller can be obliged to collect use tax, rationalizing that "Congress is now free to decide

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COSTS 3 (2017). These jurisdictions generally also impose a complementary use tax on the purchaser buying goods outside the state for use in the state. Adam Thimmesch, *Taxing Honestly*, 118 W. VA. L. REV. 147, 149–50 (2016).

<sup>79</sup> See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

<sup>80</sup> The Due Process Clause of the Fourteenth Amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

<sup>81</sup> See *Quill*, 504 U.S. at 312.

<sup>82</sup> *Id.* at 305.

<sup>83</sup> In 1967, the Supreme Court held that the Due Process Clause did not allow a state to impose tax collection obligations on a remote seller whose only connection with the state was by mail. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 758 (1967).

<sup>84</sup> In 1992, the Supreme Court reconsidered its position with respect to the due process nexus requirement by shifting its focus to the more lenient notion of fundamental fairness rather than physical presence. *Quill*, 504 U.S. at 312. Thus, the Due Process Clause requires only that the remote seller purposefully direct its business towards the taxing state. See *id.* at 305.

<sup>85</sup> See *id.* at 313, 317–18 (noting that it was possible for a retailer to have "minimum contacts" as required by the Due Process Clause, but lack the "substantial nexus" as required by the Commerce Clause).

whether, when, and to what extent the states may burden interstate mail-order concerns with a duty to collect use taxes.”<sup>86</sup>

The U.S. Congress did not act. Instead, over forty states proposed or enacted some form of legislation that broadens the definition of physical presence to include items such as cookies on an in-state customer’s computer or the presence of commission agents, in order to ameliorate the sales tax revenue losses caused by the physical presence requirement.<sup>87</sup> In 2016, South Dakota enacted a statute that required out-of-state businesses to collect sales tax on purchases made by its residents.<sup>88</sup> The legislation was struck down by the lower courts,<sup>89</sup> and the U.S. Supreme Court was asked to reconsider the validity of *Quill* in light of the expansion of e-commerce.<sup>90</sup> While in 1992, it was estimated that the states were losing between \$694 million and \$3 billion per year in sales tax revenues as a result of the physical presence rule,<sup>91</sup> current estimates ranged from \$8 to \$33 billion.<sup>92</sup> *Quill* had become a “judicially created tax shelter for businesses” that limited their physical presence yet still sold “their goods and services to a State’s consumers.”<sup>93</sup>

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<sup>86</sup> *Id.* at 313, 318.

<sup>87</sup> Jaye Calhoun & William J. Kolarik II, *Implications of the Supreme Court’s Historic Decision in Wayfair*, 89 STATE TAX NOTES 125, 126 (2018); *see also* Joseph R. Crosby et al., *South Dakota v Wayfair: Three Maps*, MULTISTATE INSIDER (Oct. 4, 2017), <https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps>.

<sup>88</sup> S. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016). The statute itself recognized that the economic nexus test it uses is inconsistent with the physical presence requirement of *Quill*. *See* South Dakota v. Wayfair, Inc., 229 F. Supp. 3d 1026, 1029 (D.S.D. 2017).

<sup>89</sup> State v. Wayfair, Inc., 901 N.W.2d 754 (S.D. 2017); *see also* Eric Smith, *Due Process Implications Related to State Notice and Economic Nexus Laws*, 70 TAX LAW. 833 (2017).

<sup>90</sup> *See* Ryan Prete, *High Court Should Review South Dakota Digital Tax Case: Brief*, BLOOMBERG (Oct. 26, 2017), <https://news.bloomberglaw.com/tech-and-telecom-law/high-court-has-the-ball-state-digital-tax-cases-slowng-down-1>.

<sup>91</sup> Brief for Law Professors & Economists as Amici Curiae Supporting Petitioner, South Dakota v. Wayfair, 138 S. Ct. 2080 (2018) (No. 17-494), 2018 WL 1203458, at \*11 n.7.

<sup>92</sup> *Wayfair*, 138 S. Ct. at 2088; *see also* Brief for Petitioner-Appellant, South Dakota v. Wayfair 138 S. Ct. 2080 (2018) (No. 28160), 2017 WL 4083981, at \*34–35. The South Dakota legislature went so far as to declare an emergency, demonstrating the urgency of overturning the physical presence rule. *Wayfair*, 138 S. Ct. at 2088; *see* S. 106 § 9.

<sup>93</sup> *Wayfair*, 138 S. Ct. at 2094.

Thus, it was not a complete surprise when the Supreme Court overruled the physical presence requirement deemed necessary for a state to require an out-of-state seller to collect and remit its sales tax.<sup>94</sup> A South Dakota lower court had “asserted the necessity of a review of those earlier decisions in light of current economic realities.”<sup>95</sup> Although the Supreme Court judgment was a 5-4 decision, both the majority opinion and the dissenting opinion repudiated the physical presence requirement.<sup>96</sup> The dissent had adhered to the principle of *stare decisis* and argued that Congress should be the one to make such a significant change to the rules.<sup>97</sup>

Indeed, *Quill* disadvantaged businesses with a physical presence compared to the remote sellers that were able to “avoid the regulatory burdens of tax collection.”<sup>98</sup> The Supreme Court decided that “[p]hysical presence is not necessary to create a substantial nexus,”<sup>99</sup> holding “that the physical presence rule as defined by *Quill* must give way to the ‘far-reaching systemic and structural changes in the economy’ and ‘many other societal dimensions’ caused by the Cyber Age.”<sup>100</sup> The Court found sufficient nexus given the economic and virtual contacts Wayfair had with South Dakota.<sup>101</sup> Justice Kennedy wrote, “[S]uch a nexus is established when the taxpayer [or collector] ‘avails itself of the substantial privilege of carrying on business’ in that jurisdiction.”<sup>102</sup>

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<sup>94</sup> *Id.* at 2099 (concluding “that the physical presence rule of *Quill* is unsound and incorrect. The Court’s decisions in *Quill* and *National Bellas Hess* should be, and now are, overruled.” (internal citations omitted)).

<sup>95</sup> *State v. Wayfair Inc.*, 901 N.W.2d 754, 760 (S.D. 2017).

<sup>96</sup> *See Wayfair*, 138 S. Ct. at 2099 (majority opinion); *id.* at 2101 (Roberts, C.J., dissenting).

<sup>97</sup> *Id.* at 2104–05 (Roberts, C.J., dissenting).

<sup>98</sup> *Id.* at 2094 (majority opinion).

<sup>99</sup> *Id.* at 2093 (stating that the “reasons given in *Quill* for rejecting the physical presence rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller’s liability to remit sales taxes”).

<sup>100</sup> *Id.* at 2097 (quoting *Direct Mktng. Ass’n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring)).

<sup>101</sup> *Id.* at 2099.

<sup>102</sup> *Id.* (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)). Annual in-state sales exceeding \$100,000 or 200 separate transactions were unlikely to occur “unless the seller [had] availed itself of the substantial privilege of carrying on business in South Dakota.” *Id.*

The U.S. Solicitor General had filed an amicus brief stating that the “United States has a substantial interest in the Court’s resolution of the question presented because the rules that govern in this area will significantly affect the functioning of the national economy and the States’ financial stability.”<sup>103</sup> The brief advocated for a clear rule “that an out-of-state retailer’s virtual presence within a State is a sufficient ground” for collection requirements on the retailer.<sup>104</sup> The *Wayfair* saga mimics a similar phenomenon that is taking place in the international arena with the discussion of a “significant economic presence” proposal as a means of allocating corporate income between source and residence countries.<sup>105</sup>

As mentioned above, e-commerce and digitalization have also disrupted the international tax field.<sup>106</sup> There is much commentary and discussion in the literature on the issue of whether the international tax regime has kept pace with the evolving digital economy.<sup>107</sup> In international tax, there is no “constitution” to guide the boundaries of the international tax regime. From an international law perspective, to establish taxing jurisdiction there must be some form of connecting factor with the country such as residence, citizenship, domicile, place of incorporation, place of effective management, or source of income.<sup>108</sup> This can lead to problems of “potentially overlapping

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<sup>103</sup> Brief for the United States as Amicus Curiae Supporting Petitioner, *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018) (No. 17-494), 2018 WL 1168802, at \*1 [hereinafter Brief Supporting Petitioner].

<sup>104</sup> *Id.* at \*9, \*11.

<sup>105</sup> See *infra* notes 123–27. Stephen Shay advocates that the “significant economic presence” proposal in Pillar One of the OECD Inclusive Framework’s February 13, 2019 public consultation document *Addressing the Challenges of the Digitalization of the Economy* “has the greatest potential to achieve a meaningful realignment” of “corporate income between source and residence countries.” Letter from Stephen Shay to OECD Inclusive Forum Delegates (Mar. 6, 2019), <https://ssrn.com/abstract=3349186>.

<sup>106</sup> Tracy Kaye, *The U.S. Nexus Debate and Its Implications for International Tax Policy*, in TERRITORIALITÄT UND PERSONALITÄT 67 (Roland Ismer et al. eds., Ottoschmidt 2019).

<sup>107</sup> See, e.g., Michael P. Devereux & John Vella, *Implications of Digitalisation for International Corporate Tax Reform*, in DIGITAL REVOLUTIONS IN PUBLIC FINANCE (Sanjeev Gupta et al. eds., 2017); Michael P. Devereux & John Vella, *Are We Heading Towards a Corporate Tax System Fit for the 21st Century?*, 35 FISCAL STUD. 449 (2014); Stephen E. Shay et al., *The David R. Tillinghast Lecture: “What’s Source Got to Do With It?” Source Rules and U.S. International Taxation*, 56 TAX L. REV. 81 (2003); Reuven Avi-Yonah, *International Taxation of Electronic Commerce*, 52 TAX L. REV. 507 (1997).

<sup>108</sup> Ramon Tomazela Santos & Sergio Andre Rocha, *Tax Sovereignty and Digital Economy in Post-BEPS Times*, in TAX SOVEREIGNTY IN THE BEPS ERA 29, 33 (Sergio Andre Rocha & Allison Christians eds., 2017). Under international law, each sovereign nation has the right to tax based on a nexus of the

national claims to tax” (i.e., double taxation) or “possibilities of tax evasion and avoidance” (i.e., double nontaxation) necessitating international cooperation such as the conclusion of bilateral double-taxation agreements.<sup>109</sup> Under current tax treaties, mostly based on a model tax convention developed by the Organization for Economic Cooperation and Development (OECD), this required tax nexus is defined as a “permanent establishment” meaning a “fixed place of business.”<sup>110</sup> The OECD has been reconsidering the criteria for a permanent establishment for many years but took up the broader issues of base erosion and profit shifting (BEPS) in 2012.<sup>111</sup>

### III. OECD BASE EROSION AND PROFIT SHIFTING (BEPS) PROJECT

Following the Great Recession, the G-20 declared that BEPS must be prevented and called upon the OECD to take action.<sup>112</sup> For more than fifty years, the OECD has been developing normative tax principles with the goal of resolving the conflicting tax jurisdiction claims that arise with respect to

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conduct to the territory of the nation (source jurisdiction) or to a natural or juridical person whose status links the person to the nation (residence jurisdiction). *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 411, 412 (AM. L. INST. 1986). Most nations’ income tax systems are based on one or both of these two types of jurisdiction. SUMMARY OF BEPS, *supra* note 9, at 6.

<sup>109</sup> THOMAS RIXEN, THE POLITICAL ECONOMY OF INTERNATIONAL TAX GOVERNANCE 1 (2008).

<sup>110</sup> *Id.*; *see also* OECD Model Tax Convention on Income and on Capital art. 5, ¶ 1 (2017), <https://doi.org/10.1787/5cd2b87b-en> [hereinafter OECD Model] (defining permanent establishment as “a fixed place of business, through which the business of an enterprise is wholly or partly carried on”). “More than 3,000 tax treaties in force around the world are based on the OECD Model.” *Tax Treaties: Update to OECD Model Tax Convention Released*, OECD (Dec. 18, 2017), <https://www.oecd.org/tax/treaties/tax-treaties-2017-update-to-oecd-model-tax-convention-released.htm>. Profits are then attributed to these permanent establishments based on arms-length transfer prices.

<sup>111</sup> The OECD is an influential forum where thirty-seven governments (in 2020), including the United States, come together to discuss economic and tax policy, among other topics, and set international standards. *About the OECD*, OECD (2020), <https://www.oecd.org/about/>. Note that the G-20 includes countries such as China, India, Saudi Arabia, Russia, Brazil, Indonesia, South Africa, and Argentina that are not members of the OECD but participated in the BEPS project as associates “on an equal footing with OECD members.” OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 25 (2013), <https://www.oecd.org/ctp/BEPSActionPlan.pdf> [hereinafter BEPS ACTION PLAN].

<sup>112</sup> G20 Leaders’ Declaration (Sept. 6, 2013), <http://www.g20.utoronto.ca/2013/2013-0906-declaration.html>.

cross-border income.<sup>113</sup> The OECD issued its BEPS report in February 2013,<sup>114</sup> and followed up in July 2013 with an Action Plan of fifteen steps to address profit shifting by MNEs.<sup>115</sup> Action 1 of the BEPS Action Plan dealt with the tax challenges of the digital economy and its business models, which includes features such as the mobility of intangibles, users, and business functions.<sup>116</sup> The 2014 report on the digital economy acknowledged that these key features exacerbated BEPS risks.<sup>117</sup> One item to be considered was whether these business activities “inappropriately benefit from the exception from permanent establishment (PE) status.”<sup>118</sup>

The OECD’s 2015 report on measuring BEPS found that worldwide annual tax revenue losses from aggressive tax planning ranged from \$100 to \$240 billion.<sup>119</sup> The OECD released twelve other reports in October 2015 that dealt with, *inter alia*, tax issues affecting the digital economy, hybrid entities, tax treaty abuse, and transfer-pricing guidelines.<sup>120</sup> The 2015 Action 7 Report included changes to the definition of permanent establishment in the OECD Model Tax Convention to address strategies being used to avoid having a taxable presence in a country under tax treaties.<sup>121</sup> The G-20 leaders endorsed these reports urging “the timely implementation of the project” and

<sup>113</sup> SUMMARY OF BEPS, *supra* note 9, at 6.

<sup>114</sup> OECD, ADDRESSING BASE EROSION AND PROFIT SHIFTING (2013) (reviewing various data and studies and finding an increased separation between the locations of the actual business activities and the reporting of profits for tax purposes).

<sup>115</sup> BEPS ACTION PLAN, *supra* note 111.

<sup>116</sup> OECD, ADDRESSING THE TAX CHALLENGES OF THE DIGITAL ECONOMY: ACTION 1: 2014 DELIVERABLE, at 13 (2015) (discussing the tax implications of the spread of multisided business models (such as the sharing economy) and their heavy reliance on network effects as well as the lowered barriers for adopting global business models).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 14–15 (“The work on Action 7 . . . should consider whether certain activities” previously excepted should now “be considered core activities.”).

<sup>119</sup> OECD, MEASURING AND MONITORING BEPS: ACTION 11: 2015 FINAL REPORT (2015).

<sup>120</sup> *See generally* OECD, BEPS 2015 FINAL REPORTS (2015), <https://www.oecd.org/ctp/beps-2015-final-reports.htm>.

<sup>121</sup> OECD, PREVENTING THE ARTIFICIAL AVOIDANCE OF PERMANENT ESTABLISHMENT STATUS: ACTION 7: 2015 FINAL REPORT, at 1, 9 (2015).

participation by “all countries and jurisdictions, including developing ones” in order to “reach a globally fair and modern international tax system.”<sup>122</sup>

In its 2015 report *Addressing the Tax Challenges of the Digital Economy*, the OECD acknowledged, just like the U.S. Supreme Court did in *Wayfair*, that the growth of e-commerce has caused business models to evolve in such a way that “non-resident companies operat[e] in a market jurisdiction in a fundamentally different manner today than at the time international tax rules were designed.”<sup>123</sup> Businesses now centrally manage functions such as procurement, inventory management, and local marketing that previously required local presence; the traditional business model for market economies is rendered obsolete.<sup>124</sup> Although reliance on physical presence to determine thresholds for taxation made sense when traditional businesses needed a local physical presence, this rule no longer works. All these changes raise challenges for international income taxation just as they did for state and local sales taxation in the United States or value-added tax (VAT) in other countries, including in the EU.

The 2015 Action 1 Report also identified a number of broader tax challenges raised by the digital economy with respect to nexus, data, and the characterization of income.<sup>125</sup> These challenges go beyond BEPS<sup>126</sup> and focus on the question of the allocation of taxing rights on income generated from cross-border activities among countries. To tackle these broader direct

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<sup>122</sup> G20 Leaders Communiqué ¶ 15 (Nov. 15–16, 2015), <https://www.consilium.europa.eu/media/23729/g20-antalya-leaders-summit-communication.pdf>.

<sup>123</sup> OECD, ADDRESSING THE TAX CHALLENGES OF THE DIGITAL ECONOMY: ACTION 1: 2015 FINAL REPORT, at 98 (2015), <https://doi.org/10.1787/9789264241046-en> [hereinafter ACTION 1 FINAL REPORT] (noting that while it was always possible to sell into a jurisdiction without a physical presence there, the internet has allowed this activity to become pervasive).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 13.

<sup>126</sup> OECD, TAX CHALLENGES ARISING FROM DIGITALISATION: INTERIM REPORT 2018, at 18 (2018) [hereinafter INTERIM REPORT]. “In the changing international tax environment, a number of countries have expressed a concern about how international standards on which bilateral tax treaties are based allocate taxing rights between source and residence States. This Action Plan is focused on addressing BEPS. While actions to address BEPS will restore both source and residence taxation in a number of cases where cross-border income would otherwise go untaxed or would be taxed at very low rates, these actions are not directly aimed at changing the existing international standards on the allocation of taxing rights on cross-border income.” BEPS ACTION PLAN, *supra* note 111, at 11.

tax issues, the report analyzed three options: (1) changes to the permanent establishment thresholds, (2) imposition of a withholding tax to be applied to certain types of digital transactions, and (3) introduction of an equalization levy “where the foreign business had a sufficient economic presence in the jurisdiction.”<sup>127</sup> Although none of these options were recommended in the 2015 Action 1 Report, the report concluded that countries could introduce any of these options in their domestic laws, provided they respect existing treaty obligations.<sup>128</sup>

The G-20 Finance Ministers asked the OECD/G20 Inclusive Framework on BEPS (the “Inclusive Framework”)<sup>129</sup> for an interim report. Issued in March 2018, the report provided an overview of the impact of digitalization on the global economy and considered the implications of these changes on the international tax system but did not propose a solution.<sup>130</sup> Given the many alternative tax initiatives that various countries were enacting, members of the Inclusive Framework agreed that a multilateral approach is necessary to reduce complexity, double taxation, and the distortions to investment and growth.<sup>131</sup>

#### *A. Countries Take Unilateral Action While Pledging for a Global Agreement*

Given the lack of global consensus and dissatisfaction with the consequences of the current international tax regime, many countries took unilateral action with respect to taxation of the digital economy.<sup>132</sup> Countries

<sup>127</sup> ACTION 1 FINAL REPORT, *supra* note 123, at 13. INTERIM REPORT, *supra* note 126, at 19.

<sup>128</sup> ACTION 1 FINAL REPORT, *supra* note 123, at 13.

<sup>129</sup> In 2016, a coalition of countries, beyond the OECD membership, known as the Inclusive Framework on BEPS, was established to ensure the effective implementation of the 2015 BEPS package. *What is BEPS?*, OECD, [www.oecd.org/tax/beps/beps-about.htm](http://www.oecd.org/tax/beps/beps-about.htm) (last visited Oct. 1, 2020). As of December 2019, 137 countries and jurisdictions are represented. *Members of the Inclusive Framework on BEPS*, OECD, <https://www.oecd.org/ctp/beps/inclusive-framework-on-beps-composition.pdf> (last visited Oct. 1, 2020).

<sup>130</sup> *See generally* INTERIM REPORT, *supra* note 126, at 24 (illustrating the different positions of the countries and outlining some alternatives).

<sup>131</sup> *Id.* at 173.

<sup>132</sup> *Id.* at 134–62.

such as Australia, India, Israel, Italy, France, Hungary, and the United Kingdom adopted measures that either employed alternative applications of the permanent establishment threshold, increased the use of withholding taxes, or created specific regimes targeting large MNEs.<sup>133</sup> The European Commission determined that in “the absence of adequate global progress,” it needed to advance its own digital tax proposals,<sup>134</sup> including a digital services tax on certain digital services revenues.<sup>135</sup> On December 4, 2018, the EU Finance Ministers failed, however, to reach agreement on the compromise text regarding the proposed EU Digital Services Tax.<sup>136</sup> But Benjamin Angel, acting director-general of the Directorate-General for Taxation and Customs Union, has since stated at a July 13, 2020 meeting of the European Parliament’s Committee on Economic and Monetary Affairs “that if global talks fail, any European solution to digital taxation will be based on the progress made in those discussions.”<sup>137</sup> And on November 10, 2020, Ursula von der Leyen, President of the European Commission, solemnly reaffirmed that prospect, as the deadline for the global talks within OECD and with the G-20 slipped to mid-2021.<sup>138</sup>

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<sup>133</sup> *Id.*

<sup>134</sup> “In the absence of adequate global progress, EU solutions should be advanced within the Single Market and the Commission stands ready to present the appropriate legislative proposals.” *Communication from the Commission to the European Parliament and the Council: A Fair and Efficient Tax System in the European Union for the Digital Single Market*, at 10–11, COM (2017) 547 final (Sept. 21, 2017). In March 2018, the European Commission proposed new rules relating to the corporate taxation of a significant digital presence. *Proposal for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence*, at 2, COM (2018) 147 final (Mar. 21, 2018); *Commission Recommendation of 21.3.2018 Relating to the Corporate Taxation of a Significant Digital Presence*, at 2, COM (2018) 1650 final (Mar. 21, 2018).

<sup>135</sup> *Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services*, at 3, COM (2018) 148 final (Mar. 21, 2018).

<sup>136</sup> See generally *Economic and Financial Affairs Council, 4 December 2018*, EUR. COUNCIL, <https://www.consilium.europa.eu/en/meetings/ecofin/2018/12/04/> (last updated Oct. 31, 2019) (regarding a proposed three percent tax on certain revenues from targeted advertising on a digital interface, intermediation services, and the sale of user data).

<sup>137</sup> Sara Paez, *European Commission Won’t Pursue EU-wide DST*, TAX NOTES TODAY INT’L, July 14, 2020, Doc. No. 2020-26745.

<sup>138</sup> Ursula von der Leyen, President Eur. Comm’n, Speech by President von der Leyden at the E.U. Ambassadors’ Conference 2020 (Nov. 11, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_20\\_2064](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_2064) (“Anyone who does business in the Single Market and thus benefits from our infrastructure, our education system and our social system, is welcomed to make profits. But our social contract expects them to pay appropriate taxes in order to contribute to the social market economy. . . .

But let there be no doubt: should an agreement fall short of a fair tax system, Europe will act. The new deadline of mid-21 must be the final one. Should an agreement fall short of a fair tax system that provides long-term sustainable revenues, we will come forward with our own proposal.<sup>139</sup>

In the meantime, the Commission approach and the timetable have been endorsed by the heads of state and governments of the EU.<sup>140</sup>

The United States was adamantly opposed to these digital tax proposals, and on October 25, 2018, U.S. Treasury Secretary Steven Mnuchin issued the following statement:

[T]he issues are not unique to technology companies but also relate to other companies, particularly those with valuable intangibles. . . . I highlight again our strong concern with countries' consideration of a unilateral and unfair gross sales tax that targets our technology and internet companies. A tax should be based on income, not sales, and should not single out a specific industry for taxation under a different standard. We urge our partners to finish the OECD process with us rather than taking unilateral action in this area.<sup>141</sup>

The OECD determined that because the entire economy is digitized, any measures that it proposes should be broadly applicable to all businesses in what is known as the “unified approach.” On January 23, 2019, the Inclusive Framework on BEPS approved a policy note on the tax challenges of the digital economy and the “question of how taxing rights on income generated from cross-border activities in the digital age should be allocated among

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Our goal remains a consensus-based solution at the OECD and G20 level on both pillars of the global discussions.”).

<sup>139</sup> *Id.*

<sup>140</sup> Statement of the Members of the European Council 3, 5 (Mar. 25, 2021), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjJrMuJreTvAhUFqxoKHXRKcPQQFjACegQIFRAD&url=https%3A%2F%2Fwww.consilium.europa.eu%2Fmedia%2F48976%2F250321-vtc-euco-statement-en.pdf&usg=AOvVaw3QGbl6uGrIKZB7t4eJi3hv> (“[W]e . . . stress the need to urgently address the tax challenges arising from the digitalisation of the economy to ensure that all operators pay their fair share of tax. We reiterate our strong preference for and commitment to a global solution on international digital taxation and will strive to reach a consensus-based solution by mid-2021 within the framework of the OECD. We confirm that the European Union will be ready to move forward if the prospect of a global solution is not forthcoming.”).

<sup>141</sup> Press Release, U.S. Treas. Dep’t, Secretary Mnuchin Statement on Digital Economy Taxation Efforts (Oct. 25, 2018), <https://home.treasury.gov/news/press-releases/sm534>.

countries,” proposing a two-pillar approach.<sup>142</sup> The first pillar addresses the allocation of taxing rights and nexus, while the second pillar focuses on global anti-base-erosion proposals that would have broad application to most MNEs.<sup>143</sup> The OECD had previously promised a consensus-based solution by the end of 2020 and put forth multiple public consultation documents during 2019 and 2020.<sup>144</sup>

This is all very controversial and there is a real chance that the OECD will fail to reach consensus on Pillars 1 and 2. On June 12, 2020, U.S. Treasury Secretary Mnuchin sent a letter to various finance ministers expressing the U.S. government’s concerns with the ongoing OECD negotiations on these international tax rules and called for a pause in the multilateral talks with respect to Pillar 1.<sup>145</sup> The G-20 communiqué issued after the July 18, 2020 video conference pledged to

continue our cooperation for a globally fair, sustainable, and modern international tax system. We acknowledge that the COVID-19 pandemic has impacted the work of addressing the tax challenges arising from the digitalization of the economy.

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<sup>142</sup> OECD, ADDRESSING THE TAX CHALLENGES OF THE DIGITALISATION OF THE ECONOMY: POLICY NOTE (2019) [hereinafter POLICY NOTE], <https://www.oecd.org/tax/beps/policy-note-beps-inclusive-framework-addressing-tax-challenges-digitalisation.pdf>. “The proposal . . . would re-allocate some profits and corresponding taxing rights to countries and jurisdictions where MNEs have their markets. It would ensure that MNEs conducting significant business in places where they do not have a physical presence, be taxed in such jurisdictions, through the creation of new rules stating (1) where tax should be paid (‘nexus’ rules) and (2) on what portion of profits they should be taxed (‘profit allocation’ rules).” Press Release, OECD, OECD Leading Multilateral Efforts to Address Tax Challenges from Digitalisation of the Economy (Sept. 10, 2019), <https://www.oecd.org/tax/oecd-leading-multilateral-efforts-to-address-tax-challenges-from-digitalisation-of-the-economy.htm>.

<sup>143</sup> POLICY NOTE, *supra* note 142, at 2.

<sup>144</sup> See, e.g., OECD, ADDRESSING THE TAX CHALLENGES OF THE DIGITALISATION OF THE ECONOMY 7 (2019), <https://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf>. Stakeholders submitted more than 200 items yielding over 2,000 pages of written comments. A public consultation meeting was held in Paris on March 13 and 14, 2019, with over 400 attendees. See OECD, SECRETARIAT PROPOSAL FOR A “UNIFIED APPROACH” UNDER PILLAR ONE, at 2 (2019).

<sup>145</sup> Letter from Steven Mnuchin, U.S. Treasury Sec’y, to U.K. Chancellor of the Exchequer and the Finance Ministers of Italy, France, and Spain (June 12, 2020) (warning that discussions had reached an “impasse” and that the United States was unable to agree even on an interim basis on changes to global taxation law that would affect leading U.S. digital companies and asserting that “[a]ttempting to rush such difficult negotiations is a distraction from far more important matters” . . . “[t]his is a time when governments around the world should focus their attention on dealing with the economic issues resulting from Covid-19”). The U.S. Treasury Secretary also reiterated prior threats to retaliate if the countries continued to implement their own digital taxes. *Id.*

We stress the importance . . . to continue advancing the work on a global and consensus-based solution with a report on the blueprints for each pillar to be submitted to our next meeting in October 2020. We remain committed to further progress on both pillars to overcome remaining differences and reaffirm our commitment to reach a global and consensus-based solution this year.<sup>146</sup>

Negotiators later indicated that they would not reach agreement in 2020.<sup>147</sup> The members of the OECD/G20 Inclusive Framework on BEPS did submit reports on the blueprints of Pillar 1<sup>148</sup> and Pillar 2<sup>149</sup> in October 2020. Pillar 1 aims to reform the international income tax system “through changes to the profit allocation and nexus rules applicable to business profits,” specifically by “expand[ing] the taxing rights of market jurisdictions” where the business has substantial “activities in, or remotely directed at, that jurisdiction.”<sup>150</sup> However, there remain serious political issues to be resolved, such as the scope of the proposal (narrow versus wider group of activities should be affected).<sup>151</sup> Furthermore, the United States was demanding that Pillar 1 be optional.<sup>152</sup>

Although the group pledged “to swiftly address the remaining issues with a view to bringing the process to a successful conclusion by mid-2021

<sup>146</sup> G20 Finance Ministers & Central Bank Governors Meeting Communiqué ¶ 10 (July 18, 2020).

<sup>147</sup> Jim Tankersley, *Global Talks on Taxing Tech Firms Will Slip into 2021*, N.Y. TIMES (Oct. 12, 2020), <https://www.nytimes.com/2020/10/12/business/digital-tax-talks.html> (OECD Secretary-General Gurría stating that “[t]he alternative to finding an agreement would be a trade war”).

<sup>148</sup> OECD, TAX CHALLENGES ARISING FROM DIGITALISATION: REPORT ON PILLAR ONE BLUEPRINT: INCLUSIVE FRAMEWORK ON BEPS (2020), <https://doi.org/10.1787/beba0634-en> [hereinafter PILLAR 1 BLUEPRINT] (focusing on nexus and profit allocation).

<sup>149</sup> OECD, TAX CHALLENGES ARISING FROM DIGITALISATION: REPORT ON PILLAR TWO BLUEPRINT: INCLUSIVE FRAMEWORK ON BEPS 3 (2020), <https://doi.org/10.1787/abb4c3d1-en> (focusing on a global minimum tax).

<sup>150</sup> PILLAR 1 BLUEPRINT, *supra* note 148, at 11 (grouping the key elements of Pillar 1 “into three components: a new taxing right for market jurisdictions over a share of residual profit calculated at an MNE group . . . level (Amount A); a fixed return for certain baseline marketing and distribution activities taking place physically in a market jurisdiction . . . (Amount B); and processes to improve tax certainty through effective dispute prevention and resolution mechanisms”).

<sup>151</sup> *Id.* at 12. Other unresolved issues include “how much residual profit would be reallocated under the new taxing right” and “the scope of mandatory binding dispute resolution.” *Id.* at 12–13.

<sup>152</sup> Letter from Steven Mnuchin, U.S. Treasury Sec’y, to OECD Sec’y Gen. Gurría (Dec. 2019) (reiterating the U.S. support for a multilateral solution but proposing that Pillar One be implemented on a “safe harbour” basis).

and to resolve technical issues, develop model draft legislation, guidelines, and international rules and processes as necessary to enable jurisdictions to implement a consensus based solution,”<sup>153</sup> politics as well as the COVID-19 pandemic may impede upon this goal. However, new Treasury Secretary Janet Yellen has emphasized that the “United States is committed to the multilateral discussions on both pillars within the OECD/G20 Inclusive Framework, overcoming existing disagreements, and finding workable solutions in a fair and judicious manner.”<sup>154</sup> That allowed the G20 finance ministers to confirm that they “will endeavour to achieve a global and consensus-based solution by mid-2021.”<sup>155</sup>

*Wayfair*, the EU digital tax proposals, and the OECD reports are all signs of a time when policymakers and academics are reconsidering taxation systems that were constructed a century ago, and making a determination as to whether these systems still work today. As Professor Walter Hellerstein wrote in 2000, he understood the necessity of nexus rules but urged a “focus on rules that are appropriate to the twenty-first century, not the nineteenth.”<sup>156</sup> The United States supported a change to the physical presence rule in the context of state sales tax collection,<sup>157</sup> and after fifty years the rule has been modified to allow the states to adapt to the realities of e-commerce.<sup>158</sup> The United States correctly argued in its amicus brief that it had a substantial interest in the Supreme Court’s resolution of the issue because the physical presence rule hampered state sales tax collection and

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<sup>153</sup> OECD, COVER STATEMENT BY THE INCLUSIVE FRAMEWORK ON THE REPORTS ON THE BLUEPRINTS OF PILLAR ONE AND PILLAR TWO, at 3 (2020).

<sup>154</sup> Press Release, U.S. Dep’t of Treasury, Letter from Treasury Secretary Janet L. Yellen to G20 Colleagues (Feb. 5, 2021), <https://home.treasury.gov/news/press-releases/jy0034>. Secretary Yellen also told the G20 that the Biden administration “had dropped the Trump administration’s proposal to let some companies opt out of new global digital tax rules.” Andrea Shalal et al., *U.S. Drops “Safe Harbor” Demand, Raising Hopes for Global Tax Deal*, REUTERS, Feb. 26, 2021, <https://www.reuters.com/article/us-g20-usa-oecd-idINKBN2AQ2E6>. This may facilitate agreement.

<sup>155</sup> Press Release, G20, First Meeting of the G20 Finance Ministers and Central Bank Governors (Feb. 26, 2021), [http://www.g20.utoronto.ca/2021/210226-finance.html?mc\\_cid=f2717eb477&mc\\_eid=0183d5123f](http://www.g20.utoronto.ca/2021/210226-finance.html?mc_cid=f2717eb477&mc_eid=0183d5123f).

<sup>156</sup> Walter Hellerstein, *Deconstructing the Debate over State Taxation of Electronic Commerce*, 13 HARV. J.L. & TECH. 549, 553 (2000).

<sup>157</sup> *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2102 (2018).

<sup>158</sup> *Id.* at 2099.

was significantly affecting the functioning of the national economy and the states' financial stability.<sup>159</sup> The U.S. Supreme Court decided that the physical presence rule must give way to the “‘far-reaching systemic and structural changes in the economy’ and ‘many other societal dimensions’ caused by the Cyber Age.”<sup>160</sup>

A similar phenomenon is happening at the international level. There is much consternation and chaos in the international tax arena, as evidenced by the variety of initiatives countries are undertaking in order to collect the taxes they deem appropriate in the digital economy. The internet has considerably changed the way businesses operate, leading to the creation of new business models or, at the very least, the substantial transformation of old ones. The digital economy has placed pressure on basic concepts, such as nexus and the profit allocation rules that underlie the existing international tax regime, which was created almost a century ago. Longstanding international tax principles must be reexamined and new ideas must be considered.

“The United States has vociferously opposed the digital tax initiatives of the European Union. However, it is imperative that the United States seriously consider alternative taxing schemes that re-examine the existing allocation of taxing rights. . . . The status quo will not hold.”<sup>161</sup>

### *B. EU's Common Consolidated Corporate Tax Base (CCCTB) as the Political Answer*

In 2011, the European Commission proposed its system for a common consolidated corporate tax base (CCCTB).<sup>162</sup> The goal of this proposal was

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<sup>159</sup> See Brief Supporting Petitioner, *supra* note 103.

<sup>160</sup> *Wayfair*, 138 S. Ct. at 2097 (quoting *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring)).

<sup>161</sup> Kaye, *supra* note 106, at 74.

<sup>162</sup> See *Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)*, at 4–7, COM (2011) 121/4 (Mar. 15, 2011) [hereinafter *CCCTB Proposal 2011*]. The Commission had previously formed a working group comprised of tax experts from the administrations of all Member States to provide it with technical assistance and advice. See *Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee: Towards an Internal Market Without Tax Obstacles: A Strategy for Providing Companies with a Consolidated Corporate Tax Base for Their EU-wide Activities*, COM (2001) 582 final (Oct. 23, 2001).

to improve the efficiency of the single market and create a business-friendly tax environment by minimizing compliance costs resulting from cross-border activity.<sup>163</sup> The CCCTB creates a single tax base for all Member State group economic activity in the EU in an effort to “ensure consistency in the national tax systems.”<sup>164</sup> With the CCCTB, cross-border companies would only have to comply with a single set of corporate tax rules.<sup>165</sup>

Companies can file one tax return for all of their EU activities, and offset losses in one Member State against profits in another. The consolidated taxable profits will be shared between the Member States in which the group is active, using an apportionment formula. Each Member State will then tax its share of the profits at its own national tax rate.<sup>166</sup>

According to its promoters, the alleged benefits of a CCCTB-regime include: reduced tax compliance cost for businesses, lower tax administration cost for governments, the reduction of double taxation of foreign source income, increased tax transparency, and the elimination of transfer-pricing disputes among participating countries.<sup>167</sup> The Commission asserts that the CCCTB proposal will “[i]mprove the single market for businesses,” “support[ing] growth, jobs and investment in the EU,” and, relevant to this Article, aid in “combatting tax avoidance.”<sup>168</sup> On that last point, the Commission explains that because the CCCTB will be mandatory for the largest MNEs in the EU, those “companies with the greatest capacity to tax plan” will be hindered from avoiding taxation.<sup>169</sup> “The CCCTB will eliminate mismatches between national systems, preferential regimes and hidden tax rulings” and “remove the need for transfer pricing,” a primary tool for profit shifting.<sup>170</sup> “The CCCTB contains robust anti-abuse measures, to defend

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<sup>163</sup> *CCCTB Proposal 2011*, *supra* note 162, at 4–6.

<sup>164</sup> *Id.* at 4.

<sup>165</sup> *Id.* at 5.

<sup>166</sup> *Common Consolidated Corporate Tax Base*, EUR. COMM’N, [https://ec.europa.eu/taxation\\_customs/business/company-tax/common-consolidated-corporate-tax-base-ccctb\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/common-consolidated-corporate-tax-base-ccctb_en) (last visited Dec. 30, 2020).

<sup>167</sup> See generally Michel Aujean, *The CCCTB Project and the Future of European Taxation*, in 53 COMMON CONSOLIDATED CORPORATE TAX BASE (Michael Lang et al. eds., 2008).

<sup>168</sup> *Common Consolidated Corporate Tax Base*, *supra* note 166.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

Member States against base erosion and profit shifting to non-EU countries.”<sup>171</sup>

Since 2011, there have been numerous revisions or additional proposals, conferences, expert groups, discussions within the Council of Ministers, etc. In 2016, the Commission relaunched the CCCTB with rules that would be mandatory for groups with consolidated group revenue of over €750 million annually.<sup>172</sup> The Commission reiterated that the CCCTB is a fair and efficient framework for corporate taxation in an “economic environment [that] has become more [globalized], mobile and digital.”<sup>173</sup> Within the European Parliament, many have seen the CCCTB as a possible way to create a new resource for the EU itself, possibly under the form of a percentage of the CCCTB to be paid by the large multinationals to the EU budget.<sup>174</sup> The COVID-19 pandemic has severely increased the financial needs of the EU,<sup>175</sup> so a new funding source is inevitable. However, the CCCTB has not yet won the necessary support of all the Member States. As discussed previously, the institutional EU framework requires that, in tax matters, unanimity is needed within the Council of Ministers.

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<sup>171</sup> *Id.*

<sup>172</sup> *Proposal for a Council Directive on a Common Corporate Tax Base*, art. 2(1)(c), COM (2016) 685 final (Oct. 25, 2016) [hereinafter *CCCTB Proposal 2016*]. The Commission also changed its strategy to two-step adoption: (1) the mandatory rules for a common corporate tax base and (2) consolidation. *Id.* at 3.

<sup>173</sup> *Id.* at 2.

<sup>174</sup> José Manuel Fernandes & Valérie Hayer, *Legislative Package for the System of Own Resources of the European Union After 2020*, EUR. PARLIAMENT, <https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-mff-post-2020-own-resources> (last visited Dec. 30, 2020). Within the Commission, the priority for a new fiscal resource is rather “a lump sum or a fee proportional to the [ . . . ] size, measured by the annual revenues made in the EU” by large enterprises (i.e., with global annual revenues above €750 million). *Parliamentary Question E-004469:2020*, EUR. PARLIAMENT (July 30, 2020), [https://www.europarl.europa.eu/doceo/document/E-9-2020-004469\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-004469_EN.html); *Answer Given by Mr. Hahn on Behalf of the European Commission*, EUR. PARLIAMENT (Oct. 22, 2020), [https://www.europarl.europa.eu/doceo/document/E-9-2020-004469-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-004469-ASW_EN.html).

<sup>175</sup> *See Jobs and Economy During the Coronavirus Pandemic*, EUR. COMM’N, [https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic\\_en](https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic_en) (last visited Feb. 2, 2021).

Notably, the Commission, in its 2020 Communication, “[a]n action plan for fair and simple taxation supporting the recovery strategy,”<sup>176</sup> did not mention its CCCTB proposals as a way to help EU Member States restore their finances after the COVID-19 crisis, or as a way to support “growth, jobs and investment in the EU”<sup>177</sup> after this crisis. However, on October 19, 2020, the Commission published its Communication to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions containing the Commission work program for 2021 and listed the CCCTB proposals among the “priority pending proposals.”<sup>178</sup> Moreover, in a roadmap titled “A Modern EU Business Taxation Framework,”<sup>179</sup> published on March 4, 2021, the Commission considers the CCCTB proposals as an element for “the way forward towards an EU corporate tax framework fit for the 21st century.”<sup>180</sup>

#### IV. A TRANSATLANTIC WAY TO A FAIR FEDERALISM IN CORPORATE TAX—CCCTB?

According to tax commentators, the United States is engaged in two “tax wars” with the EU: one dealing with the application of the state aid restrictions to U.S. multinationals<sup>181</sup> and the other dealing with the digital services taxes (DSTs) from various European countries, such as France and Spain, applied to Facebook, Apple, Amazon, Netflix, and Google (referred

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<sup>176</sup> See *Communication from the Commission to the European Parliament and the Council, Tax Action Plan for Fair and Simple Taxation Supporting the Recovery*, COM (2020) 312 final (July 15, 2020).

<sup>177</sup> *Common Consolidated Corporate Tax Base*, *supra* note 166.

<sup>178</sup> *Annexes to the Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission Work Programme 2021*, COM (2020) 690 final (Oct. 19, 2020) (Annex 3 of this Communication lists among the “priority pending proposals” the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base).

<sup>179</sup> *A Modern EU Business Taxation Framework*, EUR. COMM’N, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12930-Business-taxation-for-the-21st-century> (last visited Apr. 5, 2021).

<sup>180</sup> *Id.*

<sup>181</sup> Lee A. Sheppard, *Notes from the Tax Wars*, 153 TAX NOTES INT’L 11 (2016). The U.S. government has set forth its opposition to the state aid decisions against U.S. MNEs in a white paper. U.S. DEPT. OF THE TREASURY, THE EUROPEAN COMMISSION’S RECENT STATE AID INVESTIGATIONS OF TRANSFER PRICING RULINGS (2016).

to as the FAANGs).<sup>182</sup> These U.S. MNEs operate remotely “without the need for any significant physical resources within countries with large consumer markets,” threatening the ability of these countries to receive “a fair division of cross-border tax revenue.”<sup>183</sup> U.S.-EU relations are strained, with members of Congress asking the U.S. Treasury Department to consider imposing retaliatory taxes or tariffs on the EU Member States.<sup>184</sup>

We believe that the U.S. and EU experiences could, on the contrary, lead to a transatlantic way to a fair federalism in the field of corporate tax.

First, this solution could be predicated on defining some kind of transatlantic common corporate tax base for those very large MNEs required to file a country-by-country (CbC) report.<sup>185</sup> For example, in 2016 approximately 1,100 U.S. MNEs met the revenue threshold and were subject to the U.S. CbC reporting rules, and the EU Member States received approximately 975 CbC reports.<sup>186</sup> Both the EU and the United States are well equipped with the fundamental grounds for defining that common corporate tax base. For instance, the differences between U.S. GAAP (i.e., U.S. generally accepted accounting principles) and IFRS (i.e., international financial reporting standards)—the latter being mandatory within the EU for

<sup>182</sup> Jim Tankersley & Ana Swanson, *Trump Administration Escalates Global Fight over Taxing Tech*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/06/02/business/economy/trade-digital-taxes-tech.html> (noting that the U.S. Trade Representative is investigating countries with digital services taxes using “Section 301 of the Trade Act of 1974, which gives the government broad authority to respond to unfair practices that negatively affect U.S. commerce”).

<sup>183</sup> Arthur J. Cockfield, *Tax Wars: The Battle over Taxing Global Digital Commerce*, 161 TAX NOTES 1331, 1331 (2018).

<sup>184</sup> See Letter from Charles Grassley, Chairman, and Ron Wyden, Ranking Member, U.S. Senate Comm. on Fin., to Steven Mnuchin, U.S. Treasury Sec’y (June 24, 2019) (“Under section 891, a double rate of U.S. tax could be imposed on citizens and corporations of foreign countries engaging in discriminatory taxation of Americans.”).

<sup>185</sup> The OECD’s Action 13 report develops rules for transfer-pricing documentation including a common template to be used by the MNEs to provide relevant “information on their global allocation of the income, economic activity, and taxes paid among countries.” OECD, TRANSFER PRICING DOCUMENTATION AND COUNTRY-BY-COUNTRY REPORTING: ACTION 13: 2015 FINAL REPORT, at 9 (2015). In the United States, the parent of a U.S. MNE with annual revenue of \$850 million or more must file a country-by-country report. Treas. Reg. § 1.6038-4(a) (2017); see T.D. 9773, 2016-29 I.R.B. 56 (reporting threshold of \$850,000,000 was determined “by reference to the USD equivalent of €750,000,000 on January 1, 2015, as provided in the Final BEPS Report”).

<sup>186</sup> OECD, *supra* note 15, at 36.

the consolidated accounts of listed companies—are today smaller than ever, and in any case manageable.<sup>187</sup> The very detailed definition of the common corporate tax base worked out over the years by various working groups at the European Commission could also be part of the negotiations.<sup>188</sup> Note that working on the corporate income tax base of all MNEs, rather than creating some kind of turnover tax targeted on the MNEs specialized in the digital economy, would answer a concern the U.S. government has expressed through former U.S. Treasury Secretary Mnuchin.<sup>189</sup>

Second, the solution should implement some kind of apportionment formula. The apportionment formula in use between many U.S. states can no longer be a guide as twenty-seven states have migrated to the single-sales-factor formula.<sup>190</sup> However, the tax laws of the majority of states previously determined the portion of the corporation’s profit that is subject to tax by using an apportionment formula that referred to the shares of the corporation’s total property, payroll, and sales located in each state.<sup>191</sup> The

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<sup>187</sup> For a detailed comparison, see *IFRS and US GAAP: Similarities and Differences*, PWC, <https://www.pwc.com/us/en/cfodirect/assets/pdf/accounting-guides/pwc-ifs-us-gaap-similarities-and-differences.pdf> (last updated Nov. 2020).

<sup>188</sup> *CCTB Proposal 2016*, *supra* note 172; *see, e.g.*, European Commission Common Consolidated Corporate Tax Base Working Group, General Tax Principles 2 (Dec. 10, 2004), [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/resources/documents/taxation/company\\_tax/common\\_tax\\_base/cctbwp1finalrev1\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/common_tax_base/cctbwp1finalrev1_en.pdf).

<sup>189</sup> *See von der Leyen*, *supra* note 138.

<sup>190</sup> FED’N OF TAX ADM’RS, STATE APPORTIONMENT OF CORPORATE INCOME (2021), <https://www.taxadmin.org/assets/docs/Research/Rates/apport.pdf>. “Under a single sales factor formula, the share of a corporation’s total profit that a particular state” taxes depends “solely on the share of the corporation’s nationwide sales occurring in the state.” Michael Mazerov, *The Single-Sales-Factor Formula: A Boon to Economic Development or a Costly Giveaway?*, 20 STATE TAX NOTES 1775, 1775 (2001).

<sup>191</sup> Mazerov, *supra* note 190. “Most states’ corporate income tax laws have substantially incorporated the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA), a model law written by the National Conference of Commissioners on Uniform State Laws and formally recommended to the states for adoption in 1957.” *Id.* at 1782. UDITPA contains a three-factor formula for apportioning corporate income whereby “the share of a corporation’s total profit that a particular state may tax is determined by averaging: (1) the share of the corporation’s total sales that are made to residents of the state (the sales factor); (2) the share of the corporation’s total payroll that is paid to employees working in the state (the payroll factor); and (3) the share of the corporation’s total property that is located in the state (the property factor).” *Id.* Since then, the double-weighted sales variant of this three-factor apportionment formula was adopted by most states. *Id.* at 1783. However, as of January 1, 2020, only Alaska, Hawaii, Kansas, Montana, and Oklahoma use the pure three-factor formula; thirteen states use a variant of the three-factor formula with double weighted sales as the most common variation. FED’N OF TAX ADM’RS, *supra* note 190.

European Commission took this U.S. model in due consideration for both lessons learned and mistakes to be avoided.<sup>192</sup> The current version of the Commission’s formula is very similar to the U.S. model although there was tinkering with many of the factors.<sup>193</sup> Thus, a negotiation should not be impossible in order to come to a common formula.<sup>194</sup> Furthermore, the “property” factor included in the traditional three-factor formula could include intellectual property.

Third, the solution should be negotiated between the U.S. government and the EU Commission. This would supersede the difficult multilateral negotiations that would otherwise prevail in the United States, as well as the unanimity rule within the EU. The U.S. Constitution<sup>195</sup> as well as the TFEU<sup>196</sup> provide a basis for this power of negotiation. Article 216 of the TFEU defines the procedure for concluding such agreements, permitting the

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<sup>192</sup> See, e.g., JOANN MARTENS-WEINER, COMPANY TAX REFORM IN THE EUROPEAN UNION, GUIDANCE FROM THE UNITED STATES AND CANADA ON IMPLEMENTING FORMULARY APPORTIONMENT IN THE EU (2006).

<sup>193</sup> For example, the proposed apportionment formula splits the payroll factor into two parts—one part based on employee compensation and the other part on the number of employees:

$$\text{Share } A = \left( \left( \frac{1}{3} \frac{\text{Sales}^A}{\text{Sales}_{\text{Group}}} \right) + \frac{1}{3} \left( \frac{1}{2} \frac{\text{Payroll}^A}{\text{Payroll}_{\text{Group}}} + \frac{1}{2} \frac{\# \text{ Employees}^A}{\# \text{ Employees}_{\text{Group}}} \right) + \left( \frac{1}{3} \frac{\text{Assets}^A}{\text{Assets}_{\text{Group}}} \right) \right) * \text{Consolidated Tax Base}$$

Where Share *A* equals group member *A*’s share of the group’s consolidated tax base as determined by group member *A*’s total sales, payroll, and assets in proportion to the group’s total sales, payroll, and assets. *Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)*, at 28, COM (2016) 683 (Oct. 25, 2016).

<sup>194</sup> Ana Agúndez-García, *Taxation Papers: The Delineation and Apportionment of an EU Consolidated Tax Base for Multi-jurisdictional Corporate Income Taxation: A Review of Issues and Options* 46 (Eur. Comm’n, Working Paper No. 9, 2006) (“The choice of factors and their weighting cannot really be founded on principled scientific methodology, but they should ultimately reflect the political preferences as to the purpose of corporate taxation (whether it should remunerate producing or marketing states). The only correct rule might simply be the one on which Member States can agree.”).

<sup>195</sup> U.S. CONST. art. II, § 2, cl. 2 (“The President shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”).

<sup>196</sup> TFEU, *supra* note 29, art. 216 (“1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. 2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”).

appointment of an EU negotiator to facilitate the consistency of the EU position towards the third countries.<sup>197</sup> The recent negotiation of a post-Brexit trade and cooperation deal is a good example of how this would work. An EU negotiator has been appointed to be responsible for making an appropriate synthesis of the different expectations of the Member States, so a united negotiating position could be presented and defended in front of the United Kingdom.<sup>198</sup>

Fourth, a transatlantic agreement would be very difficult to be fundamentally challenged by other jurisdictions, including China. The United States and the EU comprised almost one-third of the world's economy in 2019.<sup>199</sup> The global success, both of the anti-money-laundering model<sup>200</sup> and of the tax common reporting standard,<sup>201</sup> comes from that scheme. This

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<sup>197</sup> *Id.*

<sup>198</sup> For example, see about the difficulties around the fishing quotas for EU fishers within U.K. waters. Katya Adler, “*Just a Few Hours*” Left to Agree Brexit Trade Deal, Says Michel Barnier, BBC (Dec. 18, 2020), <https://www.bbc.com/news/uk-politics-55358963> (“Mr. Barnier met fishing ministers from EU states to discuss the ongoing division over the issue.”).

<sup>199</sup> Kimberly Amadeo, *Largest Economies in the World: Why China Is the Largest Though Some Say U.S.*, BALANCE (Sept. 12, 2020), <https://www.thebalance.com/world-s-largest-economy-3306044>.

<sup>200</sup> See *History of the FATF*, FIN. ACTION TASK FORCE, <https://www.fatf-gafi.org/about/historyofthefatf/#d.en.3157> (last visited Dec. 30, 2020) (“In response to mounting concern over money laundering, the Financial Action Task Force on Money Laundering (FATF) was established by the G-7 Summit that was held in Paris in 1989.”). The G7 is essentially a transatlantic group, composed of Canada, France, Germany, Italy, the United Kingdom, the United States, with only Japan outside that scope; the President of the European Commission was already a permanent participant when the FATF was established. Today, the FATF monitors the anti-money-laundering measures taken all around the world, and “[as] of October 2006, there are no Non-Cooperative Countries and Territories.” G7 Economic Declaration (July 16, 1989), <http://www.g8.utoronto.ca/summit/1989paris/communiqu/index.html>; *About the Non-Cooperative Countries and Territories (NCCT) Initiative*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/publications/fatfgeneral/documents/aboutthenon-cooperativecountriesandterritoriesnctinitiative.html> (last visited Dec. 30, 2020).

<sup>201</sup> Council Directive 2003/48/EC, art. 17–18, 2006 O.J. (L 157) 38 (organizing an automatic information exchange by the tax authorities of the Member State of residency of the taxpayer about payments of interest received in another Member State (excluding at that time Austria, Belgium, and Luxembourg)). The United States followed with the Foreign Account Tax Compliance Act (FATCA) on March 18, 2010, which requires that foreign financial institutions report to the U.S. tax authorities on the foreign assets held by their U.S. account holders. Foreign Account Tax Compliance Act, Pub. L. No. 111-147, 124 Stat. 71 (2010). At their meeting of July 20, 2013, the ministers of finance and central bank governors of the G20 decided to “fully endorse the OECD proposal for a truly global model for multilateral and bilateral automatic exchange of information.” G20 Meeting of Finance Ministers and Central Bank Governors Communiqué (July 19–20, 2013), <http://www.g20.utoronto.ca/2013/2013-0720-finance.html>. Now, the “Common Reporting Standard” (CRS), developed by OECD, is a worldwide

model and this standard could be developed technically, including multilaterally, because of a transatlantic agreement on a set of objectives and methods. Why not follow the same path in favor of a consistent and fair way for taxing multinationals in the twenty-first century? On November 10, 2020, just after the U.S. elections, Ursula von der Leyen, President of the European Commission, opened the door for that transatlantic walk, at least about fair taxation of the digital economy, stating that, “[o]ur focus should be on providing joint leadership to address the global challenges of today.”<sup>202</sup>

“[T]he [initial] international tax architecture is a compromise solution based on political considerations and administrative feasibility more than any economic coherent principle.”<sup>203</sup> It must be understood that the next global tax solution will be the same.

#### POSTSCRIPT

On April 8, 2021, leaders from the Office of Tax Policy at the U.S. Department of the Treasury presented proposed modifications to Pillar 1 and Pillar 2 to the Steering Group of the Inclusive Framework on base erosion and profit shifting (BEPS) as part of the OECD/G20 international tax negotiations.<sup>204</sup> The Biden-Harris Administration’s compromise proposal focuses only on the top 100 most profitable multinational enterprises

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framework organizing the collection of tax information from financial institutions and the exchange of this information between tax administrations, through a digital tool. *See* CRS IMPLEMENTATION AND ASSISTANCE, OECD, <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/> (last visited Mar. 12, 2021). More than ninety jurisdictions have implemented or are in the process of implementing the CRS. *Id.*

<sup>202</sup> Ursula von der Leyen, President Eur. Comm’n, Speech at the European Union Ambassadors’ Conference (Nov. 10, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_20\\_2064](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_2064) (“Health, climate, digital, reform of the multilateral rules-based system. These are some of the key areas where I see Europe can take the initiative and offer a positive new agenda with the United States. . . . And there is a lot more work, we can do, on our bilateral trade issues, on standards, on taxation and many other areas. We can make quick progress together with the administration and the new Congress. There are so many compelling reasons for the EU and U.S., the two largest poles of free market activity in the world, to work together.”).

<sup>203</sup> Werner Haslehner & Marie Lamensch, *General Report on Value Creation and Taxation: Outlining the Debate* 3, 14, in *TAXATION AND VALUE CREATION* (Werner Haslehner & Marie Lamensch eds., 2021).

<sup>204</sup> Laura Davison et al., *U.S. Floats Tax Compromise Targeting 100 International Firms*, *DAILY TAX REP.: INT’L* (Apr. 8, 2021, 1:06 PM), <https://news.bloombergtax.com/daily-tax-report-international/u-s-offer-on-global-tax-deal-would-tie-levies-to-revenue>.

(MNEs), “those companies that benefit most from global markets, are most intangibles-driven, and are equipped to handle the compliance burden that Pillar 1 entails.”<sup>205</sup> This proposal is intended to address administrability concerns by applying a total revenue threshold that eliminates many MNEs, thus retaining only the largest corporations<sup>206</sup> “regardless of industry classification or business model.”<sup>207</sup>

This proposal is presented by the U.S. administration as a major simplification over the tax uncertainty of the Pillar 1 blueprint’s application to consumer-facing businesses (CFB) and automated digital services (ADS).<sup>208</sup> For example, is Apple subject to Pillar 1 as “an ADS even though it earns most of its profit from selling tangible consumer products like phones, tablets, and laptops?”<sup>209</sup> Furthermore, a profit margin threshold would “define those MNE groups that are the most intangible driven, the most profitable, and have the highest profit-shifting potential.”<sup>210</sup> International reaction has generally been positive to the “comprehensive scoping” proposal.

The *Made in America Tax Plan* was released by the United States Treasury Department in April 2021 and would fund increased investments in infrastructure by, among other things, “eliminating incentives to offshore investment, substantially reducing profit shifting, [and] countering tax competition on corporate rates.”<sup>211</sup> These legislative proposals would

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<sup>205</sup> U.S. Dep’t of Treasury, Presentation by the United States to the Steering Committee of the Inclusive Framework Meeting, at slide 13 (Apr. 8, 2021) (on file with author) [hereinafter Treasury Slide Deck].

<sup>206</sup> *Id.* at slide 15. Approximately 2,300 companies satisfied the €750 million global revenue threshold of the OECD proposal that further narrowed to 780 companies if requiring profit margins exceeding ten percent. *Id.* at slide 11.

<sup>207</sup> *Id.* at slide 12.

<sup>208</sup> PILLAR 1 BLUEPRINT, *supra* note 148; *see also* Treasury Slide Deck, *supra* note 205, at slide 10 (“Compliance and administrative burdens disproportionate to expected tax benefits: **simplification is highly desirable.**”).

<sup>209</sup> Robert Goulder, *Treasury’s Pillar 1 Reset: In Praise of Comprehensive Scoping*, 102 TAX NOTES INT’L 553, 554 (2021).

<sup>210</sup> Treasury Slide Deck, *supra* note 205, at slide 15.

<sup>211</sup> U.S. TREASURY DEP’T, THE MADE IN AMERICA TAX PLAN 1 (April 2021), [https://home.treasury.gov/system/files/136/MadeInAmericaTaxPlan\\_Report.pdf](https://home.treasury.gov/system/files/136/MadeInAmericaTaxPlan_Report.pdf).

increase the minimum tax rate on foreign earnings of U.S. MNEs to twenty-one percent, replace the global calculation of that tax with a country-by-country system, and remove the ten percent exemption tied to qualified business asset investment.<sup>212</sup> This domestic legislative agenda overlaps with the ongoing negotiations at the international level on a global minimum tax and would bring the U.S. minimum tax regime closer to the structure of Pillar 2. Raising the U.S. statutory rate to twenty-eight percent and the global intangible low-taxed income (GILTI) rate to twenty-one percent would have consequences for U.S. competitiveness, unless the rest of the international community agrees to a meaningful minimum tax.<sup>213</sup> The Treasury Department has “proposed to the Steering Group that the global minimum tax rate should be at least 15%,” underscoring that this rate “is a floor and that discussions should continue to be ambitious and push that rate higher.”<sup>214</sup>

On the EU front, the European Commission published a Communication entitled *Business Taxation for the 21st Century* on May 18, 2021.<sup>215</sup> In this Communication, the Commission appeared to welcome the evolution of the U.S. position about the reform of the international corporate tax framework,<sup>216</sup> but also confirmed its willingness to introduce a digital levy that could be applied to digital companies even after a possible international agreement.<sup>217</sup> The EU digital levy “will ensure a fair contribution of the digital sector to the financing of the recovery in the EU” and will be “independent of” and “coexist with” an OECD agreement.<sup>218</sup>

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<sup>212</sup> Treasury Slide Deck, *supra* note 205, at slide 5.

<sup>213</sup> Robert Goulder, *All Roads Lead to Ireland: Pillar 2 and the Path of Least Resistance*, 102 TAX NOTES INT’L 695 (2021).

<sup>214</sup> U.S. Dep’t of Treasury, Readout, U.S. Department of Treasury’s Office of Tax Policy Meetings (May 20, 2021), <https://home.treasury.gov/news/press-releases/jy0189> (noting “that a global corporate minimum tax rate would ensure the global economy thrives based on a more level playing field in the taxation of multinational corporations, and would spur innovation, growth, and prosperity while improving fairness for middle class and working people”).

<sup>215</sup> See *Communication from the Commission to the European Parliament and the Council: Business Taxation for the 21st Century*, COM (2021) 251 final (May 18, 2021).

<sup>216</sup> See *id.* at 8.

<sup>217</sup> *Id.* at 5.

<sup>218</sup> *Id.*

The Commission also announced the replacement of the CCCTB proposals by a new “BEFIT” proposal (“Business in Europe: Framework for Income Taxation”).<sup>219</sup> BEFIT appears to be predominately an update of the previous CCCTB proposals, according to the description given by the Commission of the project:

BEFIT will consolidate the profits of the EU members of a multinational group into a single tax base, which will then be allocated to Member States using a formula, to be taxed at national corporate income tax rates. Key considerations will include how to give appropriate weight to sales by destination, to reflect the importance of the market where a multinational group does business, as well as how assets (including intangibles) and labour (personnel and salaries) should be reflected, to ensure a balanced distribution of corporate tax revenue across EU Member States with different economic profiles.<sup>220</sup>

Treasury officials were “heartened by the positive reception to [the Pillar 1 and 2] proposals and the unprecedented progress being made towards establishing a global corporate minimum tax.”<sup>221</sup> However, Ireland is insisting that it will not “budge from its 12.5 percent corporate tax rate.”<sup>222</sup> Furthermore, the EU Commissioner for the Economy asserts that “the European Commission’s digital levy proposal will not undermine global discussions regarding pillar 1.”<sup>223</sup> On the other side of the Atlantic, these initiatives will require legislative action by a very divided U.S. Congress. Democratic members of the Senate Finance Committee have already introduced their version of the Biden-Harris Administration proposals. Republican members of Congress are voicing concerns over the possibility of an EU digital levy and questioning “why the new strategy justifies ceding U.S. taxing rights over profitable U.S. companies to foreign jurisdictions.”<sup>224</sup>

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<sup>219</sup> *Id.* at 11–13.

<sup>220</sup> *Id.* at 12.

<sup>221</sup> U.S. Dep’t of Treasury, *supra* note 214.

<sup>222</sup> Kiarra M. Strocko, *U.S. Global Tax Reform Stance Is Game Changing, Gentiloni Says*, 102 TAX NOTES INT’L 651, 651 (2021) (Irish Finance Minister “noting that a global tax deal could cause Ireland to lose 20 percent of its corporate tax revenues.”).

<sup>223</sup> *Id.* (stating that the digital levy proposal will “‘be perfectly compatible’ with any global agreement”).

<sup>224</sup> *See, e.g.*, Letter to Janet Yellen, Sec’y, U.S. Dep’t of Treasury, from Mike Crapo, U.S. Sen. & Ranking Member of the Senate Fin. Comm. (May 24, 2021) (noting that “a European Commission communication asserted that the EU digital levy . . . will be ‘independent of’ and ‘coexist with’ an OECD

Overall, these initiatives are promising particularly given the Biden-Harris Administration's commitment to multilateralism, noting that "[i]t is imperative to work multilaterally to end the pressures of corporate tax competition and corporate tax base erosion."<sup>225</sup> However, there are very difficult negotiations ahead both globally and domestically and there remains much more to be done.

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agreement. These EU statements are directly counter to the OECD's key objective of the current negotiations. It would be unacceptable for the United States to endorse any agreement that would allow DSTs or similar unilateral measures to continue to be imposed on U.S. companies." (footnote omitted).

<sup>225</sup> U.S. Dep't of Treasury, *supra* note 214 ("Treasury expressed its belief that the international tax architecture must be stabilized, that the global playing field must be fair, and that we must create an environment in which countries work together to maintain our tax bases and ensure the global tax system is equitable and equipped to meet the needs of for [*sic*] the 21st century global economy.").

