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Taxation and Digitalization of the Economy

Introduction

The phrase, "the world is a global village" was initially coined in the 1960s to reflect the growing interconnectivity of the world due to the proliferation of media technologies; and is more relevant now than ever before with digitalization transforming every aspect of our lives. It is becoming more apparent that existing international tax rules are not sufficient to meet the needs of a growing digital economy. With the evolution of business models that do not require a physical presence in the market to derive profits, multinationals now derive substantial income in jurisdictions where they have no physical presence (and therefore no tax obligations). The OECD is spearheading efforts to develop a consensus-based, long-term global solution to address these concerns.

In this issue, country practitioners provide their insight on how the tax authorities, as well as multinationals in their jurisdictions, are preparing for the anticipated OECD harmonized global approach to the digitalization of the economy. Some jurisdictions have acted unilaterally, some have made failed attempts, while some have adopted a "wait and see" approach. The one consistent theme is that we are in for quite a ride over the next few years, as the global efforts to address this topic are further developed and implemented.

Questions

1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, *Addressing the Tax Challenges of the Digitalisation of the Economy*, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy?

(b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of "place of sales," "number of employees," or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate "digital" activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

THE TRANSFER PRICING FORUM is designed to present a comparative study of typical transfer pricing issues by Country Panelists who are distinguished transfer pricing practitioners in major and emerging industrial countries. Their discussions focus on practical questions posed by guidance, case law and practice in their respective jurisdiction, with practical recommendations whenever appropriate.

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Preface

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Taxation and Digitalisation of the Economy: From Fixing the Gaps to Changing the Paradigm

Digital transformation, digital revolution, digitalisation of the economy. . . these are all widely used expressions to refer to the impact that the use of digital technologies and data are having on the way people, firms and governments interact, work and produce. This phenomenon is spreading widely and at a rapid pace, putting into question the effectiveness of long-settled policies in several areas, including taxation.

In May 2019, the OECD published the "Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy". This document lays out the ambitious roadmap to achieve a global, consensus-based and long-term solution to fix the imbalances created by the fact that the current international tax system is not well-equipped to tax multinational enterprises operating globally and taking advantage of the current economic and technological context.

The current tax rules on nexus and profit allocation are strongly rooted in the existence of physical presence (through either a subsidiary or a permanent establishment) and the performance of functions, assumption of risks and/or use of assets in the taxing jurisdictions. Conversely, the new business models that have flourished with the advent of digitalisation present three precise features. First, scale without mass, which allows some highly digitalised enterprises to be heavily involved in the economic life of a jurisdiction without any, or any significant, physical presence. Second, a heavy reliance on intangible assets, for which it can be easier to shift profits to favourable tax jurisdictions by offshoring the performance of important functions or the assumption of risks related to that intangible asset. And third, the importance of data, user participation and their synergies with intangible assets, which are not recognised as value-creating factors in the existing profit attribution rules. The clash between these two realities have put governments around the world under unprecedented pressure to act promptly.

While this may seem a new problem, the truth is that the OECD has been working on the tax implications of the development of communications technologies for over 20 years. The reasons that led to that work back in 1996 are broadly similar to the ones prompting the work under Action 1 of the OECD/G20 BEPS Project and the current project: the new opportunities offered by the digital revolution of the 1990s for business to sell products in circumstances that formerly required a degree of physical presence challenged the application of tax concepts developed for a physical, rather than a virtual, world. In 1998, the OECD's Committee on Fiscal Affairs produced the report "Electronic Commerce: Taxation Framework Conditions"[1], which established the principles that would underlie the subsequent work on tax issues arising from the rise of e-commerce. Interestingly, one of the main conclusions reached in the 1998 Report was that "widely accepted general tax principles that guide governments in relation to conventional commerce should also guide them in relation to electronic commerce". Specific subsequent work in the area of profit attribution highlighted that while e-commerce did not present fundamentally new or categorically different problems for treaty and transfer pricing purposes, it did have the potential to make some of the more difficult problems more common. The work that followed attempted to address specific issues, without putting into question the foundations of the system.

Almost 20 years later, the OECD/G20 BEPS Project put on the table for discussion the same critical issues. In 2013, however, the political, economic and social context was different: governments and citizens still suffered the adverse effects of the severe economic crisis and, at the same time, the number of reported cases of tax planning by multinational enterprises that artificially reduced their taxable income continued to grow. The result of that work is found in the 2015 Final Report on Action 1 of the OECD/G20 BEPS Project[2]. While there are parallels with the conclusions reached in this report and the work done in the 1990s and early 2000s, a key difference is that the 2015 Final Report on BEPS Action 1 identified a series of broader tax challenges. Those challenges go beyond BEPS issues, and relate to the more fundamental questions of how taxing rights on income generated from cross-border activities in the digital age should be allocated among jurisdictions. Although there was not a convergence on an option to address these concerns, the OECD obtained the commitment of the Inclusive Framework[3] to "deliver a report in 2020 aimed at providing a consensus-based long-term solution".

Since 2015, the pressure has continued to rise for all stakeholders. As the responses in this issue of the Bloomberg Tax Transfer Pricing Forum illustrate, certain governments have rushed to adopt unilateral

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measures that only partially address the fundamental issues but that yield tax revenues in the short-term in market jurisdictions. Importantly, the unilateral adoption of tax measures targeting specific types of highly digitalised businesses has the potential to damage the commercial relations among countries. Multinational enterprises struggle to keep pace with this proliferation of legislative measures and regulatory developments. Simultaneously, they are also subject to greater scrutiny from tax authorities, because of the intensified audit activity. Last but not least, multinational enterprises are exposed to reputational risks, which can have a real impact on their businesses.

In this context, supranational organisations, and the OECD in particular, are urged to intensify the efforts to deliver a multilateral, consensus-based solution that is efficient to address, not only now, but also in the years to come, the tax challenges created by the digitalisation of the economy. The Programme of Work encapsulates that ambition. It contains a broad range of options, which are the reflection of the different interests that are at stake for governments. However, it also materialises the firm commitment of the over 130 jurisdictions that are members of the Inclusive Framework to work towards a unified approach that reallocates taxing rights to market jurisdictions where value is created by a business activity through (possibly remote) participation in that jurisdiction that is not recognised under the current tax system.

At this point in history, inaction is not an option. Governments need to take a bold approach towards a multilateral consensus-based solution instead of postponing the problem for 20 more years.

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NOTES

[1] OECD (2001a), Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions, OECD Publishing.

[2] OECD (2015), Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project OECD Publishing, Paris.

[3] The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting brings together over 130 countries and jurisdictions to collaborate on the implementation of the BEPS Package.

Argentina

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

The major Argentine tax reform passed as *Law 27,430*[1] that took effect on January 1, 2018, introduced the most recent changes in connection with the taxation of digital services. While the tax reform did not alter the previous income tax framework, arguably awaiting final OECD recommendations on BEPS Action 1 initiatives, it did change the Value Added Tax ("VAT") regime, to ensure taxation of digital services provided by foreign suppliers to domestic consumers.

Before such reform, *Law No. 27,346 (2016)* set a special income tax rate of 41.50% for the exploitation of gambling activities performed by individuals or legal entities within the country through digital platforms. However, such law was not aimed at taxing cross-border digital services; but to heavily burden local taxpayers engaged in gambling-related business implemented by digital means.

In furtherance of the taxation of digital services, only Law 27,430 is worth mentioning, for it acknowledged the BEPS Action 1 initiative at the time of amending the VAT rules. This reform introduced a new taxable event, which applies to the provision of digital services by individuals or legal entities domiciled abroad to Argentine customers. While business to business cross-border services were taxed even before the tax reform, the novelty is that the new taxable event applies even on final customers, in spite of the fact that they may not be registered for VAT. Previously, only cross-border services to VAT registered taxpayers were subject to the tax. In both cases, taxable digital services are now broadly taxed, including downloads on a smart phone, tablet or computer, as long as the recipient or payor is located within the country.

The implementing decree for Law 27,430 provides that the tax shall be collected by the customer, by means of a reverse charge. If there is an Argentine resident intermediary or payor (e.g. a local financial institution that channels the payment), such intermediary will be responsible for collecting the reverse charge. The provider of digital services shall not be deemed to be resident or domiciled abroad if he has a taxable presence in Argentine according to the Income Tax Law.

In addition, Law 27,430, further levied a 15% schedular tax on the sale of digital currencies, bitcoins and other cryptocurrencies.

Despite there being no official statistics, according to media reports the Argentine Revenue Services ("ARS") collected approximately USD 19 million dollars during the first ten months of the tax reform (i.e., until October 2018).[2]

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

The challenges faced by the Argentine Congress are no different from those still pending from a tax policy perspective at the OECD level.

The first challenge is to define an adequate legal basis to tax income from cross-border digital services. While some Argentine States tried unsuccessfully to levy a gross turnover tax on such income, these initiatives were not fruitful due to the lack of a substantial nexus between the foreign supplier and the taxing State. At the local tax level, there were past, unsuccessful experiences in Argentina, which resemble the Spanish legislative proposal of a 3% tax on revenue from advertising and online services, including sales of useŕs business data.

The second challenge is to develop a comprehensive solution to the traditional concept of permanent establishment, so as to ensure that income from cross-border digital services are properly taxed in the customeŕs country. The traditional permanent estab-

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lishment definition of the OECD Model Convention - Article 5 was not useful in practice. In addition, highly digitalized services do not require a material presence in the market countries, for they primarily rely on automated processes or remote functioning.

Even if the issue regarding the definition of permanent establishment is addressed, the next issue would be to determine how much income should be allocated to such permanent establishment. In this regard, Argentina is monitoring the OECD discussions as to what significant economic presence means for the digital business, since value created by highly digitalized marketing intangibles is hard to quantify. In addition, related support and marketing affiliates in the source countries are usually remunerated on a cost plus basis, but such outcome may not comprehensively address the full value contributed by the functions performed by such affiliated parties.

Argentine tax scholars are monitoring the international tax experience on a global level. The UK diverted profit tax has been criticized domestically for having an open taxable event, applicable on artificial structures used to avoid a permanent establishment. The existence of an actual substantial nexus with the taxing jurisdiction is questionable. It looks like a dissuasive tool to force transfer pricing adjustments, without a sound underlying tax policy. The French outcome on a similar tax, which was declared unconstitutional on December 29, 2016 (*Decision 2016-744 DC*)[3] could be expected under the Argentine constitutional framework as well. This is because the legislature has the burden to clearly set the taxable event and the taxable amount in order to comply with the legality principle, which requires clear tax statute.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

Both the profit split and the fractional apportionment solutions could be conflicting, under the Argentine tax framework.

On the one hand, the profit split approach has the disadvantage that the tested party, under Argentine statute, is the locally resident taxpayer only. A profit split requires the testing of not only the Argentine party but the foreign affiliate as well. While the ARS understands that, under certain circumstances, testing the other party is not prohibited to the extent of assessing properly the Argentine taxpayer, this understanding proves controversial in the daily transfer pricing practice. The profit split, however, is sensible when both parties to a digital transaction make unique and valuable contributions. In such case, an independent party might wish to share the profits of the transaction in proportion to their respective contributions, consistent with the arḿs length standard. Nevertheless, some market intangibles may not be owned (e.g. market share), but may be the effort of functions performed by the source country affiliate. These issues create an additional problem for the proper valuation of the functions performed and the assets devoted by affiliated parties in the cross border context.

On the other hand, the formulary apportionment method may be challenged for exercising taxing powers beyond the legal borders of the relevant taxable jurisdiction. While the parameters would not be hard to agree in the international tax arena in view of the diverse interest of all relevant taxing locations, the final outcome could turn out to be a material compromise on the arḿs length standard and its long-standing international consensus. This outcome is certainly unprecedented, and could result in international double taxation. The formulary apportionment approach appears more controversial compared to the profit split primarily because of it being untested.

The main concerns are the same concerns that drive the ARS to not test the foreign affiliated party for domestic transfer pricing purposes. Argentine implementing regulations provide that the Argentine affiliate should be the so-called "tested party," namely, the one affiliated company that will be benchmarked in view of a set of comparable uncontrolled companies. The Argentine outcome contradicts most OECD countries, which require scrutinizing the least complex entity, be it a local taxpayer or a foreign affiliate. The tax policy reason for such a definition is that the Argentine Tax Authorities felt uneasy scrutinizing a company that is not located within the countrýs boundaries, as they have limited resources, limited language and technical capabilities, etc. This definition brings about a practical problem when a practitioner tests developing country affiliates with a set of comparables located in developed countries. In particular, comparability adjustments are certainly more complex and less reliable. For example, in the car manufacturing industry there is a leading case related to Toyota S.A., in which the ARS contended that a taxpayer may not make the comparability adjustment on the tested party unilaterally, unless it proves that any extraordinary losses - segregated from taxpayers profit and loss statement- were not also present in the comparables. The Tax Court held, in 2011, that the ARS bears the burden of proof. The decision was finally sustained by the Federal Supreme Court in 2014.[4]

While the ARS may accept the profit split in selective circumstances as noted above, the complexities resulting from the impairment to test the foreign affiliate creates an additional problem of valuing cross border digital services. We expect that applying the profit split on the digital economy could only aggravate the ARS's negative bias to test any affiliate other than the local one, for value created by highly digitalized business is even harder to measure compared to the other economic activities.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

While the taxation of the digitalized economy in Argentina is yet immature, some general guidelines could be anticipated from the recent transfer pricing developments.

Functional segmentation has been aggravated by the recent *Decree 1170/18, enacted on December 2018*. Section 21.22 anticipates that taxpayeŕs shall be required to keep segmentation by business line and by transactions, according to new guidelines to be set by the ARS. While these guidelines have not been yet released, it is expected that digital services will be one of the business lines to be benchmarked separately.

In addition, the same implementing decree (Decree 1170/18) provides that the taxpayer has the burden to explain to the ARS any change in the transfer pricing methodology used for each functionally separated line of business. In addition, such changes should be properly documented, elaborating the reasons for the changes.

While it is certainly difficult for MNEs to isolate digital services from the remaining related-party supplies, the recent changes to the transfer pricing framework compel such companies to implement functional segmentation and to keep robust, supporting documentation.

The ARS is carefully monitoring the OECD multilateral response expected for 2020, while it continues tuning up the requirements for more detailed transfer pricing information.

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NOTES

[1] *https://www.boletinoficial.gob.ar/detalleAviso/primera/176831/20171229*. *See also* Bloomberg Tax BEPS Tracker for coverage on Law 27,430.

[2] *https://www.lanacion.com.ar/economia/los-servicios-digitales-le-dejaron-al-pais-mas-de-700-millones-en-impuestos-nid2183914*

[3] *https://www.conseil-constitutionnel.fr/decision/2016/2016744DC.htm*. *See also* Bloomberg Tax BEPS Tracker for coverage on the December 29, 2016 decision.

[4] Federal Supreme Court, 9.2.14, "Toyota Argentina S.A. c/DGI."

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Austria

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

In Austria, a new digital advertising tax has been proposed, which would impose a 5% tax on revenue from digital advertising. This new tax would only apply to companies with at least €750 million in worldwide net sales (on a single entity or consolidated group basis) and €25 million in Austrian net sales. The digital advertising tax has been promoted as a way to introduce fairness, as traditional advertising (e.g., print, radio, TV) has been subject to a 5% tax since 2000. The new law would be effective from 2020 onwards.

The same bill includes the EU-mandated reduction of the import VAT threshold from €22 to €0.01 for packages delivered from non-EU countries, as well as the introduction of tax reporting requirements for online platforms, such as AirBnB. The combined revenue from these measures is expected to total €200 million per year.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

As part of the 2018 EU discussions on implementing a tax on the digital economy, Austria lobbied for the implementation of a digital tax. The Austrian digital tax has broad political support; however, with the recent failure of the Austrian coalition government and elections declared for Autumn 2019, it remains to be seen whether the digital advertising tax will be enacted as proposed on January 1, 2020 or if it will be subject to amendments. The digital tax is supported by the Austrian Chamber of Labour and the Trade Union Confederation as a measure to improve competition between the digital and traditional economies; indeed, these groups appear open to further digital taxation measures.

In contrast, the proposed digital tax has been criticized by the Austrian Chamber of Commerce for its lack of neutrality and for the expectation that the targeted internet giants will simply pass on the tax to its customers, and thereby raise the cost of online advertising for small local businesses. Furthermore, critics

worry that such a revenue-based tax may result in inordinately high marginal tax rates.

Another criticism relates to the implementation of the law, specifically the collection of data using IP addresses, as well as the empowerment of the government to introduce, by decree, a requirement to store the information for seven years, which may conflict with existing European data protection laws. It may also be difficult to define which IP addresses are truly domestic and to determine how to treat artificially "re-routed" IP addresses.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

In Austria, the profit split approach is mostly applied as a second line of defense for another primary method. The profit split method can be very flexible and tailored to a taxpayer's business model. However, currently there is a high level of uncertainty perceived by taxpayers when applying the profit split. Particularly, the weighting element of a contribution analysis seems to be subject to a high level of discretion. Thus, the testing of the results by other means, such as splitting profits by the number of FTEs or relevant cost base, is also carried out.

Conversely, the fractional apportionment approach would likely require a departure from the arm's length principle and result in a complete overhaul of the current international tax system, including rewriting treaties. The ensuing consequences for countries and businesses mean that achieving agreement on its implementation is likely to be a long, arduous process and may also require budgetary refinancing for certain countries. Further, it seems difficult to apply without a common accounting standard as a basis. On the other hand, the fractional apportionment method could be simpler and more objective in its application than the profit split approach.

In practice, the application of the profit split method may involve subjective determinations of value-adding activities, complex calculations, and extensive documentation. Furthermore, the availability of information often plays a major role in determining which allocation factor should be used, as companies may not have segmented budgets or income statements per business line. In addition, we have observed an increasing trend by the Austrian tax authorities of applying a simulated profit split model based on information found online or in the local or master files. Thus, the taxpayer must be particularly careful as to the information and level of detail disclosed to the Austrian tax authorities.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

Due to the uncertainty and potentially a lack of awareness, businesses have not yet taken significant actions to adapt their business models to the OECD's global tax approach. Currently there is no general requirement to separately report digital activities or to segment business lines in Austria.

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Belgium

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

A draft digital service tax legislation was introduced in the Belgian Parliament in early 2019.

It contained two proposals:

1. The first proposal provided for the implementation of a 3% tax on revenue from activities such as the selling of user data by companies with annual worldwide revenues of Euro 750M and EU revenues of Euro 50M;
2. The second proposal concerned the digital PE under which non-resident companies would be subject to non-resident corporate income tax in Belgium when they provide significant digital services in Belgium regardless of any physical presence.

However, the parliamentary proposals were disapproved by the Tax Commission of the Belgian Parliament and are thus not valid anymore.

There are currently no new discussions or consultations at the level of the Belgian tax authorities or Parliament with respect to the taxation of digital activities. Belgium seems to currently prefer to wait for measures to be adopted by the European Union (directive) and/or for OECD guidance.

Elections have recently taken place in Belgium. Therefore, the taxation of the digitalized economy may possibly be part of the future government political agreement to be concluded in the coming months.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

As no specific legislation has been implemented yet, the taxation of the digitalized economy is not in the scope of tax (corporate tax or transfer pricing) audits yet.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

As a preliminary remark, the authors are of the opinion that it is key that profit attribution rules are kept simple and administrable for taxpayers. The simpler

and more administrable these rules are, the less distortions there will likely be for the market.

With the formulary apportionment approach, the potential for market distortions appears to be more important, as under this approach two sets of rules would apply: existing transfer pricing principles for non-covered activities and new formulary apportionment rules for covered activities. In addition to the complexity of having a dual set of rules, this approach would likely also result in many disputes as to whether or not a business is within the scope of the new measures.

It seems to the authors that it is rather unlikely that a single set of factors or allocation keys could be agreed upon given the variety of the situations faced. Without consistent use of the allocation keys among countries, taxpayers will irremediably face transfer pricing disputes.

For these reasons, the authors believe that the formulary apportionment approach will likely delay consensus or make it impossible to reach an international or European consensus as, in addition to reaching a global consensus on the taxation of digital economy, the approach \\would also depart from existing transfer pricing rules.

Because of the foregoing considerations, the authors (in line with KPMG International point of view) feel that a modified (residual) profit split based on existing transfer pricing principles might likely be the preferred approach. This would entail determining an agreed share of total profits attributable to users' "activity" as a marketing intangible. A fair amount of the MNE value creation would thus have to be allocated to user participation, in the same manner as it is currently attributed to commonly used labor, capital and risk factors. Relying on existing (although slightly amended) transfer pricing rules is likely to help mitigate the necessary changes.

Once the total profit attributable to user participation has been determined, its allocation among jurisdictions would preferably be determined based on actual contributions of the particular markets. In that respect, pre-determined objective allocation criteria such as sales or revenues might not always be reflective of the actual contribution of certain local markets. Authors are therefore more in favor of the flexible criteria.

Although, as explained above, the authors feel that the modified profit split is likely to be the less disruptive approach, they also acknowledge that the profit split method might be the most complex and subject to discussions with respect to existing transfer pricing rule. Hence, they recommend that specific attention be paid to the avoidance of double taxation.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

We observe that Belgian companies with significant activities in the e-commerce market are simulating the potential impact of a future digital tax. Other players are awaiting more concrete international or European initiatives.

Belgian companies might already be required to segment financial information for other purposes besides reporting. Example of domestic legislations requiring such segmentations are:

- The filing of the local file form;
- The innovation income deduction.

Such segmentations are also frequently requested during transfer pricing audits.

It is our experience that such segmentations are not always available, which would result in additional administrative burden for Belgian taxpayers.

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Brazil

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

i. Income Taxes

A Brazilian company, regardless of its involvement in digital activities, is subject to *two different taxes on income* and *two related taxes on revenue*. The taxes on income are Corporate Income Tax ("IRPJ") and Social Contribution on Net Profits ("CSLL"). The taxes on revenue are the Social Contributions on Total Revenues ("PIS/COFINS").

a. IRPJ and CSLL

IRPJ and CSLL are imposed on all income earned by a Brazilian company (worldwide income) at a combined rate of up to 34%. The definition of taxable income for IRPJ and CSLL purposes depends on the taxable regime elected by (or applicable to) the taxpayer.

Generally, the applicable tax regimes for companies are: (1) the Actual Profit Regime, in which the taxable basis is the company's adjusted net income, and (2) the Deemed Profit Regime, where the taxes are imposed on a percentage of the company's gross revenues. In Brazil, the use of the Actual Profit Regime is the general rule, however, companies that meet certain requirements may opt to use the Deemed Profit Regime.

Notwithstanding the discussion above, there are no specific provisions that are applicable to entities that carry out digital activities, as all Brazilian entities are subject to the imposition of these taxes at the standard rate. However, even though the discussions with respect to IRPJ and CSLL on digital activities are still in their embryonic stages, there are two key topics that have already received rulings from the Brazilian tax authorities: (i) cryptocurrencies and (ii) royalties.

(i) Cryptocurrencies: Brazilian IRS issued *Normative Ruling No. 1,888/2019* on May 7, 2019, establishing ancillary obligations to perform the income tax return on capital gains, as well as establishing penalties for non-compliance. This Normative Ruling did not establish any ancillary obligation concerning the mining of cryptocurrencies.

(ii) Royalties: Brazilian legislation establishes that expenses with respect to royalties that are considered necessary to preserve the possession or use of the intangible asset generating the source of income, should be deemed as deductible expenses. Such provisions are only beneficial to entities subject to the Actual Profit Regime.

Brazilian legislation also establishes that the company must register the royalty contract with the Brazilian Patent and Trademark Office ("BPTO"). Companies are only allowed to deduct these expenses with respect to royalties up to a threshold calculated by the application of a statutory percentage (defined by the Ministry of Economy) on the net sales deriving from the use of the intellectual property. Any excess expenses are not allowed for tax purposes.

Ordinance No. 436/58 lists these percentages, with a maximum 5% rate. The specific percentage to apply is determined according to the type of intangible being transferred to Brazil. For example, royalty expenses deriving from trademark agreements should not exceed 1% of the net sales deriving from the use of the intangible.

BPTO issued *Normative Instruction No. 70/2017* in an attempt to stop assigning the percentage. However, Brazilian IRS had already ruled that BPTO would continue to assign the percentage for every royalty contract in Brazil.

b. Social Contributions on Gross Revenues

Social contributions on gross revenues are due to the Federal Government and, as a general rule, are imposed at a 9.25% rate under the non-cumulative regime, which allows corporations to offset the amounts due with credits recorded from essential and relevant goods and services for its main activity, which are deemed as inputs, decreasing the tax due.

However, the legal provisions for these contributions segregated the revenues derived from digital activities, and determined that distinct rules should be applied. Thus, the revenues earned by companies that

provide computing, software (development and/or licensing), and services related to these activities (i.e., maintenance, consulting, installation, technical support) are subject to the cumulative regime. These companies cannot record credits from the acquisition of inputs to offset amounts due, however, the actual rate for the imposition of PIS/COFINS is lowered to 3.65% on the operational revenue.

Regardless of the implications above, should the company opt to use the Presumed Profit Regime for IRPJ and CSLL, the company will automatically be moved to the cumulative regime for PIS/COFINS.

ii. Value-Added Taxes

Regarding the value added tax ("VAT") and its impacts on digital activities, it is important to keep in mind that Brazilian tax rules do not have a single VAT, but rather three distinct taxes, which are imposed on different operations. They are: (a) Tax on Services ("ISS") charged by municipalities; (b) State Value-Added Tax ("ICMS") charged by the states; and (c) Excise Tax on Manufactured Products ("IPI") charged by the Federal Government.

The key discussions regarding the imposition of the VAT on digital activities in Brazil concern the dispute between states and municipalities.

This dispute dates back to 1998, when the Brazilian Supreme Court ("STF") ruled in a leading case on the ICMS levied on off-the-shelf software.

For almost two decades, notwithstanding some disputes and discussions on the taxation of software, the majority of the states did not impose ICMS on downloadable software, but only on physical media. Municipalities, in turn, imposed ISS on software and other computing and software services, including licensing.

However, in September 2017, the states, in a meeting of the National Treasury Council, issued *Covenant n. 106/2017*. This Covenant established that ICMS would be levied on the exchange of intangible goods, such as software, electronic games, apps, and other similar goods, if these are intended for the final consumer. Additionally, the imposition of ICMS would take place regardless of the physical media, impacting even the downloadable or available on streaming software.

Thus, the Covenant created a new conflict between municipalities and states regarding the tax imposed on these operations, as well as which is the lawful entity liable for the taxation of the digital activity operations. STF is yet to rule on this subject, even though there are several ongoing lawsuits on this matter.

iii. Preliminary Discussions

For Income Tax purposes, there are no clear propositions on the modification of the applicable rules for entities devoted to digital activities. However, there have been discussions on the possibility of the imposition of taxation on the distribution of dividends by Brazilian entities, which are currently tax exempt. Even though the discussion is not new, recently there has been a greater push on the subject. In this regard, there is no clear definition on how this measure would be implemented (e.g., credit system for vertical groups, rate of imposition) or on other impacts (e.g., decrease in the IRPJ and CSLL rates).

Aside from the modifications to the Income Tax in Brazil, currently there are four key bills of law on the overhaul of the Brazilian tax system for VAT. The first of them was created by Brazilian economist Marcos Cintra, who proposed a single tax levied on financial transfers. The vote on this proposal by the National Congress is still pending. The second is a proposal from the Brazilian Economy Ministry, which proposes punctual changes to simplify the imposition of taxes in Brazil, with an additional focus on PIS/COFINS.

The third proposal was proposed in 2004 and was processed under n. 293 ("*PEC 293/04*"). This proposal intends to eliminate ICMS, ISS, IPI, PIS/COFINS, and the contribution for economic intervention ("CIDE") and create two new taxes in their place. The first tax to be created is a pure VAT imposed on goods and services operations ("state VAT"). The second tax to be created is a selective, monophasic tax ("federal VAT"), which will be levied on specific goods, such as fuel, energy, minerals, vehicles, and electronics.

The fourth and final proposal, which is the most likely to be converted into Law and Constitutional Amendment, was initiated in 2019 and was processed under *n. 45* ("*PEC 45/19*"). Under this proposal, which is a simplified version of *PEC 293/04*, only ICMS, ISS, IPI, and PIS/COFINS would be terminated, and only one tax - the state VAT - would be created in their stead. These discussions are still ongoing and there is not a definitive timeframe for the implementation of any of the alternatives, if any are to be implemented at all.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

All of the measures adopted thus far in Brazil with regard to the digitalized economy were enacted within the original framework of the legislation, mostly as specific modifications to the system that was already in place. Furthermore, these measures are notably sparse; thus, no major challenges have been identified as of this moment regarding the implementation of the measures. However, if any of the tax system overhaul proposals mentioned in our answer to Question 1 are implemented, several new challenges may arise.

On the other hand, in the wake of our response above, with the exception of the discussions on the taxation of dividends, MNEs are not overly concerned with the main aspects of the income tax. However, the recent definitions of cryptocurrencies and royalties have drawn attention to IRPJ and CSLL rules.

Regarding the royalties, MNEs have been pushing for a review of *Ordinance 436/58* in order to update its standards to current practices on the royalties' remuneration and on the deductibility of the corresponding expenses. In this regard, there has been no traction on these pleas, as the Brazilian tax authorities have been enforcing these rules, and there have been no internal discussions on their modification.

The scenario regarding the VAT is even more uncertain. This is due to the divergences between states and municipalities, both with the intention to impose taxation on the transfer of software and licensing rights, in accordance with their own legislation and rules. In some cases, MNEs are paying both ISS and ICMS in order to avoid further tax challenges, which has entailed an overall increase in the tax costs for the Brazilian branches.

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3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalization of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

The OECD's Public Consultation Document describes an envisioned scenario of allocation of profits and the ensuing taxation in light of the MNEs' structure and operations, which intends to effectively correct inefficiencies and tackle the challenges brought by the innovation of the digitalized economy, with the final goal of orienting the enactment of new legal frameworks.

Both of the envisioned methods can be advantageous to both Brazil and the MNEs, to the extent that they intend to reallocate the taxable profit to developing countries like Brazil, which are usually not the location where the intellectual properties ("IPs") are held.

Additionally, this may lead to modifications to the transfer pricing rules, with the enactment of rules that follow the OECD Guidelines, which are not currently adopted by Brazil.

Given that Brazil is not a member of the OECD, the OECD Transfer Pricing Guidelines are not applicable locally, to the extent that the legislation on these matters establishes methods that are considerably distinct from those set forth in the OECD Guidelines. Thus, taxpayers in Brazil must carry out the calculations using very strict and objective mathematical formulas, with predetermined profit margins on all of the operations carried out with foreign-related parties, leading to very pragmatic audit proceedings.

In this sense, it is not possible to discuss the potential challenges that these new approaches could generate in Brazilian legislation. However, any modification to the global scenario that involves these approaches can indirectly impact the Brazilian transfer pricing framework, since both envision the reallocation of profits to other countries in which the MNEs operate.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

Brazil is not a member of the OECD, therefore, our view is that MNE branches in Brazil are not currently working to meet new requirements, as they should not directly impact their operations, at least at the moment.

Regarding the possible isolation of "digital activities" and the financial information by activity, product line, or region, Brazilian legislation already requires that companies segment their activities for tax purposes. For instance, companies must specify the service rendered and the code of the product transferred or industrialized for tax purposes.

Additionally, for the imposition of income taxes, companies are required to segment their accounting entries for revenues, costs, and expenses in accordance with their nature and origins.

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Canada

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

To date, Canada has not made any public statements regarding the implementation of a regime to impose new taxes that are specifically targeted at digital activities. Further, to date Canada has not adopted the recommendations in Action 1 of the BEPS project at the federal level.

However, Canada is represented on the Steering Committee which is working hard to achieve a global consensus on the issue of tax and digitalization in a very tight timeframe, to avoid unilateral action by countries (which could lead to problems of double taxation and increased complexity, and could impede economic growth). As one of the countries leading this work, it is reasonable to expect Canada to implement a global consensus if it is achieved. For all countries, including Canada, this will require domestic and treaty changes (bilaterally and/or through the multilateral instrument).

There have been new indirect tax measures at the provincial level in the province of Quebec. On June 12, 2018, the National Assembly of Quebec passed into law the measures announced in the 2018-2019 budget, relating to the new Quebec sales tax (QST) registration regime for suppliers with no physical or significant presence in Quebec, notably those engaging in e-commerce. This provision effectively results in the imposition of QST on digital services rendered by suppliers that would not have otherwise been obligated to charge QST.

As well, the province of Saskatchewan has announced new measures to force businesses located outside the province that make retail sales in the province to register and collect the Provincial sales tax (PST). According to the new rules, persons who do not otherwise carry on business in Saskatchewan would be required to register and collect PST on the sale at retail of tangible personal property, where:

- The tangible personal property is made available for purchase by persons in the province;
- The orders to purchase tangible personal property originate and are accepted in the province; and
- The tangible personal property is caused to be delivered in the province.

Tangible personal property generally refers to goods and also includes data, information or material that is transferred, transmitted or distributed by means, such as landlines, wires, fiber optic cables, and satellites.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

To date, there has been no public statement by the Department of Finance or the Canada Revenue Agency on taxing digital activities. However, the authors would envision certain challenges to introducing measures related to the taxation of the digitalized economy.

With respect to the development and implementation of a tax on the profits of a non-resident enterprise from digitalized activities, the authors would envision a number of challenges. The existing domestic tax regime does impose income tax on a non-resident person that carries on a business in Canada (with a low threshold that would likely capture most digital activities). The domestic provisions are modified by the application of Canada's numerous tax treaties in the case of a non-resident that is a resident of a treaty country. Generally speaking, a resident of a treaty country would typically only be subject to tax if it has a permanent establishment in Canada. As such, in order to impose a tax on non-residents that conduct digital business without a physical presence in Canada, it would be necessary to effect a change to the various tax treaties. Assuming a change to the various tax treaties was possible, it would then be necessary to

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establish a basis for determining the income of the non-resident that is attributable to carrying on a business in Canada.

In the authors' view, it would be challenging to apply current transfer pricing principles to attribute income to a jurisdiction where the enterprise does not have any physical activity, and as such the adoption of a transfer pricing regime (which would presumably require agreement from the treaty partner on the appropriate application of Article IX of the relevant treaty) would be required.

Finally, the audit and enforcement of any measures related to the taxation of the digitalized economy would also face challenges. For example, the availability of reliable data, access to books and records of non-resident enterprises, and the collection of tax and enforceability of the provisions would be examples of potential challenges. However, the authors would note that these challenges are not new or unique, as existing regimes for taxing non-residents with operations in Canada (for example, operating through a traditional physical branch) face similar challenges.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

The OECD's work in this area is intended to address the global concern of tax equity between jurisdictions – this represents a paradigm shift, redefining how taxing rights are allocated between jurisdictions.

The changes being considered could potentially modify the current profit allocation to attribute a portion (or potentially all) of the non-routine profit to marketing intangibles and allocate it to the market jurisdiction. The allocation to a market jurisdiction would apply regardless of existing transfer pricing rules, e.g., location of development, enhancement, maintenance, protection and exploitation functions, control and management of risks, or legal title.

A potential advantage of the profit split approach is that it may, at least conceptually, better align with the current concept of the arm's length principle and the notion of attributing income to where value is created.

Conversely, the potential advantage of the fractional apportionment approach is its simplicity. Assuming there is international consensus on the apportionment factors, the application of the approach may be more straightforward and may rely on more objective and verifiable data.

The challenges of the profit split approach for the taxation of digital activities are similar to the challenges that have always existed with the profit split method. These include:

- Achieving a consistent, fair, and standard definition of profit;
- Adjusting for different accounting standards and definitions between jurisdictions;
- Establishing routine and non-routine profits, which is subjective and would likely lead to significant controversy; and
- Achieving consensus on how best to allocate profits.

These are challenges taxpayers and tax administrations routinely face when using the profit split method today, and these challenges would also exist if using the profit split method in the taxation of digital activities. It is the authors' expectation that the application of a profit split approach would lead to a greater level of significant controversy, and higher risk of double tax.

A significant challenge regarding fractional apportionment is achieving international consensus on a common tax base, and on the apportionment factors themselves. Once there is a consensus on the apportionment factors, it might be expected that the application of the approach would be straightforward from a compliance perspective, and would be based on objective and verifiable data. However, the authors expect that there will still be practical issues that will lead to controversy. For example, allocation keys may be subject to manipulation. There may also be differing views on how to interpret even a seemingly straightforward allocation factor, for example, if employees were used as means of allocating profit, would an independent contractor or temporary worker count as an employee? A metric such as the number of employees would likely also assume that the value created by each employee is equal. The functions, risks, and assets that create value are different across industries and may even be different amongst entities in the same industry. Using simple metrics to allocate profit has the potential to ignore those functions, risks, or assets that truly create value in an enterprise.

Finally, the authors expect that losses will also create challenges under either approach. For example, if one entity accumulated significant start-up losses before undertaking a global expansion to market its technology, how would those losses be allocated to the various jurisdictions under either of the suggested approaches?

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

As there has been no change to tax policy in Canada to address the taxation of digital activities to date (nor any formal commentary from the Department of Finance Canada or the Canada Revenue Agency), we have not observed any material action by MNEs to date. However, we expect that many are closely monitoring developments.

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China

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

The relevant Chinese government authorities (the Ministry of Finance (MOF) and the State Taxation Administration (STA)) have not yet set out any formal "China position" in the manner of the U.K. (publicly), or the U.S. (semi-publicly). This being said, a certain amount can be inferred by drawing on information in the public domain, including tax media reports on the Inclusive Framework (IF) deliberations and public digital economy tax seminar presentations by government officials. Chinese tax policymakers appear to consider interim measures, such as gross basis turnover taxes, to be suboptimal, distortive, and not a good path forward. The Chinese government authorities might be considered to favor a long-term solution which has its basis in the existing international tax framework, without ring-fencing the digital economy, and which could minimize double tax outcomes and additional burdens on businesses. This would be very much in line with the repeated statements by China's top leadership concerning China's position as a strong advocate of continued globalization, with economic digitalization being a key element of this. It would also make sense in view of the blossoming overseas operations of the major Chinese digital economy players, and their rapid innovation of new service offerings that are attractive to consumers in overseas markets. Apart from this, the indications are that China will keep an open mind regarding the shape of the long-term solution proposals emerging from the work of the IF.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

Challenges in developing and implementing measures related to the taxation of the digitalized economy

The volume of cross-border e-commerce and digital service activity into China has been increasing rapidly. Various government policies have sought to encourage this, in connection with the goal of shifting China to a consumption and services driven economy. However, incompleteness and ambiguity in the tax and regulatory framework lead to continuing issues for such businesses.

For example, the current guidance on the appropriate WHT treatment for various digital services provided cross border into China is not clear. Without official or specific guidance on cloud services, for example, the local Chinese tax authorities could seek to treat related service fees under the domestic law WHT categories of leasing income or license fees, thereby attracting WHT under the royalty article of China's double tax agreements (DTA).

Additionally, the strict Chinese foreign exchange controls continue to pose challenges for digital economy businesses. For example, the sale of software cross border into China should, in principle, not result in WHT leakage. However, in order for the purchase payment out of China to meet foreign exchange authority bank processing requirements, proof of import through customs needs to be provided, but this is clearly not relevant for software. As a result, the outbound payment may be labeled as a license fee, requiring WHT to be paid. As another example, the MNEs operating more advanced digital economy businesses may arrange their digital economy collaborations that apply a profit split transfer pricing methodology. However, the current forex rules in China do not readily facilitate payments being made or received as a result of profit split adjustments.

On the PE front, the Chinese PE guidance currently does not cover server PE cases. As the Chinese cybersecurity law requires the storage and processing of personal data onshore, and limits data transfer offshore, foreign enterprises are compelled to build up their onshore capacity, usually in conjunction with Chinese partners. This typically leaves the foreign enterprises without direct interest in the servers but with a measure of control over their usage and deployment. There remain open technical questions on whether the authorities will pursue the foreign enterprises for tax on the basis of a server PE.

Further, the Chinese VAT regime has yet to be simplified for digital services. Chinese VAT zero-rating only applies in very limited circumstances. A VAT exemption may be obtained where certain services can be shown to be consumed outside China (which is complex to prove in a digital services context), but none of the input VAT would be recoverable in such cases.

Reactions of MNEs

Chinese outbound enterprises have expressed concerns that the unilateral measures implemented by countries around the world are complicated and impractical, leaving businesses vulnerable to multiple taxation without effective measures to avoid such outcomes. Their concerns are further compounded by the fact that Chinese outbound enterprises are still in the process of building up their tax team capabilities and experience.

For inbound MNEs, the lack of a comprehensive set of laws to deal with digitalized businesses is a challenge that needs to be managed. As noted above, issues such as the characterization of certain expenses and the tax treatment thereon, become costs to businesses which may or may not be recovered by the counterparties. In another example, practical implementation of the residual profit split transfer pricing methodology (i.e., to adjust the profits upwards or downwards) is challenging under the existing Chinese framework.

Despite the challenges outlined above, the business community is optimistic that the Chinese government will be taking a practical view of resolving issues around the taxation of digitalized businesses that will ultimately provide certainty in the long term.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

Digitalization of the economy has called into question the applicability of the traditional arm's length principle in delineating related party transactions. The notion of treating enterprises as separate entities and pricing their related party transactions by reference to third-party transactions is becoming harder to apply in a just manner for digitalized businesses. The source of value for digitalized businesses come from intangible assets and data, which can be located anywhere in the world without a physical presence in the jurisdictions that these companies exploit. These intangibles and data are not necessarily easy to value. In most instances, it is impossible to find independent third-party transactions that are comparable to price those related party transactions. For these reasons, the

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profit split approach or fractional apportionment method may be solutions to a more equitable allocation of profits in market jurisdictions.

Under the profit split approach or the fractional apportionment method, the system profits (either residual or total) would be allocated under certain agreed allocation key(s), which may likely result in a bigger share of profits being allocated to large market jurisdictions, such as China.

Having said that, China, which is home to leading enterprises with highly digitalized business models with overseas reach, may be seen to favor a more modest additional profit allocation to market countries.

Various practical challenges would need to be considered and resolved with respect to the implementation of either the profit split approach or the fractional apportionment approach. These are identified by the OECD in the May 31, 2019 release of the program of work for the overhaul of international tax rules.

Firstly, data availability is critical in enabling the correct identification of system profits For example, there are questions on which accounting rules to be used for the calculation of total profits; whether to use the group consolidated accounts or principal entity accounts; which profit indicators to use; and whether any adjustments would be required.

The allocation keys for the splitting of residual profits among market jurisdictions can be arbitrary and may not reflect the actual value derived in a particular market. To overcome any arbitrariness, a sophisticated value driver analysis may need to be devised so that more objective allocation keys could be deployed. However, there is bound to be a certain degree of subjectivity in analyzing value drivers, which can lead to disagreements (e.g., different market jurisdictions may have different value drivers).

Under the profit split proposal, there is a need to identify routine and non-routine profits. The new proposal does not intend to cover all profits of an MNE. The profit split proposal looks into whether the existing transfer pricing methodology could be adopted to identify routine profits or whether a more simplified method could be used. The existing transfer pricing methodology for the remuneration of routine profits is already subject to local disputes. The quantification of residual profits under certain proxies, to be developed under the proposal, would be challenging to apply uniformly across all MNEs, as every MNE has its unique facts and circumstances.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

The current development trend on the taxation of digitalized businesses is probably not going to be based on isolating digital activity. From our interactions with the general business community, Chinese enterprises are unlikely to be able to isolate their businesses along digital and non-digital business lines.

The ability to segment management accounts depends very much on how businesses are organized and how financial performance is measured. Some are aligned by product line but span across countries and regions, while others are segmented by region, as their business managers are responsible for various products and services in their respective regions. Any changes to their management accounting and financial reporting purely for tax purposes will ultimately bring additional costs to businesses.

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France

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

After the EU State Members failed to reach a consensus on a European common tax on digital services ("DST"), and similarly there being no consensus reached yet at the OECD level, the French Finance Minister committed to introduce such a tax at the national level.

The text was finally adopted by the French Parliament on July 11, 2019; and published on July 25, 2019. It will apply with retroactive effect from January 1, 2019.

According to the impact assessment, the French DST is of a temporary nature and is to be cancelled as soon as new international principles are adopted. However, this is not a binding commitment, but merely a political stance at this stage, as there is no provision for the automatic cancellation of the French DST upon the reaching of an agreement on the EU directive or the OECD guidance.

The French Parliament has however adopted an amendment according to which the French Government shall submit to Parliament, before September 30th of each year, a report on the negotiations conducted within the OECD and the EU. The report should emphasize the impact of the negotiations on the French DST, and indicate the potential date on which a new international mechanism could replace it.

This amendment was designed to recall the temporary nature of the DST, while taking into account the difficulties under French law to make the withdrawal of the DST conditional upon the adoption of an international text that is not yet adopted.

The DST is a 3% tax designed to apply to companies meeting the following three criteria: (i) they must provide specific digital services, (ii) in France, (iii) generating a certain amount of turnover.

(i) Material criterion (digital services under the scope)

Falling within the DST scope are the following services:

- Digital intermediation services, i.e. the provision of a digital interface to enable users of platforms to interact with each other in order to exchange goods or services (including marketplaces). An amendment adopted recently by the second legislative chamber has specified that the tax focuses on digital platforms and market places remunerated by a commission fee in exchange for the interaction enabled between users.
- Services aimed at placing targeted advertisements on a digital interface. The impact assessment emphasizes the importance of the "targeted" dimension of the advertising: "*those services must allow advertisers to place an ad on a website, depending on the individual data of the user consulting the said website*".
- The resale and management of personal data for advertising purposes.

In contrast, some services are expressly excluded from the DST scope, i.e., the provision of content on a platform, communication and payment services, as well as some regulated financial services and services provided between companies of the same taxpayer group.

We are expecting more details on these exclusions, and how to separate for example, marketplace activities within the DST scope and direct sales from a website, which should be excluded from the DST scope. This could be provided in the law or in administrative tax guidelines to be published later this year.

(ii) Territorial criterion (provision of services in France)

The criterion to determine whether a digital service is provided in France is not linked to the location of the company providing the services, as the DST precisely aims at taxing profits that are not covered by existing tax rules. The DST territorial criterion rather depends on the type of service provided:

- An intermediation service is considered to be provided in France when one of the users of the platform is located in France or has an account opened from France;
- A targeted advertising service is deemed to be located in France if the website displaying the targeted ad is consulted from France;

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- The sale of user data is considered to occur in France if the data is collected from a user located in France.

The way the user data will be tracked and disclosed for DST purposes is also a key aspect which requires clarification at this stage.

(iii) Quantitative criterion (turnover thresholds)

Two thresholds have to be reached for the DST to apply. Companies must have a "digital turnover" (i.e. a turnover generated by services falling under the scope of the DST) exceeding:

- EUR 750M worldwide, at consolidated group level, and
- EUR 25M in France.

According to the French government, the said tax should generate approximately 400 million euros of income for the French State per year.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

As in many other countries, traditional vehicles used by the French Tax Authorities – such as the permanent establishment ("PE") concept - appear to be unfit to tax the profits arising from the digital economy.

This was recently evidenced by a decision rendered by the Paris Administrative Court of Appeal (*CAA Paris, 25 April 2019, Google Ireland, n°17PA03065 to 3069*), in which the Court confirmed that Google Ireland had no PE in France as a result of activities performed by Google France, in particular because Google France was not able to contract in the name of Google Ireland. Therefore, Google Ireland was not liable for various French corporate taxes levied for the period from 2005 to 2010.

However, this decision was rendered under the previous PE definition, which has since evolved under the influence of the BEPS project. In adopting the OECD multilateral instrument (MLI), France adopted the broadest definition of the PE concept, notably, an extension of the dependent agent definition. France will now characterize a PE not only in case of conclusion of contract in the name of a foreign enterprise, but also "*when a person habitually [. . .] plays the principal role leading to the conclusion of contracts*", which implies that it is no longer necessary for the dependent agent to conclude the contract to characterize a PE.

Alongside this OECD initiative, and after the failure of the EU project to introduce a digital tax, the French Finance Minister committed to levy such a tax at the national level as from January 1, 2019. Hence the establishment of the tax event at the end of each civil year in the draft bill, to allow the DST to apply retroactively from the beginning of 2019.

Some MNEs likely to fall under the DST scope have raised concerns about the measures. In particular, it is difficult for some MNEs to determine among all the activities they were performing, which ones fell under the DST scope.

This difficulty was partially solved by the French Parliament which adopted amendments providing clarifications about the definition of taxable activities. For example, it provided a definition of ancillary services to be included in the DST scope, along with the express exclusion of logistics services marketed by companies providing a numeric interface for the provision of goods.

Another useful amendment excluded from the DST scope the provision of a digital interface when the provider is remunerated by users' subscriptions. This clarification is of importance as it ensures that the tax focuses on income sourced from the use of data of French users, and as a result that the DST merely applies to intermediation platforms and marketplaces remunerated by a commission fee in exchange for the interaction enabled between web users.

As to the risk of challenges to the DST, since it would be implemented in France as of January 1, 2019, these challenges, through future claims or litigations, could come in early 2020.

In particular, it could be questioned whether the DST should apply when a tax treaty exists, as it could be deemed to be of a similar nature as corporate income tax. Also, such a tax could be deemed by the Court of Justice of the European Union (CJEU) as a disguised and prohibited restriction, as in practice it will primarily apply to foreign companies, which would result in an unjustified difference in the treatment between local companies and foreign companies. Finally, even if the French DST has been designed as an indirect tax like VAT (to avoid the above-referenced tax treaty restriction), it could be considered that this qualification is artificial and indeed leads to a double taxation of the same turnover.

Speaking of double taxation, this risk could also result from the fact that the DST is being levied on the turnover of a company instead of its profits, implying that some income could be taxed twice. It could also result from the territoriality rule, according to which the intermediation service is taxable in France if the transaction induced by the intermediation involves a user located in France. Indeed, if the country in which the other user is located provides for the same rule, the same transaction could be taxed twice.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

Understanding how legal entities contribute to the value creation of a Group is an extremely difficult undertaking. This difficulty is increased if the Group operates a digitalized business model. It is further amplified if additional factors, external to the Group (e.g. user contribution) are to be taken into account.

We believe that the issue becomes inextricable if it consists of devising a simple, mechanical rule, applicable to all situations and able to withstand changes in business models and above all, the legal and operational adaptations of taxpayers to such a rule.

We do not believe that any simplistic or formulaic rule will be able to cope with the immense challenges raised by the digital economy. Such a rule would be quickly circumvented by taxpayers, if applicable at all.

In the case at hand, we fear that the transposition of concepts developed under the arm's length principle - such as "routine" activities – to an environment which would not ultimately rely upon the arm's length principle (such as the MRPS rule or in the Factional apportionment rule) would be bound to fail. These concepts may be somewhat loosely defined in the OECD Transfer Pricing Guidelines, where they relate to a web of concepts (such as comparability, etc.) which ultimately all relate to a very precisely defined (yet versatile) rule in the arm's length principle. Outside of the arm's length principle, the house of cards collapses. When concepts and definitions are removed from a solid and consistent framework, they are likely at risk of being circumvented.

The application of the arm's length principle has been bolstered by BEPS 1.0 (tackling base erosion and profit shifting situations). We believe that it remains the most promising route to address the concerns which lead to BEPS 2.0 (allocating tax bases more fairly between jurisdictions).

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

Based on our experience, MNEs are still taking a cautious stance toward the fast-paced evolution of the tax environment. They are especially sensitive to the impact that concepts developed or reactivated in the context of the digitalized economy (e.g. marketing intangibles) may have on other aspects of their activity.

Based on our experience, digital activity reporting is driven by business reasons and not by tax reasons. The ability of MNEs to identify, as an example, digital sales, may vary from one company to another, depending on the industry, internal organization, etc.

A number of B2B companies manage their e-commerce business separately. Yet, even in this case, in-depth analyses may be needed to create segmented P&L statements for digital and non-digital activities (if possible at all), insofar as – amongst many examples – (i) it is often the case that brick & mortar investments (flagship stores) directly fuel e-commerce sales or (ii) a non-digital sale to a third-party retailer may effectively be a digital sale from the retailer to the consumer, or vice versa.

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Germany

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

While the German authorities are actively involved in promoting an international approach to additional digital taxation, they are strongly opposed to any unilateral measures. Therefore, currently, the German authorities do not plan to introduce a specific taxation of digital activities in Germany.

The Federal Minister of Finance has pointed out on several occasions that generally taxation should follow the arm's length principle by taxing functions where they are performed. For countries with a strong export focus, such as Germany, this approach is favorable and significant. Some of the proposals to tax the digital economy break with this principle and are therefore seen as a slippery slope that would result in more taxation of the traditional industry or the digital activities of German industrial companies. Hence, if other countries begin to tax imports in their markets, Germany and other industrialized countries may experience billions in tax revenue losses.[1]

The Scientific Advisory Board at the Federal Ministry of Finance recommended that the EU Commission's proposals on a digital service tax (DST) should not be supported.[2] In particular, it cited the following reasons:

- Impending undesirable double taxation for companies with a presence in Germany
- The hybrid character of the DST and legal concerns, as a direct tax on profits would entail an interference with the principle of taxation on net income and constitute a new tax, which could imply complex constitutional questions in Germany[2, 3]
- Undesirable economic side effects and lower overall tax revenues for Germany
- Breaking with existing principles of the international tax system
- Limited fiscal flexibility and the resulting harm to tax competition

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

The German tax authorities are technically very competent and have a long history of relatively tough audits with regard to transfer pricing questions of traditional businesses. However, with the digital industry there is some uncertainty, as the business models are relatively new, and the key digital industry participants are primarily located abroad. This means that most of the business is inbound, and local (i.e., German) value-creating activities of foreign multinationals in the digital industry are arguably low value.

On the other hand, German industrial companies are comparatively advanced in digital applications for manufacturing activities, in particular in Industry 4.0 and smart manufacturing. The German central tax office strongly considers such manufacturing activities to be "non-routine" in nature and tries to identify the effect of German manufacturing IP (especially digital IP) on foreign manufacturing plants, and between the German plants and foreign distribution companies.

A key challenge for the German audit process is the strong federal structure of Germany, where audits are primarily carried out by the various states (*Länder*), with supervision and control by the central federal tax office. This means that the technical competency and aggressiveness, as well as the approaches, can vary greatly between the states.

For example, the state of Bavaria developed a somewhat unusual approach where the Munich tax office, in particular, tried to levy source taxation on German companies on their purchases of Google advertisements based on the income taxation act dealing with artists, performers, and athletes.[4] This would have meant that German companies would have effectively paid additional tax on their advertising budgets. Over-

all, this approach was quickly quashed through the federal-state coordination. However, it does illustrate the challenges in the audit procedures and also the creativity of German auditors.

Overall, the federal German tax authorities developed (and continue to develop) special units (*Spezialreferate*) for questions concerning the digitalized economy, and the Federal Ministry of Finance continues to be extremely involved in trying to tackle this (perceived) issue.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

NERA regularly comments on the OECD public consultation documents, and we invite readers to review our extensive response to these proposals. Overall, we hold that it is extremely important to maintain a globally consistent standard of international taxation, as a large number of individual approaches would be an extremely serious impediment to global trade and prosperity due to the danger of double taxation under different systems and also to an increased compliance burden when an MNE has to conform to different norms. We would also point out that various inconsistent systems have a greater potential for misuse, potentially resulting in double non-taxation.

Given this background, we appreciate the OECD's initiative to reach a consensus on these questions, but we note that in particular the fractional apportionment of a part of the profits to the source country – irrespective of any economic activity there – is a significant departure from the arm's length principle and poses serious risks for this key principle. In particular, applying this approach only to the digital industry (as one of the OECD proposals envisions) would establish an artificial distinction and lead to the application of two parallel and incompatible systems between the digital and traditional industries. In a time when practically all industrial companies are heavily investing in digital activities, this seems unsustainable.

When applied correctly, the profit split approach leads to economically more appropriate outcomes than a broad fractional apportionment approach. In our experience, we were able to utilize the profit split method in various digital business models with significantly different outcomes, such as online retailing, networking sites, or robo-advising start-ups. These various business models have different value chains, and a simple apportionment approach would not be able to capture this.

For example, we introduced a profit split approach for a customer-central digital industry that delineated the value contribution of consumer data from the scalable technology intangibles via a contribution analysis based on game theoretical approaches. This allowed for an arm's length attribution of profits to these intangibles and could work as a wider framework.

Today, profit splits are commonly used in transfer pricing and, while they require a higher level of attention to the technical details, they can no longer be considered an exotic method. Hence, there is rarely any fundamental issue in the application of a profit split, but there are certainly key challenges.

The key advantage of a profit split for any industry is that it allows for a more gradual and accurate remuneration of local activities, as they are conducted in the specific value chain of the company. Thus, the crucial aspect is to identify the value-generating elements and to find an appropriate metric for this contribution. In practice, this can be done via different methods, such as survey data, customer or employee remuneration metrics, or proper identification of entrepreneurial costs, weighted for their economic lifetime, riskiness, and contribution. The details of this can be tricky, but in practice simple headcount information is rarely insightful.

The common, and most important, aspect of this is that the use of these metrics should be rooted in the value chain analysis. Moreover, specifically in the digital industry, companies should be aware that business models change continuously, and the contributions of various entities will vary depending on the current business model and their specific activities.

Thus, we introduced a flexible profit splits model for an automotive company that includes predefined mechanisms for the effective buy-in and buy-out of new or existing profit split participants when the business model changes. In particular, it was crucial to properly define the pool of intangibles in light of a flexible (and somewhat undefined) business model, since otherwise significant development costs would be incurred with unclear tax consequences.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

Large German multinational companies are making enormous investments in the digitalization of their business models. The funds invested in, for example, self-driving cars or Industry 4.0, (see response to question 2), can easily reach into billions of euros, while simultaneously the underlying business models for the commercialization of the data can be much less clear.

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This poses a difficulty in trying to properly set up the model from a transfer pricing perspective.

Given the very significant uncertainty with regard to which of the OECD models will be adapted, most German MNEs are waiting for further clarification before adapting their tax systems with respect to digital operations. As long as there is no consensus on whether there will be additional specific taxes, a different value attribution for digital companies (or any companies), or simply a minimum tax regime, it will be difficult to formulate a specific response. More importantly, digital activities of most German companies are not purely ancillary but generally are actually geared towards core parts of the business, especially in automotive adaptation. In this sense, it would seem highly artificial or even impossible to produce completely delineated financial information regarding business lines.

That being said, many German MNEs are actively setting up models to accommodate their digital investments in their transfer pricing framework. These activities are usually connected to extremely large investments, with many entities contributing differently to new products, be it though data-gathering, coding, analytics, or developing business applications. Especially as the underlying business model continues to change, MNEs are developing frameworks to adapt to such continuing changes and to attribute costs and future rights appropriately. As outlined above, defining the economic ownership in these models is going to be extremely important going forward as these activities mature and become profitable.

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NOTES

[1] Interview with the German Federal Minister of Finance on November 12, 2018. (*https://www.bundesfinanzministerium.de/Content/DE/Interviews/2018/2018-11-12-spiegel-online.html*)

[2] A monthly report from the BMF in January 2019 stated, "Stellungnahme des unabhängigen Wissenschaftlichen Beirats beim BMF zu den EU-Vorschlägen für eine Besteuerung der digitalen Wirtschaft."

[3] Constitutional competence problem due to BVerfG vom 13.04.2017, 2 BvL 6/13 (NJW 2017, 2249).

[4] h § 49 Abs. 1 EStG i.V.m § 50a Abs. 1 Nr. 3 EStG. (*Einkommenssteuergesetz*).

India

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

Information and communication technology has made it possible for businesses to conduct themselves in ways that they could not have done previously. Emerging business models do not require physical presence, draw more reliance on digital and telecommunication networks, and derive substantial value from data collected or transmitted through such networks.

India, like other jurisdictions across the world, is aware of the tax challenges that these new business models have created in terms of identifying nexus, value creation and characterization, valuation of data, user contribution etc. India has actively participated in international discussions to tackle these challenges posed by the so-called 'digital economy' in the Base Erosion and Profit Shifting (BEPS) project endorsed by G-20 and OECD countries. The 2015 OECD BEPS Action 1 Report, while recognizing the challenges and considering the possible measures[1] that could be used to address the challenges posed by the digital economy, falls short as it did not recommend an immediate plan for jurisdictions to adopt to address the potential tax leakage that could happen as a result of the digital economy. The Report suggested that developments in the digital economy will be monitored, jurisdictions will be regularly consulted on the issue and it is expected that by the year 2020, it would be in a position to develop mutually agreeable options regarding taxation measures for the digital economy.

Following the issuance of the BEPS Action 1 Report in 2015, the Central Board of Direct Taxes (CBDT), Department of Revenue, Ministry of Finance, recognized the significance of the issue surrounding taxation of the digital economy and constituted a 'Committee on Taxation of e-Commerce' to analyze the issue and suggest an approach. The Committee submitted its report in February 2016 which recommended imposing an Equalization Levy on specified digital payments, one of the measures identified in the BEPS Action 1 Report that could be taken to tackle the taxation issue.

Equalization Levy

In the Finance Act of 2016, the Indian Government introduced an Equalization Levy equal to 6% of the amount of consideration for specified services[2] received or receivable by a non-resident not having a permanent establishment ('PE') in India, from a resident in India who carries out a business or profession, or from a non-resident having a PE in India.

To reduce the burden of small players in the digital domain, no such levy shall be made if the aggregate amount of consideration for specified services received or receivable by a non-resident from a person resident in India or from a non-resident having a PE in India does not exceed one lakh Indian rupees (approximately USD 1,434) in the previous year.

The payer is required to deduct the Equalization Levy from a payment for specified services only if it is a payment made for the purpose of business and the payer intends to claim a deduction for expenses on the account of such payment in determining its taxable profits in India.

It is interesting to note that the tax base is the value of covered transactions, not the income generated by them. It can therefore be regarded as a gross based tax or a turnover tax limited to revenue from specified services provided by non-residents. Indian Revenue has not classified the Equalization Levy as a tax on income, but rather a transaction-based tax that applies to the "amount of consideration" received. As a result, it is unlikely to give rise to double tax relief in another jurisdiction under domestic law or a double tax treaty, and may generate situations of double taxation for foreign enterprises already liable to corporate tax in their country of residence.

Though the legal liability of the Equalization Levy is imposed on the non-resident payee, the Equalization Levy is collected by the payer (i.e., the local business in India), who is responsible for remitting the tax to the central government in the month that follows the payment. In contrast, no compliance requirements apply to the non-resident payee.

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Following the introduction of the Equalization Levy, the revenue collected from June 2016 to March 2017 amounted to INR 3.4 bn (USD 47 mn).[3] The revenue collected from April 2017 to March 2018 was INR 5.5 bn (USD 76 mn).[4]

The introduction of the Equalization Levy might be considered an appropriate measure to address some of the tax challenges arising from the digital economy, however, the manner in which it has been enacted is debatable as it is considered to be a unilateral measure to override tax treaties in a clandestine manner; through amendments made in domestic tax laws.

There is no doubt that the receipt from such specified services constitutes "business income" in the hands of the non-resident company, which when there is no PE present cannot be taxed in the host jurisdiction, in this case, India. Thus, unless an amendment was made in this regard in the various tax treaties signed by India, imposing income tax on such receipts from specified services would not have been possible.

Thus, the Equalization Levy is an attempt to levy tax on income under the domestic tax laws of India. Expressly stating that the levy of such tax would not be obstructed by any tax treaty, is a direct attempt on the part of Indian Revenue to override tax treaties through legislation in domestic tax laws.

We respectfully submit that it would be in the best interest of India for the Indian Government to discontinue such 'transaction taxes', i.e., the Equalization Levy, on digital payments through unilateral action as it would defeat the overall avowed objective of the OECD/G-20 BEPS initiative of avoiding double taxation under tax treaties. Such unilateral action creates tax uncertainty and lacks the international coordination and consensus needed to promote global trade and investment. The Equalization Levy would only result in the increase of costs in the hands of the consumers of services, namely Indian residents, thus making them uncompetitive in the long run.

Modifying nexus rule in form of 'significant economic presence'

Two years after the introduction of the Equalization Levy, Indian Revenue vide the Finance Act, 2018, modified the domestic definition of "Business Connection" in India (i.e., the domestic law equivalent to the PE concept under tax treaties).

Under the new business models, as discussed above, non-resident enterprises interact with customers in another country through digital means and without having any physical presence in that country, resulting in the avoidance of taxation in the source country. Like other jurisdictions, India feels that the existing nexus rule based on physical presence is no longer an appropriate rule for the taxation of business profits in the source country, in this case, India. As it results in the rights of the source country to tax business profits that are derived from its economy to be unfairly and unreasonably eroded.

With concerns over whether the prevailing concept of PE is adequate to protect a source country's taxing rights in today's digital world, Indian Revenue expanded the domestic definition of PE, i.e., 'Business Connection', to include a nexus test based on 'significant economic presence' through technology and other digital means. This new definition recognizes the fact that it is quite possible to be involved in the economic life of another country without having a fixed place of business or dependent agent and, therefore, businesses can be liable to taxation in that country, i.e., the source country.

The legislation provides that a non-resident enterprise would be considered as a significant economic presence in the following two situations:

- *Threshold based on local revenue*: 'any transaction in respect of any goods, services, or property carried out by a non-resident in India, including the download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds the amount as may be prescribed'; and
- *Threshold based on number of local users*: 'systematic and continuous soliciting of its business activities or engaging in interaction with such number of users as may be prescribed, in India, through digital means.'

These thresholds create a direct tax liability in India irrespective of the location and/or residence of the taxpayer. It needs to be noted herein that the first situation covers any transaction in respect of any goods, services, or property being carried out by a non-resident in India and the revenue from such transactions exceeds a prescribed limit. The service of downloading data or software is illustrative in nature. This implies that even if a non-resident sells goods or renders services in India, it can potentially create a taxable presence even though the activity is undertaken without any digital means as the revenue from such activities in India exceeds the prescribed threshold value.

After amending the necessary provisions, India Revenue has called upon relevant stakeholders for consultation on further rules and implementation guidance on the two thresholds provided in the new definition. The outcomes of these consultations are still awaited.

Incidentally, the BEPS Action 1 Report on the digital economy identified three sets of factors for assessing whether a non-resident could be said to have a taxable presence under the 'significant economic presence' test – (1) revenue factors, (2) digital factors (i.e., the presence of a local domain, local digital platform, and local payment options), and (3) user factors (including the number of Monthly Active Users). However, the definition of significant economic presence, as introduced in the Indian Tax Regulations, has been selective while incorporating the factors as prescribed under the Action 1 Report. The revenue factor is only applied in the context of transactions for goods, services or property download of data or software. The user factor is adopted in relation to systematic soliciting or interaction with users. And the digital factors, which are probably the most demonstrative of a non-resident's intent to participate in the economic life of the source state, do not appear at all for determining significant economic presence.

Unlike the Equalization Levy, which was kept outside the ambit of income-tax laws in India, the 'significant economic presence' is very much part of Indian income tax regulations and, in case of any conflicting provisions with regard to double tax treaties (e.g., the PE definition under the relevant treaty article), double tax treaties would prevail over domestic nexus rules, including the concept of 'significant economic presence'. Thus, the latter is likely to only apply to situations not covered by tax treaties, i.e., transactions with countries where there is no double tax treaty and to abusive transactions such as those involving conduit or shell companies. It will not apply to situations covered by tax treaties until such conclusive changes are made to double tax treaties by Indian authorities.

However, the availability of treaty benefits in India is subject to the non-resident obtaining a tax residency certificate from their country of residence. Going forward, once the Multilateral Convention (also referred to as the "MLI") comes into force for India on October 1, 2019,[5] additional scrutiny under the Principal Purpose Test for establishing eligibility for treaty benefits may occur.

Indian Revenue believes that the amendment of the domestic law will enable India to negotiate for inclusion of the new nexus rule in the form of 'significant economic presence' in its Double Taxation Avoidance Agreements.

Indian Revenue has also stated that if digital businesses operated by non-residents are structured to artificially avoid the

establishment of a PE in India, including claiming that the activities carried out in India are preparatory or auxiliary in nature, the provisions of the General Anti-Avoidance Rules (GAAR) under the Income Tax Act may become applicable to the income of digital businesses in India.[6]

Proposing formulary apportionment to attribute profits to PE

India has been a frontrunner in the discussions to finalize the OECD BEPS Action Plans and to implement the measures proposed under the BEPS Action Plans to check tax base erosion. From the introduction of a one-sided measure, i.e., the Equalization Levy, on specified digital transactions in 2016 to modifying the nexus rule in domestic legislation to determine the PE of non-residents in 2018. In 2019, Indian Revenue proposed amending the rules for profit attribution to a Permanent Establishment.

As concerns have already been growing on how profits should be attributed in respect of profits generated from digital businesses, the CBDT formed a Committee to review the prevailing methodology of profit attribution under Article 7 (business profits) of the Double Taxation Avoidance Agreements and to recommend changes.

The Committee issued a detailed report stating its deliberations, rationale etc. to state that the arm's length principles under transfer pricing (TP) cannot be applied for the attribution of profits to PEs under the Indian model tax treaties and that a formulary approach needs to be adopted for such attribution. This would be done by applying the global operational profit margin of a foreign enterprise to the revenue derived from India and would be further adjusted with references to certain weightages relating to various factors. The Committee also recommends that in situations where the foreign enterprise has global losses or a global profit margin of less than 2%, a minimum of 2% of the turnover derived from India shall be considered as 'profits derived from Indian operations'.

The formulary approach will be applied as a three-factor apportionment approach - sales, manpower (i.e., employees and wages) and assets – each factor carrying equal weight. As per the Committee, this would represent a mix of both demand and supply related factors, thereby profits derived from India will be allocated to each of the factors, i.e., demand factors driven by consumers and the market and supply factors driven by production and supply related activities.

The three-factor apportionment approach will become a four-factor apportionment approach in the context of digital enterprises, i.e., a PE would be determined by referring to the concept of significant economic presence as introduced in the Finance Act, 2018. The fourth factor would be 'users', whereby a weightage of 10% is assigned for business models involving low or medium user intensity and 20% in some other cases. Furthermore, the weightage given to sales factors would remain fixed at 30%, while the balance (50% or 60%) would be assigned to employees and assets in equal proportion (i.e., either 25% or 30% to each of the two factors).

The Committee's disregard of TP principles to attribute profits to a PE largely stems from the rationale outlined below.

The Committee is of the view that there are three approaches for attributing profits to PEs, namely – (i) "supply approach", which allocates profits exclusively to the jurisdiction where the supply chain and activities are located; (ii) "demand approach", which allocates profits exclusively to the market jurisdiction where sales take place; and (iii) "mixed approach", which allocates profits partly to the jurisdiction where consumers are located and partly to the jurisdiction where supply activities are undertaken. As per the Committee, the provisions of Article 7 of the revised OECD Model Tax Convention (MTC), namely post-2010, which advocate that the attribution of profits with reference to FAR (i.e., functions performed, assets used, and risks assumed) analysis of the PE and other parts of the enterprise falls under the "supply approach", unlike Article 7 of both the UN and Indian model tax treaties. Also, as it stood pre-2010, the provisions of the OECD MTC advocate a "mixed approach" towards the attribution of profits to PE. The Committee considered that the "mixed approach" could only be achieved through the formulary method, albeit with proper safeguards which the Committee felt that they had adequately ensured through the use of weightages relating to several factors, e.g., assets, wages, etc.; this was coined by the Committee as "fractional apportionment" under the overall umbrella of the formulary method. In support of the aforementioned formulary method, decisions rendered by various High Courts of India were referred to by the Committee.

It should be noted that the only difference in Article 7 of the OECD MTC in the pre- and post-2010 versions, to the extent of which is relevant to the current discussions, is the insertion of the words *taking into account the functions performed, assets used and risks assumed (FAR) by the enterprise* through the PE. The Committee has come to the conclusion that the approach of profit attribution to PEs with reference to FAR analysis is synonymous with the arm's length principles under TP, which are absent in Indian and UN model tax treaties, and cannot be applied for attributing profits of PE in India.

Nonetheless, the formulary approach suggested by the Committee has not been implemented and has only been issued with the intent to receive feedback from stakeholders. It is likely that representations would flow to Indian Revenue which would clarify their understanding and interpretation of Article 7 as enshrined in Indian, UN and OECD (both pre- and post-2010) model tax treaties. It is known to everyone that the OECD stated the approach developed in the OECD 2008 PE report, namely adherence to arm's length principles under TP by resorting to FAR analysis, and this was not constrained by either the original intent or historical practice and interpretation of Article 7 of the OECD MTC. The purpose of paragraph 3 of the post-2010 version of Article 7 was to re-state those principles with slight amendments and modifications, with the main purpose of clarification.

Furthermore, the Committee would also be apprised as part of the consultation to discuss the possibility of Indian Courts rejecting the arm's length principle and resorting to the formulary approach for the purpose of attributing profits to PEs. It is only in those cases that the Courts have suggested a formulary approach, when the taxpayers have either not attributed profits at all or received lower attributed profits after resorting to their own formula. Paragraphs (2) and (13) of the commentary on Article 7 of the UN Model tax treaty, amongst others, also endorse the application of the arm's length principles for purposes of the attribution of profits to PEs, particularly where the domestic legislation of a country advocates arm's length principles to determine profits of a PE. It is expected that while issuing the final rules on profit attribution to PEs, the Indian Revenue would be mindful of the fact that the prevailing Indian TP regulations advocates the application of TP principles while attributing profits to PEs and any imposition of formulary approaches would contradict the UN Model tax convention.

On the other hand, the application of the formulary apportionment approach might not achieve the desired outcome of taxing appropriate profits as it should be attributed to the activities of India. The taxpayers might devise a way to attribute lower profits if the formulary approach is applied by either not employing people on the payroll but having them on-board, either contractually or through outsource arrangements, or not

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owing assets but leasing them, thereby resulting in the attribution factor to India being lowered. Furthermore, as the formulary approach only considers assets recorded in books, it fails to factor any self-generated intangibles by the PE and, accordingly, the profits that should be attributed to such self-generated intangibles.

Thus, as highlighted above, even the formulary apportionment approach would not yield the desired outcome of attributing the fair share of profits to PEs. Moreover, the right formula would always be controversial, and the treaty partners would challenge the validity of such an approach under Article 7 which clearly advocates for the application of the arm's length principle for determining profits attributable to PEs.

It needs to be appreciated that an arm's length analysis also mandates the application of the Profit Split Method (PSM) under special circumstances, namely when multiple parties contribute to unique and valuable intangibles resulting in the appropriate attribution of profits. In fact, unlike in the past, greater focus on value creation analysis and application of development, enhancement, maintenance, protection and exploitation (DEMPE) functions under arm's length principle (ALP) will also lead to the appropriate attribution of profits to parties making unique and valuable contributions. Thus, once routine and non-routine activities are determined by undertaking value creation analysis, the profits could be determined for entities or PEs performing such routine and non-routine activities through a combination of one-sided (Resale Price Method (RPM), Cost Plus Method (CPM), Transactional Net Margin Method (TNMM)) or two-sided TP methodologies (Comparable Uncontrolled Price method (CUP) or PSM).

Nevertheless, the formulary apportionment approach for attributing profits to PE is at the consultation stage where stakeholders are required to submit their comments on the approach within 30 days of the issuance of the Committee's proposal, i.e., 18 May 2019. It is expected that sense shall prevail and the requirement of applying the arm's length principle for profit attribution will be respected.

Characterization of payments made for software and e-commerce services

Although the above changes or proposals are quite recent, it needs to be highlighted that Indian Revenue has long debated on the characterization of payments made from India to non-residents for digital transactions. Most of the Indian tax treaties follow the source base of taxation, thereby imposing a withholding tax on the payment of royalty and technical fees by which the foreign entity is liable to taxes even in the absence of a PE. Indian Revenue has long debated whether payments for software, digital products and digital services (except for the purchase of goods online) would constitute royalty payments as this is a deviation from internationally accepted principles.

It is interesting to note that following the issuance of the OECD report titled 'The 2002 Update to the Model Convention' read with report titled 'Treaty Characterization Issues arising from E-Commerce' prepared by a Technical Advisory Group, it was recommended that the term 'royalty' should not include payments made for software and e-commerce services. The Indian Government constituted a High-Powered Committee and adopted a much broader definition of royalty and fee for technical services so that it included payments for software and e-commerce services. In fact, to endorse its view and to target digital transactions, Indian Revenue has regularly developed necessary amendments to the definition of 'royalty' in its domestic law which continues to expand its applicability. Some of the key amendments are:

- Changed the expression 'computer software' to cover computer programs recorded on disc, tape, perforated media or any other information storage device and it now includes any customized electronic data or related program (2001)
- 'Royalty' to include the right to use of any industrial, commercial or scientific equipment (2002)
- Changed the expression 'process' so that it includes transmission by satellite, cable, optic fibre or any similar technology, whether or not such processes are secret (2012)
- 'Royalty' to include consideration for rights, property and information, whether its possession or control rests with the payer or not, whether the right, property or information is directly used by the payer or not or whether the location of such rights, property or information is in India or not (2012)
- Consideration from transfer of all or any rights in respect of any rights, property or information includes the transfer of all or any right for use or right to use of computer software (including granting of a license) irrespective of the medium through which such rights are transferred (2012)

The impact of the above amendments on taxpayers operating in India has been detailed in the next section.

Indirect Taxation

With the digital revolution of the economy and society, businesses are shifting from 'brick and mortar' models to 'click and order' models. Like direct taxation, indirect taxation has tried to keep up-to-date, introducing concepts (in the tax landscape) to keep up with technological developments, for example, service tax (a federal levy) has been levied since 2012 on 'online information database access or retrieval services', but various activities or transactions needed more attention, detailing and clarity. Lawmakers have been conscious to focus on tax policy as well as laws, to suitably tax new-age transactions undertaken using the internet (in the digital economy), usually from or in another jurisdiction, and these transactions cannot be easily policed.

The taxation of digital activities has been a contentious issue in India, owing to varied taxation laws (and authorities) that separately deal with the taxation of goods and services. The classification of a transaction was one of the more litigated areas under the indirect tax regime in India (which had dual taxing powers entrusted to the central government and state governments), owing especially to the overlap between the definition of "goods" under the Constitution of India and the state VAT laws and the definition of "taxable service" under the Service Tax law. To illustrate, the taxation of software depended on whether the transaction was one for sale or a license, on a medium or otherwise, with a paper license or without, and accordingly was subjected to Service Tax, Excise Duty, VAT and Customs Duty (in case of importation).

The advent of the Goods and Services Tax ("GST") law (with effect from 1 June 2017) in India resulted in a paradigm shift in the indirect tax regime and provided clarity on the taxation of such transactions. With the distinction between 'goods' and 'services' becoming insignificant for taxation purposes, every activity which is within the ambit of 'supply' is taxed under GST. For concepts like 'Online Information and Database Access or Retrieval Service' covering different types of services imported by India, policy-makers have made the registered importers responsible for remitting GST to the tax authorities under the reverse charge mechanism. Notably, India's GST law broadly embraced key guidelines with regards to 'Place of Supply' rules outlined in the 'International VAT/GST guidelines' issued by OECD (2017).

The GST law has concepts such as 'Online Information and Database Access or Retrieval Service' which covers different types of services imported by India (for example, advertising, cloud services, digital content and digital data storage). For

these transactions, the Indian-based registered importers are responsible for paying the applicable GST under the reverse charge mechanism. E-commerce activities or transactions were defined (a first in taxation law), and it was outlined that e-commerce players are liable for Tax Collected at Source ("TCS") from sellers or vendors that operate business by or through the portal of the e-commerce operator. Such provisions thus provide data points for the GST Department, and bring forward the date for the payment of tax due to the novel approach of "withholding". It is noteworthy that non-resident taxable persons providing services to Indian customers (unregistered persons), for example, Airbnb, are liable to register in India, by itself or through an agent, and discharge tax liabilities in respect of supplies being made by them. Currently, precise collection figures for the different sectors, including digital transactions, of the economy are not available in the public domain.

Lately, apart from the above, policy-makers in India, and those of South Africa, have come to believe that a customs duty should be levied on the import of intangibles, such as data services transmitted electronically etc., which are exempted owing to a World Trade Organization moratorium. For example, if levied, it will apply on software, data and computer aided design files; these are the core resource for 3D printing and will be increasingly used in almost all manufacturing industries. Such levies will essentially protect the domestic industry of India.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

There have been two long-litigated issues in India with respect to digital transactions: (1) characterization of digital payments and (2) proving the existence of a PE. It is to be noted that the litigious environment in India stems from the fact that India has provided numerous reservations on the commentary of OECD MTC on Article 5 which provides guidance on existence of PE in source country and on Article 12 which provides guidance on payments which could be characterized as royalty[7].

The business profits of a non-resident can only be taxed with the existence of a PE. India follows the source rule of taxation wherein it taxes non-residents on a gross basis, for example, certain types of investment income from India like royalties, fees for technical services etc. Thus, with regard to e-commerce, the debate of whether a particular payment constitutes as a royalty or fees for technical services or business income in the hands of a foreign recipient has always existed.

It has already been stated above that India's interpretation and definition of the term 'royalty' under domestic tax law is quite broad when compared to the international definition. In India, the tax officers allege that the sale of copyrighted products (e.g., software or books) is akin to the payment of royalties, whereas internationally, it is simply treated as the sale of products generating business income. Thus, the licensing (i.e., sale) of computer software, which does not involve any transfer of rights in underlying Intellectual Property (IP), would still be considered as royalty with regard to the interpretation of domestic tax laws. Similarly, the sale of digital products like podcasts, subscriptions etc. could also fall under the definition of royalty.

As highlighted above, in 2012, after the initial clarificatory amendment, Indian Revenue characterized the sale of embedded software as royalty income, however, a different interpretation under the tax treaties might be possible as international principles state that the licensing of software embedded in hardware, a device or equipment is only incidental to the sale of the product and therefore, should not be characterized separately. The same principle was upheld in Delhi High Court[8] while adjudicating whether the transaction of GSM mobile telephone systems, which have software embedded in the hardware, would be characterized as a royalty transaction. The High Court ruled that the software loaded onto the hardware did not independently exist and formed an integral part of GSM mobile telephone systems, and it cannot be construed that the software is being exploited by cellular operators to provide cellular services. However, in a similar case, Mumbai Income Tax Appellant Tribunal (ITAT)[9] held the consideration payable for the software designed to be integrated into the hardware and that it should be taxable as royalty as separate agreements governed the sale of hardware and software. After analyzing the latter agreement, the sale of software could be construed as a transfer of rights in respect of copyright contained in a copyrighted article.

Another contentious issue involves characterizing payment for access to or use of scientific or technical equipment, even when no possession or control has been granted over the equipment, for example, where a website is hosted on a third-party server without renting or obtaining administrative rights over the server. The Indian courts[10] have upheld the internationally accepted principle (i.e., payment would not be construed as royalty in absence of control or possession over the equipment) while interpreting tax treaties. In another instance which involved storage of computer data on servers owned and operated by non-residents outside India, the ITAT[11] held that as the Indian customer was devoid of any right to secret processes, know-how etc. that was made available by the non-resident along with the fact that the latter performed support functions using its own intellectual properties, the transaction cannot be alleged to be a royalty. However, in some of the cases[12], the Courts have also held that even when non-residents did not grant any control or possession over their servers to Indian customers, payments received for providing access to software or portals hosted on a server outside India is royalty in nature. When interpreting the domestic definition of royalty, as provided above, one would observe that it tends to include payment for access to or use of scientific or technical equipment even when no possession or control has been granted over the equipment. Thus, the trend of considering such payments as royalty by the Revenue officers has gained momentum post amendment in 2012. However, in some of the decisions[13], it has been held that amendments in domestic tax laws should not be relied upon for interpretations of provisions in tax treaties. Even in one of the ITAT rulings[14], it was held that payments for bandwidth services and router management services class as royalty.

Payment for advertisements and online banner hosting has also not escaped Revenue Officers' attention as time and again, they have alleged that payments made for such services should be construed as royalty. In this regard, the ITAT ruled[15] that payment for advertisement space by foreign technology companies like Yahoo etc. are not taxable in India as they constitute business income in the hands of the receiver. In these cases, the ITAT observed that providing online advertisement services is a

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complex technical activity and that these search engines render highly technical services with the use of software codes, algorithms etc. Even then, the payment for advertisement services could not be considered as royalty as these services do not involve the use of or the right to use any industrial, commercial or scientific equipment by the Indian entity. However, in a recent decision made by Bangalore ITAT[16], it was held that advertisement fees paid by an Indian subsidiary to its parent in Ireland for the purchase of ad space on AdWords program for resale under the Distribution Agreement is taxable as royalty in India. Based on information regarding the AdWords program, the ITAT held that the Distribution Agreement was not merely an agreement to sell ad space but rather was an agreement to provide composite services to facilitate the display and publication of an advertisement to targeted customers with the help of embedded technology**,** as AdWords is not just an advertisement publication tool, it also gives an advertiser a variety of tools to enable it to maximize attention, engagement, delivery and conversion of its advertisements with the help of individuals' data and behavior. The ITAT stated that it is through the use of the parent's intellectual property that the AdWords tools are made available to the Indian subsidiary and the advertiser and therefore, the payment for purchase of ad space constitutes royalty. However, the ITAT completely ignored that even in the case of the distribution of tangible goods, the distributor is provided with the royalty free license for distribution rights, the rights to use trademark, some level of access to confidential information and technical know-how of the products such that services could be provided to the consumer after the sale has taken place. It should be noted that the return for all of these intangibles is embedded in the price of the goods and it is not characterized as royalty.

Apart from the characterization of payments, the next major contentious issue has been the existence of a PE. The prevailing nexus rules allege for a PE to exist, physical presence is required as one of the key factors. However, Courts in India have given credence to the fact that technology is fast replacing human interference while examining cases looking at the existence of a PE.

In 2008, the ITAT[17] deliberated whether income generated by foreign companies from Indian customers by operating a computerized reservation system has a taxable presence in India even though they do not have any physical presence. The foreign companies have developed a software system (i.e. Computerized Reservation System (CRS)) capable of displaying flight schedules, seat availability, airline fares, make seat reservations, issue online tickets and perform similar functions in respect to hotel bookings, car hire or other travel related services. This software was installed in the Indian travel agents' systems and was an integral part of foreign companies' worldwide operating systems. The CRS systems were not only capable of processing the information of various airlines for display in one place, but enabled subscribers to book tickets in a way within a seamless system originating from the desk of the subscriber's computer. The ITAT highlighted that the foreign companies had a PE in India as they exercised computer or automated control over the computers installed at the premises of the travel agents and a significant part of this (i.e., the generation of requests, part of the processing and completion of the booking) was performed in India. Accordingly, the ITAT held that the activities of foreign companies could not be said to be preparatory or auxiliary in India, as claimed by them, as they are directly responsible for earning revenue in India and hence, created a fixed PE.

On the contrary, in one of the rulings[18], it was held that advertisement services provided by online advertisers, e.g., search engine companies like Yahoo**,** would not result in the existence of a PE in India as the computer server hosting a third-party website of an internet service provider could not be said to be at the disposal of the enterprise owning the website as they were only providing banner hosting or advertisement services.

However, in 2018, we again see an aggressive approach being adopted by Indian Revenue while providing Advance Ruling[19] to non-residents for their taxability in India. The non-resident, part of a global MNC, is a global payment solution provider facilitating financial institutions, businesses, merchants, cardholders and governments worldwide to use electronic forms of payment instead of cash and cheques. The non-resident was earning revenue from India in the form of transaction processing and payment related services for managing the relationship between the cardholder and the merchant banker or financial institution through electronic means, primarily a MasterCard Interface Processor (MIP) installed at the bank's premises which is connected to MasterCard network. Among other things, the Authority for Advance Ruling (AAR) held that MIPs and the MasterCard network both constitute a fixed place of business (i.e., a PE) in India. The AAR concluded that MIPs perform significant activities in the payment authorization process, such as PIN processing, validation of card codes, address and name verification, fraud alerts, and data encryption, and are responsible for the preliminary examination and verification of transactions, failing which the transaction would not be authorized. Furthermore, significant activities relating to clearance and settlements took place in India over the MasterCard network. Relying on the judgements of ITATs in 2008, as deliberated above, the MIPs and MasterCard network passed the test of proving their permanency and, accordingly, created a fixed PE in India.

Thus, it could be seen that Indian Revenue has ruled beyond the scope of the prevailing nexus rules of tax treaties, which mandates physical presence, and held that when technology and automation (i.e., systems, software and processors) perform significant activities in India, they are replacing human intervention or physical presence and therefore, could be considered to have a fixed PE provided it satisfies other tests, i.e., permanence and disposal.

It is expected that ITAT's (the Tax Court's) decision would be overturned at the higher level. Nonetheless, the stakeholders should also take note of the developments that have occurred in the Indian Tax environment with regard to the matter of proving PE for any sort of digital presence which performs processing activities. Instead of arguing on the issue, efforts should be directed towards robust analysis for how profits should be attributed to such activities being performed in India, for which PE has been proven, considering the contribution that digital activities make to the overall value of the business operation.

To summarize, Indian Revenue have been pursuing the issue of taxing non-residents under two broad classifications; (1) characterization of income as royalty and fees for technical services and (2) the existence of a PE.

Under characterization of income as royalty and fees for technical services, Indian Revenue has disputed various digital payments (except payments made for tangible goods) including:

- Sale of digital goods and servers; *(Footnotes 5 and 6)*
- Use of scientific or technical equipment; and *(Footnotes 7 to 11)*
- Hosting banners and advertisements*(Footnotes 12 and 13)*.

Even with regard to proving the existence of a PE, Indian Revenue has disputed various types of virtual presence:

- Computerized or automated system; *(Footnote 14)*
- Hosting websites; and *(Footnote 15)*

- Presence of processors, networks or servers*(Footnote 16)*.

Indian Revenue needs to reconcile with the fact that the international tax treaties dealing with the concept of PEs, as it currently stands, focuses on the physical or tangible presence of a foreign enterprise in the host jurisdiction in order to constitute a fixed place of business or a PE. Abstract or virtual connections with the host jurisdiction, namely access by customers of the host jurisdiction to a website of the foreign enterprise without the additional factual matrix of the equipment on which such website is hosted and being at the disposal of the foreign enterprise in the host jurisdiction, cannot by itself trigger the existence a fixed place of business of the foreign enterprise in the host jurisdiction.

Without altering the definition of a PE altogether, namely through modifying the amplitude of Article 5 of the tax treaties, incomes arising with respect to such websites in the hands of a foreign enterprise from customers located in the host jurisdiction cannot be subject to income tax in the host jurisdiction through the route of a PE. This is unless it falls within the scope of the 'source rule' basis of taxation as 'royalties' or 'fees for technical services' which India, as a developing nation, generally adopts in its tax treaties, provided, of course, such income satisfies the definition of either of the two aforementioned terms.

Much needed clarity is required and would only come by 2020 when OECD, along with G20, creates a consensus around the issue of the existence of a PE in the digital economy and the subsequent allocation of profits to such a PE.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

Digitalization has led to the emergence of new business models and simultaneously reshaped traditional ones. The operations have become highly integrated with multiple parties making unique and valuable contributions. It is said that data is the new oil for the economy, driving changes and growth in everyday life. For certain types of businesses like social media platforms, search engines and online marketplaces, digitalization is generally considered as the core activity of their operations, whereas digitalization may only be a support activity for other traditional businesses. The central part of discussions for these businesses is the role of data and user participation in value creation.

Conventionally, and most commonly, the key value-driving activities of an MNC comprise either trade intangibles (patent, know-how, processes etc.) or marketing intangibles (trademark, tradename, brand etc.), or both. The intangibles normally reside with a central entity, whereas the other affiliates perform routine functions of manufacturing, procurement, sales, distribution, logistics etc. The TP methods, especially one-sided methods, i.e., RPM, CPM and TNMM, were appropriate to remunerate the affiliate entities while the residual income flows to central entities who own or exploit intangibles.

With digitalization, there arises a third category of intangibles, i.e., data and user or customer participation. However, not all types of data create value. One needs to carefully analyze the role of data, user and customer participation as their roles may significantly vary for digitalized businesses as opposed to traditional businesses. Furthermore, in a digitalized business, the role of data and user or customer participation may differ significantly for a tech-driven business as opposed to a tech-enabled business as data and user participation may contribute more for tech-driven businesses. Some of the non-core activities, for example, logistics for a FMCG company, might become a core activity due to the involvement of technology for managing logistics.

Applying a formulary apportionment approach might not be viable for attributing profits for data and user participation as their role differs depending on the business model. For convenience's sake, one may propose to arrive at a formula (e.g., number of users, revenue derived etc.) to split and provide a pie-chart of the non-routine profits for data and user participation. However, the question will always remain as to how fair that would be as the contribution of data and user participation might not be the same in all companies. Furthermore, the way each business obtains data for decision making processes and creating value is also vital to analyze for attributing profits. Thus, a 'one size fits all' strategy would not be appropriate or fair. The role of technology in the business model should be better understood, along with the quality of data that is being relied upon in the context of the overall business model to understand the value creation of data and user participation.

We must appreciate that an arm's length analysis also mandates the application of PSM under special circumstances, namely where multiple parties contribute to unique and valuable intangibles, resulting in the appropriate attribution of profits. In fact, unlike in the past, greater focus should be put on 'value creation analysis' and the application of DEMPE function under the ALP will also lead to the appropriate attribution of profits to parties making unique and valuable contributions.

It is important to look deeper into what 'value creation' really entails as the concept of value creation analysis is widely accepted by several tax jurisdictions in assessing their respective tax base. The OECD Interim Report on 'Tax Challenges Arising from Digitalization' issued in 2018 (Interim Report) stated that 'increasing the price of goods' and 'reducing costs' are two factors that lead to the creation of superior business value. Furthermore, it classified digital companies into three business operation structures or so-called 'value creation processes', depending on the level of digitalization: (1) value chains, (2) value networks, and (3) value shops. In this digitalized business environment, there are four possible ways of how value can be created – (1) an increase in current business profit, (2) an

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emergence of competitive advantage over rivals, (3) an increase in future business growth potential, and (4) new business opportunities.

Depending upon the nature of the business model and the role of digitalization in conducting business affairs, the value contribution by respective parties can be evaluated. The following three-step process in a value creation analysis would help in achieving the desired results:

Step 1 – Identify whether data and user participation are making unique and valuable enough contributions to qualify as intangible

Step 2 – Identify value or profits for such intangibles

Step 3 – Determine share of value or profits for jurisdiction depending on the jurisdiction which analyzes such data and user participation

Step 1 and Step 2 could be easily undertaken. For Step 1, enough management studies[20] exist to undertake value creation analysis and identify whether data and user participation contribute significant value to the business. As highlighted previously, even the OECD in its Interim Report has endorsed these studies that promote the undertaking of the value creation analysis of a digitalized business model. If Step 1 confirms the value of data and user participation, Step 2 can be performed with the help of economic models like the 'Shapley Value', 'A/B Testing' or 'Infonomics' which would help to determine the value of data and user participation. A brief on such models is provided below:

- The Shapley Value[21] provides a reasonable and fair way to divide gains between parties on the basis of the parties' relative contributions in the overall business operation. The Shapley Value is based upon game theory and the bargaining power of each participant in the process which aims at evaluating the role of each player and defining a quantitative tool to measure this role. It describes one approach to measure the fair allocation of gains / profits obtained by a cooperation among several players. It is based on a marginality principle which states that the share of joint output attributable to any single factor of production should depend only on that factor's own contribution to output. While applying the Shapley Value, gains from all possible coalitions of players is required to be determined such that each participant's marginal contribution for each possible coalition can be evaluated. At the end, applying the Shapley Formula (i.e., averaging the marginal contribution under each possible coalition) can determine the share of overall return for each participant. Thus, if one considers data and user participation as one of the participants in a digitalized business model, along with other participants like sales, marketing, production, technology etc., the share of data and user participation can be determined.
- A/B Testing - Another statistical approach that could be considered is 'A/B testing'. It is applied in cases where an organization deploys / undertakes several strategies / activities to create value. Value is derived by the sale of a product / service. A sale of a car could either be attributed to a positive review / recommendation by a user on social media, due to a car's technological abilities / performance or due to a strong brand built over the years by the organization. A/B testing is a statistical technique used to compare two versions of a single variable and determine which of the two versions is more effective in achieving the desired goal.
- Infonomics - As the world is becoming more information reliant and businesses are harnessing information obtained from all sorts of sources like never before to maximize their output, a new science is being developed, otherwise known as 'Infonomics'. Infonomics is a discipline that deals with the determination of the value of information.

The issue currently is only with respect to Step 3, i.e., the allocation of taxing rights with respect to the value for such data and user participation between the jurisdiction where data collection and user participation occur and the jurisdiction where they are curated, analyzed and exploited by way of developing algorithms etc. The 'bottom-up' approach may be a possible method, i.e., providing a return limited to business support activities supplied to the jurisdiction providing data and therefore, residual return reside at the jurisdiction where data is analyzed and exploited. A contrary approach could be the 'top-down' approach where the returns for processing and analyzing data are provided to the jurisdiction undertaking the activity and residual returns reside with the jurisdiction from which user participation happens and data is collected. Alternatively, a 'hybrid' approach could be undertaken for the allocation of taxing rights between the two jurisdictions.

The point to be noted herein is that a variety of economic measures exist by which value or profits can be attributed to data and user participation. One needs to appropriately apply these measures and maintain adequate documentation to support the application. The issue is only with respect to the allocation of taxing rights between jurisdictions for profits attributable to data and user participation.

A formulary approach is a simple approach to the allocation of profits, however, it may not achieve the desired result, i.e., allocating taxing rights to the jurisdiction where value is created. The BEPS project was initiated with the sole objective of preventing tax base erosion and profit shifting from jurisdictions where value is created. A formulary approach may result in defeating this objective once the defined formulas are framed and MNCs determine a way of minimizing the impact of the thresholds prescribed in the formula (refer to the instances discussed above while deliberating India's proposal to adopt formulary approach for attributing profits to PE).

Digitalization may have resulted in simplifying business processes, but it has also given birth to complex business models. In this regard, we need to deliberate whether a simple approach for profit allocation (i.e., formulary apportionment) would be appropriate for a complex business model even after appreciating and acknowledging its complexity. The idea is not to adopt complex economic models for allocation of profits which would be difficult to administer by the taxpayers and tax authorities. However, economic models which provide fair answers to the issue of allocation of profits where value is created should be given due respect and acknowledgement.

Question 4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

The final global approach on the taxation of the digital economy may be expected by 2020; however, in the interim, the OECD has given substantial guidance on its thought process and the application of the arm's length principle with regard to complex digital business models. The OECD Interim Report, 2018, highlights how value creation analysis could be undertaken by applying different concepts; (1) value chains, (2) value networks, and (3) value shops, depending on the level of digitalization in the business model. As far as Indian outbound companies are concerned, they are taking due care to undertake robust value creation analysis for their business and to determine key value-driving activities in the overall business chain. This will help to establish how to segregate routine and non-routine activities. After remunerating for the routine activities by applying one-sided TP methodologies like CPM, RPM or TNMM, the non-routine profits are split between the value-driving activities identified by way of the value creation analysis. Substantial guidance has been issued by various international forums[22] on considering profit splitting factors when applying PSM for determining the returns of non-routine activities. Indian headquartered companies operating in the digital space are learning from the discussions taking place in the international forum[23] and leading economies like the UK[24] and New Zealand[25] with respect to the taxation of the digital economy, the existence of a virtual PE, and attributing profits to such a PE. However, in the absence of any guidance on attributing profits to data and user participation, the taxpayers' allocation of non-routine profits is limited to trade and marketing intangibles.

With amendments made to business connection provisions (with regard to significant economic presence) for establishing a digital nexus for non-resident digital corporations in India, the Indian Government has made its stance clear on these issues in line with the BEPS project. Most non-resident companies still operate within the shield of existing tax treaties, however, that seems to be short lived, as it is only until the Indian Government re-negotiates tax treaties with their counterparts. However, as of now, non-routine profits are being attributed only for trade and marketing intangibles developed or created by inbound companies in India until a consensus is reached regarding the allocation of taxing rights with respect to value creation by data and users in India.

With regard to the isolation of digital activities in order to prepare segmental financial information, we have observed that it would be quite challenging as digitalization becomes a very integral part of many businesses and therefore, segregating digital activities from non-digital activities to determine separate profitability seems unfeasible. On the contrary, undertaking a detailed value creation analysis to understand the value contributed by digitalization would be a more apt measure to determine profits attributable to digital contributions. The possible measures of undertaking value creation analysis and, in turn, determining the fair share of profits by applying economic models have been deliberated above.

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NOTES

[1] Possible measures include (1) Modifying the existing PE rules by bringing new nexus in form of significant economic presence (2) imposing withholding tax on certain digital transactions (3) imposing Equalization Levy on certain digital considerations received by non-residents. OECD (2015), Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, *https://doi.org/10.1787/9789264241046-en*.

[2] As currently provided, specified service shall mean an online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement. However, the Committee has recommended a host of digital services including the provision of space for a website, distributing digital content, collecting and processing online data, online news, online search, online software application etc.

[3] OECD (2018), Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, *https://doi.org/10.1787/9789264293083-en*. pg 142.

[4] Taxation of Digital Businesses – Ministry of Finance; Posted by PIB Delhi, 12 Feb 2019.

[5] *See* Bloomberg Tax's List of Covered Tax Agreements for India's treaties that are modified by the MLI starting October 1, 2019.

[6] Taxation of Digital Businesses – Ministry of Finance; Posted by PIB Delhi, 12 Feb 2019.

[7] Refer to India's reservations to the OECD's Commentary on Articles 5 and 12 under Position of Non-Member Economies.

[8] DIT v. Ericsson AB, [2012] 343 ITR 470 (Delhi) and DIT v. Nokia Networks OY (2012) 253 CTR (Del) 417.

[9] DDIT vs. Reliance Infocomm Ltd/Lucent Technologies, 2013 (9) TMI 374.

[10] Dell International Services (India) Pvt. Ltd., In re, 305 ITR 37 (AAR); Cable and Wireless Networks India (P) Ltd., In re, 315 ITR 72 (AAR).

[11] Standard Chartered Bank v. DDIT, [2011] 11 taxmann.com 105 (MUM).

[12] In re: IMT Labs (India) P. Ltd, [2006] 287 ITR 450 (AAR); In re: Cargo Community Network Pte Ltd, [2007] 289 ITR 355 (AAR).

[13] DIT vs. New Skies Satellite BV [ITA 473/2012] (Delhi High Court); DIT v. Shin Satellite Public Co. Ltd [ITA 500/2012] (Delhi High Court); DIT v. Siemens Aktiengesellschaft, ITA No. 124 of 2010 (Bom); DIT v Nokia Networks OY, 253 CTR 417 (Delhi).

[14] DCIT v. Cognizant Technology Solutions India Private Limited, ITA. Nos. 1535, 1536/09, ITA 460 & CO.27/2010, ITA Nos. 751, 864 & 1922/Mds/2010.

[15] ITO Vs. Right Florist Pvt. Ltd., (2013) 25 ITR (T.) 639, Pinstrom Technology Ltd., Vs. ITO (2012) 54 SOT 78 (Mum. Trib.) and Yahoo India Pvt. Ltd., vs. CIT 140 TTJ 195 (Mum.Trib.).

[16] Google India Private Limited [TS-235-ITAT-2018(Bang)].

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[17] Amadeus Global Travel Distribution SA vs DCIT [2008]113 TTJ (ITAT Delhi) 767 & Galileo International Inc. [2008]19 SOT 257 (Delhi).

[18] ITO Vs. Right Florist Pvt. Ltd., (2013) 25 ITR (T.).

[19] AAR No. 1573 of 2014, MasterCard Asia Pacific Pte. Ltd.

[20] M.E. Porter, Competitive Advantage (1985).

[21] Formalized by Lloyd Shapley.

[22] Revised Guidance on the Application of the Transactional Profit Split Method, June 2018, by OECD; EU JTPF's Report on Application of Profit Split Method; Revised text on Profit Split by Co-coordinator's Report on Work of the Subcommittee on Transfer Pricing, United Nations.

[23] BEPS Action 1 (2015) of OECD; Interim Report in 2018 by OECD; OECD's Public Consultation Document on Addressing the tax challenges of the digitalization of the economy, 2019, Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalization of the Economy, 2019; Report issued by EU on Tax Challenges in the Digitalized Economy, 2017; Proposal for Council Directive laying down rules relating to the corporate taxation of a significant digital presence, 2018, EU; EU Report on Tax Issues related to the Digitalization of the Economy, 2019.

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Ireland

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

Ireland has not introduced any new measures to tax digital activity. Ireland was a vocal opponent of the EU proposal to introduce an EU-wide digital sales tax. In Ireland's view, the discussion on the tax challenges of digitalisation was more appropriately held at the OECD level on the basis that it was a global, rather than EU, dialogue. Ireland is participating in the discussions that are currently being held at OECD level.

In respect of Ireland's position on the OECD work, Ireland's Minister for Finance (the "Minister") delivered an address on Ireland's approach. The Minister favoured an approach whereby countries worked together in order to find "a balanced and appropriate reworking of the existing international tax framework," highlighting the importance of a "stable and consensus-based international tax framework" (in comparison to countries working independently) for a small, open economy like Ireland. In his address he indicated that under Pillar 1, Ireland is open to discussing a solution based on the marketing intangibles proposal. However, he emphasised the importance of aligning taxing rights with value creation in any agreed outcome and incorporating existing transfer pricing rules to the greatest extent possible.

On Pillar 2, the Minister noted that those proposals were "more problematic." He confirmed that Ireland is supportive of measures that limit the ability of taxpayers to engage in aggressive tax planning but went on to state, "I do not support measures which have as their objective the end of legitimate and fair tax competition."

In relation to an estimation of the tax revenues that would be collected as a result of the enactment of these measures, no official figures have been produced. However, it has been suggested by stakeholders, such as the Irish Tax Institute, that changes to the taxation of user created value is unlikely to generate more tax revenues overall. It has been noted by the Irish Business and Employers Confederation ("IBEC") that "small, open countries with high-intensity R&D in exporting sectors will lose net revenues" as a result of any changes toward the concept of value creation, which puts a disproportionate focus on users above more concrete value creation activities. IBEC further noted that any move away from the arm's length principle (or a focus on risks and DEMPE functions) toward apportioning tax bases based on market size, would result in lower revenue from corporate profits in smaller countries, effectively resulting in a transfer of resources from smaller countries to larger ones.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises ("MNEs") to any of these unilateral measures?

The key challenge to date faced by MNEs based in Ireland related to the taxation of the digitalised economy has been the proliferation of unilateral measures introduced by other jurisdictions and aggressive audit positions taken by certain taxing jurisdictions who are stretching the limits of existing rules to seek to assert more taxing rights. The Irish entity in an MNE group is often the principal sales entity and thus, is frequently the subject matter of either the aggressive tax audits or the new digital sales taxes that are being introduced in other countries.

Irish entities in MNE groups have been required to design new revenue reporting frameworks in order to ensure compliance with the various unilateral measures applied in other jurisdictions. This has been a costly and administratively burdensome procedure. In addition, many of those Irish taxpayers are undertaking an exercise to determine whether any double tax relief will be available in respect of the new taxes that are imposed on revenues.

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3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

Key advantages of the "profit split approach" include: it offers a solution for cases where both parties to a transaction make unique and valuable contributions (e.g., valuable intangibles) to the transaction; it provides a solution for highly integrated operations in cases for which a one-sided method would not be appropriate; it offers flexibility by taking into account specific, possibly unique, facts and circumstances of the associated enterprises that may not be present in independent enterprises; and finally, it allows the contributions of each party to the transaction to be specifically identified and their relative values measured in order to determine an arm's length compensation for each party in relation to the transaction.

Key advantages of the "fractional apportionment approach" include creating certainty and simplicity by treating MNE groups on a consolidated basis, eliminating many of the problems associated with the arm's length principle, e.g., the insistence on comparable uncontrolled transactions, which are almost impossible to find in respect of high value non-routine intangibles.

In practice, we consider that some of the key challenges in applying the residual profit split method include:

(a) the absence of an international framework to agree on a multinational basis any of the key elements of residual profit split;

(b) identifying and reaching agreement on a multilateral basis on each of the key elements of the residual profit split i.e., the appropriate remuneration of routine returns; the portion of the residual that should be allocated to market jurisdictions; and the split of the residual between market jurisdictions; and

(c) identifying the appropriate jurisdiction to give double tax relief (or cede taxing jurisdiction).

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

Currently, much of the OECD's programme centres on a theoretical debate on economic methods. As and when the programme moves on from theory to actual implementation, businesses will need to carefully assess the legal effect of the proposals. For now, MNEs will most likely want to be actively involved in the discussion on the development of the proposals, while others should maintain a watching brief at the very least.

As noted above, in practical terms MNEs are currently assessing the impact of unilateral action from other EU member states imposing unilateral taxes on particular digital activities e.g., France, Spain, Austria and the UK. Due to growing digitalisation across all sectors of the economy, it would be extremely difficult to "ring-fence" digital activity from other business activities for tax purposes and/or implement a bespoke tax regime for so-called "digital companies." Within individual MNEs, it would be equally as difficult to isolate digital activity due to its intrinsic use in every business function.

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Israel

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

Facing the rapid expansion of financial activity via the internet in Israel and around the world in recent years, and the need to address a changing economy, the Israeli Tax Authority issued a circular explaining the situations and circumstances in which income of a foreign corporation (i.e., a corporation that is not an Israeli resident) from services provided through the Internet to Israeli residents is taxable in Israel.

According to existing rules, a foreign corporation's income from services to Israeli residents is taxable only if it has been produced in Israel. If the foreign company is a resident of a country with which Israel has a double taxation agreement (i.e., tax treaty), the foreign corporation is taxed in Israel only if the activity is considered to be that of a "permanent establishment." The term "permanent establishment" is defined in tax treaties as a fixed place of business through which the business of an enterprise is wholly or partly carried on.

Due to changes in the "traditional" economy and the transition to the "digital" economy, the circular clarifies that a "permanent establishment" could be determined in Israel when the economic activity of the foreign company in a permanent place of business in Israel is conducted mainly through the internet, and additional conditions exist, such as: representatives of the foreign company are involved in identifying Israeli customers, gathering information, and managing customer relations of the foreign company; and the internet service provided by the foreign company is adapted to Israeli customers (i.e., through language, style, currency, etc.).

In terms of value-added tax liability, the circular stipulates that a foreign corporation that maintains significant business activity in Israel is required to register for VAT as an authorized dealer and its transactions are liable to VAT. For example, a foreign corporation that operates a website that provides advertising/brokerage services to Israeli clients for Israeli consumers and is assisted in its operations in Israel by an Israeli representative conducting business activities on behalf of the foreign corporation, would be required to register for VAT, and its income from Israeli customers would be subject to VAT.

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2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

Recently, the Israeli Tax Authority is promoting a bill that provides that a foreign resident that provides digital services or operates an online store that provides digital services to Israeli residents that are not authorized dealers acting in a business capacity, nonprofit organizations, or financial institutions (acting in such capacity), will be required to register in a specific registry and pay VAT on transactions mentioned in the final paragraph of the response to question 1.

In practice, MNEs in Israel that provide services through the internet are already involved in tax audits where the ITA is implementing this approach.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

In most tax audits, the ITA implements the profit split approach when challenging companies that characterize themselves as "routine service providers" and "low risk distributors." This approach is applied for all MNEs under audit, in light of the BEPS project, but in particular when the digital economy issue is concerned. Then the combination of the profit split method and the PE issues are in full effect.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

The OECD plan to develop a harmonized global approach to the taxation of the digitalized economy certainly causes MNEs in Israel to begin planning and updating their business models and tax management in order to adapt their operations accordingly. It is very difficult for the MNEs to segment their activity, isolating specific digital economy activity. It also requires a massive amount of work on their IT systems. Thus, MNEs are examining several alternatives and solutions to cope with this matter.

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Italy

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

In Italy there have been several proposals addressing the issue of the taxation of the digital economy. Some of these provisions have been implemented, while others were only proposals.

In order to provide a complete picture, we provide below a chronological overview of the different proposals and legislative provisions.

The first attempt of the Italian legislator to address taxation of the digital economy dates back to the 2014 Budget Law. This law contained several provisions, in particular a VAT provision[1] (improperly called "Web Tax"), and a transfer pricing provision.[2, 3]

According to the VAT provision, any taxable person purchasing advertising services and sponsored links online, even through media centers and other operators, was required to purchase such services from suppliers registered for VAT purposes in Italy. The provision was aimed at keeping track of the advertising services provided in Italy by non-resident companies. However, since the introduction of an obligation for non-resident persons appeared to be contrary to the EU fundamental freedoms (particularly the freedom of establishment and the free movement of capital), the rule was repealed.[4]

The transfer pricing provision of the 2014 Budget Law states that companies engaged in online advertising and in the provision of related ancillary services had to determine their income derived from intercompany transactions using transfer pricing methods that are not based on costs (e.g., TNMM using costs as a profit level indicator), unless those companies entered into an advance pricing agreement with the Italian tax authorities. The introduction of this provision was based on a presumption that the intensity of the activity of these companies could only be correctly assessed by indicators based on sales generated or intermediated.

Based on a technical report published by the Italian Parliament, the estimated revenue from this provision was approximately €331.2 million for the FYs 2014-2016, determined by applying a ROS of 7% to the turnover generated by companies engaged in online advertising.

In 2015, a proposed law[5] was issued aimed at introducing a "virtual PE" provision, under which non-resident e-commerce providers were deemed to have a PE if they carried out their business in Italy on a continuous basis through online activities.[6] In cases where a virtual PE was deemed to exist, a withholding tax would have been applied to any digital transaction incurred between the non-resident e-commerce providers and Italian customers.[7] A second law proposal[8] was issued in 2016, with a view to introducing the notion of a "digital PE" for corporate tax purposes, under which non-resident enterprises were deemed to have a PE in Italy whenever they carried on their business therein on a continuous basis through qualified "dematerialized" digital activities.[9] In cases where a digital PE was deemed to exist, the Italian tax authorities could request the foreign enterprise to regularize its tax position (i.e., to declare the existence of the PE).[10] Neither of these two proposals were adopted.

During 2017, a mechanism similar to the diverted profit tax was introduced for taxable persons operating in the gambling and digital betting industries.[11]

The Italian Parliament approved the Budget Law for 2018 in December 2017, introducing a new tax on digital transactions, the so-called "Web Tax",[12] which should have been applied beginning from 2019. However, the Web Tax has never been implemented and was replaced by the Digital Services Tax,[13] which was introduced in the Budget Law for 2019 and mirrored the European Commission's digital services tax proposal released in March 2018.

The Digital Services Tax would apply to companies with at least €750 million in annual global revenue and total revenue of at least €5.5 million from qualifying digital services in Italy. It would be levied at 3 percent on revenues (net of VAT) resulting from the following digital services:

- placing advertising on a digital interface targeting users of that interface;
- making available multisided digital interfaces that allow users to find and interact with other users and

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potentially facilitate the provision of underlying supplies of goods or services directly between users; and

- transmitting user data collected and generated from users' digital interface activities.

The Digital Services Tax is not in force, as the implementing rules have not been issued yet. As explained by the Director of Finance of the Ministry of Economy and Finance, the work on the implementing decree of the Digital Services Tax introduced by the budget law has been "slowed down as the European proposal has not been finalized."

Based on the technical report published by the Italian Parliament, the estimated revenue from this proposal would be approximately €150 million in 2019 and €600 million per year starting from 2020.

The aforementioned Budget Law for 2018 also amended the domestic definition of permanent establishment.[14] The changes were mainly influenced by the recommendations of the OECD Final Report on BEPS Action 7 "Preventing the Artificial Avoidance of Permanent Establishment Status", subsequently transposed into the 2017 OECD Model Tax Convention.

In particular, under the new definition of permanent establishment, a new case was introduced in the positive list, according to which: "The term 'permanent establishment' includes (especially f-bis) a significant and continuous economic presence in the territory of the State construed in such a way that it does not result in a physical presence therein." The preparatory work on the new provision shows that the aim is to "prevent manipulation that avoids the existence of a permanent establishment."

Finally, Article 13 of Law Decree no. 34/2019 introduces new obligations for taxable persons who facilitate distance sales through an electronic interface, such as an online marketplace, a platform, a portal, or other similar means. The new provision - which introduces a temporary regime, replacing the one set forth in Article 11-bis, paragraphs 11-15 of Decree Law no. 135/ 2018, relating to obligations on the distance sales of mobile phones, tablets, computers, and laptops - was adopted in view of the implementation of Directive 2017/2245/EU, which is scheduled to begin in 2021.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

In the discussion above, we identified numerous attempts by the Italian legislator to tackle the issue of taxation of the digital economy. However, these unilateral attempts have often encountered difficulties in reaching agreement during the final approval discussions (e.g., the main issues were that such measures would affect not only the most significant digital operators but also small/medium Italian companies) or in implementation. The various issues encountered led to the practical decision to wait for the measures to be implemented at the European and OECD levels.

From a legislative point of view, while Italy is waiting for the finalization of the initiatives at the European and OECD levels, this is not the case for the audit activity being carried out by the Italian Revenue Agency and Tax Police towards the most significant digital economy players. In particular, based on the publicly-available information, the assessment activities of the Revenue Agency and Tax Police have led to claims concerning the existence of hidden permanent establishments in Italy and/or the alleged improper remuneration of the activities carried out in Italy by local subsidiaries of foreign groups.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

At the beginning of its work on the digital economy, the OECD identified in the 2015 BEPS Action 1 Report a number of tax challenges raised by digitalization, notably in relation to "nexus, data and characterization." These challenges were recognized as relating to the question of how taxing rights on income generated from cross-border activities in the digital age should be allocated among countries.

The Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS highlighted the importance of considering the implications of these three characteristics for the international tax system. It raised important issues concerning the allocation of taxing rights between jurisdictions (the "nexus" rules) and the determination of the relevant share of the MNE's profits that will be subject to tax in a given jurisdiction (the "profit allocation" rules). Thus, there is a question of whether, and to what extent, the existing profit allocation rules continue to produce appropriate results, in particular in cases where some or all of the three characteristics are present.

In this respect, reference can be made to the objectives of the first pillar.[15] As affirmed by the OECD, the first pillar will focus on how the existing rules that divide the right to tax the income of MNEs among jurisdictions, including traditional transfer pricing rules and the arm's length principle, could be modified to take into account the changes that digitalization has brought to the world economy.

On the basis of the above, in our opinion, in order to ensure the smoothest implementation of the above criteria in Italy and to avoid arbitrary approaches (especially in terms of tax audits and adjustments against operators of the digital economy), a solution to the issues identified by the OECD should be based on a key criterion: the correct application of the internationally

agreed arm's length principle, considering the necessary adjustments for the objectives of the Inclusive Framework. Formulary-like transfer pricing alternatives basically exclude vital and essential reference points, both qualitative and quantitative, that are critical to an evidence-based, and principled approach to any negotiated resolution of double taxation. An opening to such formulary-like approaches, especially in Italy, could lead to a high risk of very discretionary challenges and therefore a significant increase in disputes.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate "digital" activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

Companies operating in the digital world in Italy have been the subject of several aggressive tax audits and have therefore already reacted in order to protect themselves. In particular, MNE groups operating without a subsidiary in Italy have in some cases set up a local company in order to avoid disputes regarding permanent establishment. On the other hand, companies that already had a local company have decided in some cases to initiate an APA procedure (often bilateral) to avoid (other) audits by local offices that may attempt, for example, to overvalue the so-called marketing intangibles.

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NOTES

[1] Art. 1 (33) of Law no. 147 of December 27, 2013.

[2] Art. 1 (177) of Law no. 147 of December 27, 2013.

[3] The first draft of the Budget Law for 2014 also included a proposal to amend Article 162 of Presidential Decree 917 of December 22, 1986, which provides for a PE definition for domestic purposes, in order to adapt the PE definition to the digital economy. According to the proposed wording of the amended Article 162, "[. . .] the habitual use of a national network, whether fixed, mobile or satellite, directed at transmitting data to computers, even those located outside the national territory towards Italian IP addresses, aimed at providing online services, including those consisting of actions taken for the purpose of giving greater visibility to the user on the Net, constitutes a permanent establishment." However, during the approval process of the Law, the proposal to amend the PE definition was abandoned.

[4] *See* Art. 2 (1) of Law Decree no. 16 of March 6, 2014.

[5] *See* Legislative Decree no. 16 of March 6, 2014.

[6] Continuous online activities were deemed to exist if the period of online activity of the non-resident e-commerce providers was not less than six months and if the income generated in the same period was equal to at least €5 million.

[7] In particular, a 30% WHT on business-to-consumer (hereinafter B2C) transactions and a 25% WHT on business-to-business (hereinafter B2B) transactions. In both cases, the financial institutions processing the payments would have had to directly apply the WHT.

[8] *See Senato della Repubblica* [Senate of the Republic], Law proposal no. 2526 of September 14, 2016.

[9] In particular, the foreign enterprise should have concluded more than 500 digital transactions during a semester, which should have generated income flows of an amount not lower than €1 million.

[10] If the foreign digital enterprise did not regularize its tax position within 30 days, the ITA would have requested the financial institutions processing the payments on the e-commerce transactions to apply a 26% WHT.

[11] *See* Article 1(927-932) of Law no. 208 of December 28, 2015 (hereinafter 2016 Stability Law). The 2016 Stability Law introduced a presumption of "virtual PE" for Italian resident betting and gaming operators, also acting as data transmission centers (e.g., for the collection of bets and sums deriving therefrom and for the payments of win premiums) and doing business: (i) on behalf of non-resident operators and/or (ii) on the basis of agency or intermediation agreements with third parties. If betting and gaming activities exceed the threshold of €500,000 in a 6-month period, the ITA enters a dialogue phase with the Italian resident and the non-resident operators to investigate the matter. The parties involved have 90 days to submit all the relevant evidence to rebut the ITA's presumption on the deemed existence of a PE in Italy. If a PE is found to exist, the ITA issues the Italian resident operator a notice of assessment, quantifying higher taxes and corresponding penalties. Furthermore, financial institutions involved in the betting and gaming payment flows apply a 25% WHT on sums derived from the transactions with the non-resident operator. The absence of a PE can also be proven by filing a request for a ruling under Article 11(2) of Law 212/2000 (*interpello disapplicativo*) within 60 days from the beginning of the fiscal year.

[12] Art. 1 (1011-1017) of Law no. 205 of December 27, 2017.

[13] Art. 1 (35-50) of Law no. 145 of December 30, 2018.

[14] Art. 1 (1010) of Law no. 205 of December 27, 2017.

[15] As defined in the Policy Note published by the OECD/G20 Inclusive Framework on BEPS.

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Japan

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

In October 2015, Japan revised its taxation and began to impose tax on digital activities, but only for purposes of the Japan Consumption Tax (JCT), a Japanese version of VAT.

Previously, JCT was based on the location of the service providers, and foreign digital service providers such as Google, Amazon and Facebook were not subject to JCT. After the revision, however, JCT is based on the location of service recipients, so the foreign business providers' digital activities targeting Japanese recipients are now subject to JCT.

The following discussion summarizes the current JCT system:

(1) With regard to business-to-business ("B2B") transactions, under the reverse charge mechanism, service recipients are required to pay JCT, whereas normally service providers would be required to do so.

(2) With regard to business-to-consumer ("B2C") transactions, the foreign business providers should declare and pay JCT.

(3) Considering administrative burdens, for businesses whose rate of taxable sales to total sales is 95% or more, transactions subject to the reverse charge mechanism are exempt from tax filing.

(4) A foreign taxpayer who does not have its offices, etc. in Japan is required to appoint a resident as an agent to whom tax documents of the taxpayer are delivered.

For other taxes including corporate income tax, no proposed regulations have been issued regarding the taxation of digital activities. The ruling party's 2019 Tax Reform Proposal, which was announced in December 2018, only made reference to the taxation of international digital transactions in its preface:

With digitalization of the economy, the problem of current international taxation principle has become apparent, such as the inability to tax the business income of foreign companies doing business without physical bases. However, if each country unilaterally responds to such issues, it will increase the uncertainty in business development and negatively affect economic activities. Therefore, a global and long-term sustainable solution should be put together by 2020, and it is necessary for us (Japan) to lead international discussions as the host country of the G20 next year (2019).

In summary, although JCT taxation was revised to charge for the digital activities (however due to the reverse charge mechanism, foreign business providers are not taxed for B2B transactions), Japan seems somewhat passive to levy other taxes on foreign businesses' income from digital activities performed in Japan.

There is no publicly disclosed figure of JCT revenues collected from foreign business since October 2015. Also there is no estimate or forecast of future tax revenue from foreign digital business activities, as there are no current proposals in terms of other taxes on digital activities.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

There may be three primary reasons for Japan's passive attitude and lack of progress on the development of digital taxation (other than JCT).

First, Japan strongly supports the consensus-based approach of the OECD. For example, the Japanese transfer pricing regulations strongly follow the OECD Transfer Pricing Guidelines. In making international tax rules, Japan prefers following the OECD Guidelines rather than making its own unique rules.

Second, most of the foreign digital business providers are U.S. companies, so Japan may be hesitant to implement any strict enforcement actions against U.S. digital business MNEs due to a fear of possible

retaliation by the US, in the form of, for example, the imposition of high tariffs on Japanese industrial products such as automobiles exported to the U.S.

Third, even though the number and size of Japanese digital business providers are much less than the U.S. providers, some large Japanese providers, such as Rakuten and Mercari, provide services outside of Japan, and some are said to have a close relationship with the Japanese government. It is therefore not unusual that Japan would avoid potentially harming such national digital business providers.

As for tax enforcement, it was reported in January 2019 that the Tokyo Regional Taxation Bureau ("TRTB"), alleged that Google's Japanese affiliate ("Google Japan's") taxable income did not reflect its advertising activities in Japan, as most of its advertising profits were reported by its Singapore affiliate. It was also reported that the TRTB ordered Google Japan to adjust its taxable income upward by JPY 3.5 billion (USD 32 million), and that Google Japan paid approximately JPY 1 billion (USD 9 million) in additional taxes including penalties. This is the only major news disclosed regarding the Japanese tax authorities' enforcement on foreign digital business providers so far. However, we believe that this enforcement (from TRTB to Google Japan) captured only a part of Google's significant income originally generated, but not recognized in Japan.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

The OECD's Public Consultation Document "Addressing the Tax Challenges of the Digitalisation of the Economy" consists of three different proposals regarding the global allocation of digital business profits, i.e., (i) the "user participation" proposal, (ii) the "marketing intangibles" proposal, and (iii) the "significant economic presence" proposal. Proposals (i) and (ii) are similar in that the approaches are based on the Residual Profit Split Method ("RPSM"). RPSM is one of formally recognized transfer pricing methodologies ("TPM"), so a big advantage of these two proposals is the consistency with current transfer pricing rules.

On the other hand, proposal (iii) utilizes the fractional apportionment approach that is not consistent with current transfer pricing rules; however, the advantage of this approach is its simplicity. It will likely require GAFA (Google, Apple, Facebook, and Amazon) or other large digital business providers to allocate substantial profits to jurisdictions having a significant number of users. In this sense it could be regarded as more "fair" for countries having many users but who have not been able to tax such digital activities.

The biggest challenge in applying proposals (i) and (ii) is the use of RPSM. RPSM is certainly a recognized TPM, but it is used only when non-routine intangibles are shared between or among multiple jurisdictions. The first challenge is splitting an MNEs' functions (and accompanying profits) between routine and non-routine, which is difficult, and in many cases controversial. Measuring routine profits requires analysis (primarily the transactional net margin method (TNMM)) in many jurisdictions, and that could be very costly.

The second challenge for the application of RPSM is how to allocate non-routine profits among jurisdictions. In this sense, I think proposal (i) is more objective than proposal (ii) because the factors for measuring the level of user participation are clearer. In contrast, proposal (ii) has the big challenge of identifying the marketing intangibles in each jurisdiction and how to measure the intangibles. This proposal allows MNEs the flexibility to keep substantial profits in certain jurisdictions, such as low tax jurisdictions or the U.S., because marketing intangibles could be measured by factors not related to users, such as marketing expenses or marketing activities of the MNEs. Moreover, this proposal is intended to be applied not only to digital business but to all other businesses, bringing confusion to the industry where technical intangibles play a more important role than marketing intangibles.

Meanwhile, proposal (iii) has the big disadvantage of not being consistent with current transfer pricing rules. Adopting this approach would be very difficult unless there are ways to coordinate it with the existing transfer pricing rules.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

Because most Japan-based MNEs are involved in traditional, non-digital businesses, and because there has not yet been a proposal for taxing profits from digital activities, this question is not relevant in Japan at the moment.

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Korea

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

On February 14, 2019, the Korean Ministry of Finance and Economy (MOFE) held a briefing and made it clear that a thorough review would be necessary before the MOFE considers the introduction of a digital service tax (DST) or something of that nature. In terms of the timeline, this means that Korean taxpayers will not see a DST or something similar until at least 2021.

The MOFE's position is based on the following arguments. First, a DST is sales revenue-based and thus is not consistent with the Korean corporate system, which is based on income (profit). Second, the MOFE's view is that a DST is in principle double taxation for consumers already paying value-added tax.

The MOFE also pointed out three other concerns:

(a) Once the DST is introduced, due to the WTO non-discrimination principle, Korean HQ-based taxpayers would be subject to the DST, in addition to the income-based corporate tax.

(b) The possibility that a DST might trigger trade disputes with the United States.

(c) An immediate introduction or adoption of the DST would fundamentally violate a basic constitutional principle that any act of taxation should have a legal basis in the form of a statute or a code.

Aside from the discussion of DST, with Article 53(2) of the Value Added Tax Act that was amended and announced last year, effective July 1, 2019, a new 10% value-added tax (VAT) shall be imposed on offshore businesses that provide a range of online services to local consumers that are fundamentally B2C, such as online advertisement placement services, cloud computing services, services involving intermediating goods and services between offshore businesses and local consumers in Korea, and other similar services. At the end of the day, the new VAT will be passed on to both offshore businesses and local consumers. The impact is unclear at this early stage.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

In the author's view, the number one challenge for tax auditors would lie in understanding the many difficult concepts in the digitalized economy and how the digitalized economy works in terms of how a value chain and key value drivers are created and maintained. In other words, how quickly the tax authorities would be able to educate and train a sufficient number of tax auditors to prepare them to audit taxpayers engaged in businesses in the digitalized economy. As tax auditors and taxpayers are all in the early innings of the game, the challenges and reactions are still up in the air. Only time will tell.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

Whatever approach is utilized, a key question is whether the business profile and the functions, risks, and assets (related to the business) of a taxpayer are divisible and reliably segmented in terms of clearly defined profit drivers. The time and effort of determining what is feasible in terms of slicing and dicing data and the reliability of doing so would be more important than the advantages that could be extracted from an approach, if any.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

The author would not be surprised to see Korean taxpayers sitting on the fence for the time being, as the MOFE has made it clear that a DST will not be introduced in the fiscal year 2020. The MOFE is highly unlikely to disappoint the OECD in terms of being a loyal fan of the OECD consensus. The author believes that will continue to be the case for Korea, as the OECD works to develop a harmonized global approach to the digital challenge. The concerns and stumbling blocks raised by the MOFE in defending it current position on the DST (as discussed in Question 1) will be addressed accordingly once the OECD consensus on this matter takes concrete shape in 2020.

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Mexico

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

In September 2018 one of the parties in the Mexican Senate, the Party of the Democratic Revolution (PRD, for its acronym in Spanish), presented an initiative to include regulations in the Income Tax Law to tax digital service providers. This initiative was based on the model that was recently rejected by the European Union.

According to the initiative, companies that earn taxable income in Mexico derived from the following activities that exceeds 100 million pesos, would be subject to a tax equivalent to 3%:

i. Offering digital advertising platforms,

ii. Engaging in digital intermediary activities, and

iii. Selling user data.

Foreign residents with a permanent establishments (PE) in Mexico would be required to tax the income attributable to such PE that is derived from the above-mentioned activities.

To determine whether a service would be subject to taxation in Mexico under this initiative, it should be determined where the user is located, independent of the location of the digital service provider, or the location of the delivery of goods or the provision of services made through a digital platform.

This initiative also considers the following situations where the user is considered to be located in Mexico:

i. For digital advertising platforms, when the advertising in question appears on the user's device while the device is being used in Mexico.

ii. For digital intermediary activities:

a. If the intermediary services (through a multifaceted digital platform) facilitate the delivery of goods or the provision of services between users, and the user of a device in Mexico accesses the platform and concludes an operation.

b. If the intermediary services (through a multifaceted digital platform) facilitate other transactions, and the user has an account that allows access to the digital platform, and that account has been opened using a device in Mexico.

iii. For the sale of data, if the data generated by the user of a device located in Mexico to access a digital platform (either in the current or previous fiscal year), and that data is transmitted in such fiscal year.

Since the income earned by a digital service provider can be attributable to users in different countries, a proportion of the total taxable income should be calculated for each user's country in order to pay the taxes accordingly. For this purpose, the initiative establishes different formulas to calculate the proportion of the income attributable to Mexico, depending on the type of activity the digital service provider performs (e.g., based on number of times the advertisement appeared in the user's device, number of users that concluded transactions, number of account users, or number of users that generated data).

Companies subject to this tax would also be subject to transfer pricing regulations, since the initiative also includes a requirement for companies to determine their income derived from transactions carried out with related parties at market values, considering the price or consideration that would have been charged to or between independent parties in comparable transactions.

This proposal is still under review by the Mexican Senate. The proposal estimates that the market value of e-commerce in Mexico was 329 billion pesos in 2016; however, this amount should not be considered as the taxable basis, since it includes other income not related to the activities defined in the initiative.

This initiative would tax activities of MNEs, such as Google, Amazon, and Facebook; however, services provided by Netflix, WhatsApp, and Spotify would not be included in its scope.

Currently Uber and Airbnb have been negotiating with the tax authorities in Mexico to pay special taxes. For example, Airbnb currently pays 3% for local taxes in Mexico City, Oaxaca, and Quintana Roo. However, these are local taxes, so according to the original initiative, companies should pay both taxes.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

The initiative includes examples of how the profit should be allocated, depending on the type of activities carried out by the digital services provider. The "formula" looks easy on paper, however, in reality it would be difficult to implement since the users are located practically everywhere, and special systems might be needed to track the users' activity related to each type of service, which would raise significant data availability and administration issues, which could increase complexity and uncertainty.

Like the OECD proposal, the law initiative in Mexico is based on a fractional apportionment approach. According to the initiative, the basis would be the total taxable income related to the digital activities described in Article 1 (digital advertising platforms, digital intermediary activities, and sale of data), which is the total income received from those activities, less the deductions authorized by law, without distinguishing routine and non-routine profits. Posteriorly, allocation keys are used to divide that tax base.

Currently there is no international consensus on how to address these issues and, therefore, having a formula that differs in each country could trigger double taxation issues. MNEs are not comfortable with unilateral measures as that may result in paying taxes in two jurisdictions for the same income.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

Current regulations generally allocate profits based on the jurisdiction in which physical activities are performed. Most digital service providers have presence and generate revenues in other jurisdictions, but do not pay any taxes in those jurisdictions. In other words, unless a company has a physical presence in a jurisdiction, they will generally not be taxed there even though its users or customers that create value are located in that jurisdiction.

An advantage of both the profit split and the fractional apportionment approaches with regard to the digital economy is that they consider the economic presence or user location instead of the company location. Even though the formulas and bases differ between the two approaches, both argue that even where the physical situs of a business is substantially outside of a market jurisdiction, it is possible for that business to have an active presence or participation in that jurisdiction and generate value through customer/user-facing activities that can be said to take place in that jurisdiction.

These methodologies represent a fairer approach to the distribution of profits between the jurisdictions based on value creation than the current regulations, under which countries obtain profits only if the company is located there.

The application of these approaches certainly represents a challenge for the MNEs due to the administrative burden and modifications required to implement them.

Companies may need to implement new processes to track the user activity related to each type of service, which would raise significant data availability and administration issues, which could increase complexity and uncertainty and require additional expenses.

Tax authorities would be required to determine the identity of the taxpayer who bears the tax liability and filing obligations, which could be more difficult than expected, since the income earned from digital services/activities could involve multiple entities of an MNE group. Therefore, additional work would be required to identify the companies and allocate the tax liability to each jurisdiction.

Splitting the profits between the different jurisdictions where several entities in the MNE have presence/users will imply the use of several arbitrary assumptions or factors about what user interactions are valuable, which might not be reliable and/or might not reflect the entire situation.

In some cases, where users interact for free on digital platforms, MNEs will have the challenge of assessing the value of those interactions, which makes it more difficult to allocate taxable profits to countries based on the value that users contribute.

Additionally, since the proposed approaches imply the reallocation of the MNE group's profits to other jurisdictions (based on user or market location), tax authorities need to assess whether existing treaty provisions might need to be modified as a result.

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4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

Most companies and MNE groups already segment their financial information for reporting or tax purposes, either by business segment, product line, and/or region; however, they do not generally have the information at a user level, which would represent an extra administrative burden.

MNEs are aware of the modifications proposed by the OECD and the Mexican Senate regarding the taxation of the digital economy; however, due to the current uncertainty, MNEs are waiting for final guidelines from the OECD before implementing new processes and/or adapting their business models.

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

Historically, the Netherlands has expressed reservations over the European Commission's ("the Commission") Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence ("the Directive"). The Netherlands in October 2018, vide a letter to the Parliament[1] from the Secretary of State for Finance, placed technical observations on the "interim" nature of such digital taxation under the Directive and its subjectivity to cause increased or even unresolvable double taxation. Additionally, as explained in the letter, the Netherlands prefers that the taxation of the digital economy be addressed on a global scale. The Netherlands reiterated its constructive approach to this issue during the Eurogroup and the Ecofin Council meeting in Brussels on May 16 and 17. At that meeting, the Netherlands reaffirmed the importance of continuing to participate in the OECD's discussions on the digital economy.

The Netherlands currently has not implemented any formal legislation with regards to the proposition in the draft Directive, nor any other form of unilateral measures related to the taxation of digital activities.

The Netherlands has not made any budgetary evaluations on the projected increase or decrease in tax collections due to implementing the proposed legislation.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

The Netherlands published its evaluation and raised its concerns on the draft EU proposal[2], in particular in light of its limited focus. The Netherlands believes this issue must be evaluated together with the OECD's work under the Base Erosion and Profit Shifting (BEPS) Inclusive Framework.

The Netherlands has been forthcoming in resolving tax disputes or double taxation arising out of unilateral measures by other nations.

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In our experience, we have seen a number of Mutual Agreement Procedures ("MAP")/Bilateral Advance Pricing Agreements ("BAPA") requested by MNEs in the Netherlands where there is (or anticipated) double taxation arising from unilateral implementations of taxation on digitalized business models. However, these requests are at the preliminary stages. Additionally, the nature of these "digital tax" initiatives and whether or not they constitute direct or indirect taxes is still in dispute. As such, the expected outcome of these MAP and BAPA requests is still unknown, as the treaty counterparties may still view the implementation of the digital tax in their country as outside the scope of the tax treaty.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

(i) The (modified) residual profit split approach suggested by the OECD's Public consultation document of February 2019 (reiterated in the "Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy" dated May 31, 2019) has the advantage that it is intended to coexist with the existing transfer pricing rules. However, it is expected that disputes may arise due to the use of the existing framework and the introduction of new taxing right allocation mechanism(s). Because of this complexity, the modified residual profit split approach may be too difficult to implement within the short timeframe targeted by the OECD. (ii) The fractional apportionment method could result in some level of opposition from countries which rely on a service economy and the exploitation of intangible property. Further, there will be significant work required in terms of developing this new framework.

The OECD, with its 3-tier documentation approach in place, is striving to make information more transparent by making more useful taxpayer information available to tax administrations. However, the biggest challenge for the new framework will be the definitions of these various new terms in the OECDs proposed framework. A key breakthrough for the proposed framework will be to test how watertight these definitions can be. The existing transfer pricing framework has been consistently refined (based on consensus) to include contemporary business realities. There may need to be significant (re)work required in implementing these new approaches, and we expect that significant progress should be made as the OECD works through its most recent workplan.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

In light of the current guidance in the OECD's workplan, companies are beginning to perform assessments and scenario analyses to establish the potential impact of a new, harmonized approach to taxing their digital business models. However, due to the infancy of the new OECD workplan, most companies are not yet adapting their models solely in relation to this topic, although tax reform in general has triggered gradual changes for many companies. Additionally, MNEs are focusing on more practical responses where feasible, such as refining their documentation to create a robust assessment of the value chain in light of (potential) digital economy participation by the business. However, it remains difficult to ring-fence digital activity overall, and without more concrete guidance from the OECD, most MNEs are hesitant to implement material changes into their models.

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NOTES

[1] *Brief Snel stand van zaken richtlijnvoorstellen belastingheffing digitale economie 18 okt 2018.en.*

[2] Ibid.

New Zealand

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TP EQuilibrium AustralAsia LP

1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

New Zealand has not yet enacted legislation specifically concerning the taxation of digital activities, a digital services tax ("DST"), nor has any proposed legislation been introduced into the New Zealand Parliament.

However, new *Section GB 54 enacted under the Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018*, inserts a new anti-avoidance rule into the Income Tax Act for large multinationals (with over EUR 750 million of consolidated global turnover) that structure to avoid having a permanent establishment ("PE") in New Zealand. Broadly, the rule deems a non-resident to have a PE in New Zealand if a related entity carries out sales-related activities for it under an arrangement with a more than merely incidental purpose of tax avoidance (and the other requirements of the rule are met).

In addition, on June 4, 2019, the New Zealand Inland Revenue ("IR") released a discussion paper, '*Options for Taxing the Digital Economy*' ("the discussion paper") seeking public feedback on New Zealand's approach to any DST – which may either be deferral until an OECD solution has been agreed, or joining a growing list of countries taking unilateral, preemptive action. The consultation period closed on July 18.

The discussion paper's preparation and release has been prompted by IR concern that OECD consensus on digital services taxation matters, even if reached, could be five or more years away from the realistic enactment of legislation.

As such, the discussion paper proposes a DST with a 3% tax rate on New Zealand turnover for a given multinational corporation. The DST would only be applied to companies which meet the following two threshold tests:

1) Global turnover exceeding EUR 750 million, and

2) New Zealand-attributable turnover exceeding NZD 3.5 million.

An alternate approach to computing the DST based on New Zealand-attributable profit has been initially rejected, with feedback nonetheless requested by IR.

The DST "would apply to the services provided by business activities whose value is dependent on the size and active contribution of their user base". As such, this could include intermediate platforms (e.g. Uber), social media providers, search engines, and shared content sites. The proposed DST would raise between NZD 30 and 80 million in taxes payable annually, hence, the DST would not materially affect aggregate tax revenues.

At this stage the IR has proposed an online registration model to ensure payment of the DST, similar to New Zealand's recently implemented approach for GST on remote sales. This would require a separate tax return for the DST liability, at regular intervals to be determined. IR is also open to annual payment, as part of a company's wider tax return filing process.

The discussion paper further notes that the Tax Working Group (an advisory body created by the New Zealand Government to provide recommendations on improving the fairness, balance and structure of the tax system) also considered the current issues with taxing the digital economy, and in its final report concluded that New Zealand should continue to participate in the OECD discussions, but should also be ready to implement a DST if a critical mass of other countries move to do so.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

In the discussion paper, IR identifies that the primary challenge of the current international taxation frame-

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work is its establishment subsequent to a time period well before the digital economy existed. As identified in the OECD's Action 1 Paper on the Digital Economy, the issues of (1) scale without mass; (2) user value creation; and (3) intangible digital assets have created a significant taxation challenge in the 21st century which New Zealand will also have to address.

One of the key concerns surrounding the implementation of a DST in New Zealand relates to violation of tax and trade agreement obligations, and in this regard New Zealand could potentially be similarly affected.

Bilateral tax treaties are typically signed to avoid the imposition of double taxation by revenue authorities. However, it is noted that a DST may become a tax on a non-presence, whereas tax treaties typically require a physical taxable presence (company or permanent establishment); hence, a DST arguably may not be covered by bilateral tax treaties. That said, IR accepts that modifications to Double Tax Agreements would likely be required.

Concern also exists, stemming from New Zealand's existing Double Tax Agreements and World Trade Organisation obligations, that the application of the DST differently, or discriminately, to foreign versus domestic companies could create compliance risk, especially if unilateral action is taken by New Zealand.

The IR further accepts that valid concerns exist in respect of the DST's application to companies which are loss-making, and likewise that the DST would apply to income, and this income also contributes to taxable profit. The latter is primarily an issue for New Zealand-resident businesses, and needs to be addressed. Recent reforms in respect of the IR's powers of requesting information, and payment of tax by local companies as agents of a foreign multinational, should contribute to supporting the enforcement of any DST structure imposed on large multinational corporations.

The government and IR are likewise concerned about how a DST could affect economic incentives, whether this refers to the cost of capital, development of New Zealand's digital sector, or the incidence of the DST burden. For example, local New Zealand businesses are those most likely to pay to advertise on social media platforms operated in New Zealand. Hence, the imposition of the DST on social media companies in New Zealand could simply be passed on as an effective increase in the costs of New Zealand companies to conduct their advertising on these platforms. Given the need for modern businesses to advertise in the age of social media, a relatively high incidence of a DST burden on local business, as compared with the social media companies themselves, is a plausible outcome in this context.

Given the ongoing work of the OECD, there is also a risk of imposing a new compliance burden on companies, one which has a lifespan that is limited to the period until the completion of the OECD's consultation on digital tax matters.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

The Final Report in respect of the OECD's BEPS Action 1 states the following at paragraph 233:

The consultation process on the transactional profit split method in the course of the BEPS Project confirmed that this method can be useful when properly applied to align profits with value creation in certain circumstances. The further work on the transactional profit split method will therefore examine their application to highly integrated business operations and develop profit splitting factors that show strong correlation with value creation. This work should also address situations where comparables are not available because of the structures designed by taxpayers and could include revised guidance on the use of profit methods. This work will be carried out in 2016 and 2017 and may be relevant for highly integrated MNE groups in the digital economy.

Likewise, at paragraph 287, the Final report outlines a fractional apportionment approach:

Another approach considered would be to apportion the profits of the whole enterprise to the digital presence either on the basis of a predetermined formula, or on the basis of variable allocation factors determined on a case-by-case basis. In the context of a significant economic presence, the implementation of a method based on fractional apportionment would require the performance of three successive steps: (1) the definition of the tax base to be divided, (2) the determination of the allocation keys to divide that tax base, and (3) the weighting of these allocation keys.

Arguably, both the OECD's approach noted in BEPS Action 1 as well as the unilaterally-applied approaches to a DST are, at this juncture, too undeveloped to offer a clear assessment of the benefits or otherwise of the profit split and/or fractional apportionment as the appropriate profit allocation method. That being said, some general comments can be made:

- A profit split method, as a generally recognised and understood approach to current transfer pricing, would arguably represent the lesser implementation challenge for digital businesses. Recent revisions to the OECD's profit split guidance which require parties to the controlled transaction(s) to make unique intangible property contributions may require further revisions.

- A fractional apportionment method may be viewed as thematically contrary to current transfer pricing principles, including the arm's length standard – i.e., more akin to global formulary apportionment. As such, implementing a global (or unilateral) digital taxation framework which adopted fractional apportionment would inevitably present more significant challenges in respect of implementation and upfront compliance, both for taxpayers and revenue authorities.

- Of primary importance should be addressing the real double taxation risks, as well as additional compliance and taxation costs to businesses, which arise in respect of taxing turnover based on DST, and then also levying income tax on a company's taxable income. This challenge applies irrespective of the profit allocation method, and arguably presents the most risk in terms of the impact upon capital incentives, digital economic development, and burden of any DST taxes implemented.

- Additional challenges concerning place of sale, determination of routine versus non-routine profits, and current unilateral DST actions can arguably be addressed. However, as time passes, unilateral DST actions are likely to spread, and become increasingly embedded into local taxation laws and regulations.

- Resolution, in full or part, of matters concerning the digital economy should yield considerable political and economic benefits, overall. Given the rapid growth of value created by the digital economy without a taxable presence, the challenges of tax fairness and income generation will continue to grow until such time as an equitable solution is achieved.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

At this time, neither New Zealand-resident companies nor multinational corporations operating in New Zealand have undertaken significant (public) media campaigns in the digital taxation space. However, the government and IR's current discussion paper will likely result in numerous submissions from affected stakeholders. Given the enactment of *Section GB 54*, as well as other international changes, it is likely that various digital businesses are reconsidering / restructuring their operational structures for New Zealand. In this regard, the New Zealand Herald reported on 18 February 2019 that:

"[F]acebook and Google had [previously] structured their affairs to avoid a taxable local presence, instead using New Zealand subsidiaries to offer only marketing services with sales to Kiwi businesses for advertising . . . . Partly in response to global public and political pressure, both these companies announced last year they would no longer book locally-sourced revenue offshore."

We generally expect both New Zealand-resident companies and multinational companies operating in New Zealand who become subject to a proposed New Zealand DST and/or any other approach to digital taxation to be able to accurately and appropriately track and segment their digital revenue streams. Segmentation of financial data is a well-accepted, and often expected approach to addressing transfer pricing and taxation matters in New Zealand, and digital corporations should be the best-placed of all industries to accurately segment and record revenue streams based on activity, product line, or jurisdiction.

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Portugal

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

In February 2019, a Draft Law on the implementation of a specific tax for digital services was submitted to the Portuguese Parliament for consultation and discussion.

This Draft Law, which ultimately was not adopted, was closely modeled after the Digital Tax Package initiative of the European Commission for the interim targeted solution, and was intended to apply to any entity meeting the following criteria:

(a) Total turnover of at least Euro 750 million in the previous year; and

(b) Income of at least Euro 1.5 million from digital services provided in the Portuguese territory in the previous year.

A digital service would be deemed to be provided in Portugal if the user was located in Portugal and the services included, among others:

(a) Online advertising services, if the ad appeared in the user's interface that is located in the Portuguese territory;

(b) Online intermediation services for the delivery of goods between users, whenever the sales transaction is concluded by a user through a digital interface located in the Portuguese territory at the conclusion of the transaction.

The taxable basis corresponded to all income received from the provision of digital services (VAT and other taxes excluded), including services provided between entities of a multinational group (the taxable basis of these transactions would correspond to their normal market value).

A 3.00% rate would apply to the taxable basis.

The main reasons presented for enacting the digital tax law were similar to the discussions that already occurred at the Organisation for Economic Co-operation and Development ("OECD") and European Union ("EU") levels, i.e.:

(a) New business models and new economic activities, where dematerialization is now a fact, as physical presence is no longer needed;

(b) The erosion of the taxable basis, arising from the misalignment between tax rules based on physical presence and the economic reality based on remote access;

(c) The tax rules do not foresee the taxation of the economic value of the data created by the users of digital platforms, which results in a transfer of knowledge and wealth with no economic benefit for the countries where that information is generated.

An exact estimation of the tax revenues arising from the enactment of such a law was not performed; however, as a rough reference, the Draft Law and discussions referred to the size of the advertising market through traditional channels (e.g., TV advertising, which accounts for approximately 40% of media advertising, or approximately Euro 200 million, based on the most recent information available at the time the Draft Law was under discussion) and the fact that digital advertising has been doubling its growth in the past 5 years and is becoming more similar to TV advertising.

After discussion in the Parliament, the Draft Law was rejected in March 2019. The main arguments presented for rejecting the digital tax included formal and economic reasons, including the following:

(a) Limited effectiveness of the digital tax, as there would be no connection between the territory and the taxable basis (i.e., as the companies providing digital services do not operate in Portugal, there would be no Portuguese taxpayer);

(b) The taxation of the digital economy should follow an international approach at the EU level; and

(c) The potential negative impact of this tax on one of the most dynamic industries currently operating in Portugal.

Currently, no further actions have taken place with respect to the digital tax. Nonetheless, it is expected that more discussions on the matter will occur with the Draft Budget Law for 2020, as this is a topic on the country's agenda.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

Portugal currently does not have any rules specifically addressing the taxation of the digital economy. As such, there is limited experience on the matter.

Currently, the main challenges with respect to the development and implementation of an effective taxation of the digitalized economy are related to the fact that there is still no political consensus on the appropriate strategy to follow.

On the one hand, there is a perception by the Authorities that any unilateral measure would not have a relevant impact on the protection of the taxable basis of these activities in Portugal and, as such, the road to follow should be aligned with the options of the EU, both from a technical and a timeline perspective.

On the other hand, there is a general acknowledgment that the economy and businesses are becoming virtual, which potentially leads to an erosion of the profits that would otherwise be taxed in the country under a more traditional economy.

For inbound situations (i.e., whenever a multinational group operates in Portugal) and situations where the digital services provider already has a corporate income tax ("CIT") taxable presence in Portugal (i.e., the group operates either through a resident entity in the country or a branch), the Portuguese Tax Authorities ("PTA") have been increasing the tax audits of these businesses.

Based on our experience, the PTA typically analyzes the business model and its global alignment with the transfer pricing policy adopted, assessing whether the profits generated by the local subsidiary/branch reflect the functions performed and risks assumed. In situations where the Portuguese market generates high revenues but the local subsidiary/branch earns limited profit (e.g., a mark-up on costs incurred), the PTA is likely to argue that more income should be allocated to the local entity. In practice, this analysis is always limited by the arm's length principle and information available to the PTA. Although the exchange of Country-by-Country information and the cooperation on the exchange of other information between tax authorities could change the mindset, difficulties still exist in the allocation of a significant profit to the local entity.

Whenever the digital services provider does not have a CIT taxable presence in the country, the action of the PTA will largely depend on the traceability of the group's activities. In our experience, if the non-resident entity providing digital services in the country: (i) is known to the market as operating in Portugal, or (ii) has a Portuguese VAT number, or (iii) is identified as a supplier in a Portuguese taxpayer's accounts, there is a significant degree of probability that a tax audit occurs that could ultimately lead to the conclusion of the existence of a permanent establishment for CIT purposes, and taxation through indirect methods.

For outbound situations (i.e., when the digital services provider is a Portuguese-based Group), the PTA is typically concerned with the return on the intangibles used and developed, as the PTA considers, in these cases, that the higher return should remain in the physical place where the activities are carried out, either through the development of the intellectual property, its maintenance, the sales force, or the location of the servers.

MNEs have been reacting to this new environment both proactively and reactively. In the course of tax audits, it is not uncommon to bring the discussion of the Mutual Agreement Procedure (MAP) foreseen in the applicable double tax treaties to the Arbitration Convention of the EU. Initiatives for discussing the situation with the PTA have also been more frequent (e.g., requesting a binding ruling on the existence of a permanent establishment or requesting the negotiation of a unilateral or multilateral advance pricing agreement).

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

From a transfer pricing perspective, the use of profit split methods to determine the appropriate level of return due to members of an MNE group engaging in combined or integrated activities has been widely discussed in the past few years.

In our experience, the application of profit split methods in traditional businesses is increasingly becoming a preferred approach for the PTA (even if used as a sanity test only), especially in the negotiation of advance pricing agreements, as it should lead to an adequate allocation of the existing MNE's profit (or loss) between the members of the group.

The main advantages arising from the use of profit split methods that would also be applicable to the digital economy include:

(a) Transparency in how much profit the MNE as a whole generates;

(b) An open and fair discussion with the tax authorities in assessing the arm's length return that each member of the MNE should earn on routine functions, based on both the contribution to the global business and the value that the MNE generates. This should mitigate situations where the tax authorities want to tax the local company for a certain profit that is higher than the profit the MNE has to allocate to all the subsidiaries;

(c) Consideration of key value drivers for the MNE's business, which should be used to reflect the economic substance and

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real contribution of each party to the global activity, for the non-routine functions that should earn a non-routine profit.

Compared to the profit split method, the fractional apportionment approach would, in our perspective, mitigate the somewhat discretionary criteria that would otherwise be used in the former. In fact, under the modified residual profit split method, as foreseen in the OECD workplan discussed above, there is still a significant degree of subjectivity in defining what is routine and non-routine, which may give rise to different interpretations of what the tax authorities of the different countries see as an arm's length profit for the routine functions and an arm's length profit for the non-routine functions. Ultimately, the application of the modified residual profit split method might maintain situations where routine entities always bear limited risk and earn a portion of profit, even in situations where the overall business of the MNE has losses.

In our experience, in the application of a profit split method where routine entities are granted a routine profit and the residual profit (or loss) is shared by the entities responsible for the non-routine functions, the routine entities typically do not share in losses (thus, in risks) that they would otherwise be carrying if they operated independently in the market.

On the other hand, tax authorities from different countries may have different interpretations of what is routine and what is residual, potentially leading to situations of double taxation or double non-taxation.

As described in the OECD workplan, the fractional apportionment approach would potentially mitigate the risks arising from the calculation and allocation of routine and non-routine profits, as the starting point would be the MNE's global profit (either statutory or per business line). The fractional apportionment approach would allow MNEs to avoid potential litigation related to the question of "which profit to allocate", as the discussion at this level would not include an assessment of what is routine and what is residual, or which entities and jurisdictions generate value for the routine and non-routine profits of the MNE.

In addition, the criteria to construct the formula to apportion the relevant profit between the different jurisdictions would, in our view, tend to reflect the added value generated by the business as a whole. Especially in the digital economy, it is not always clear which functions generate the largest returns for the business – for example, success of a digital business could be either due to the technology itself or the customers' and users' portfolios obtained through marketing. On the other hand, without an effective back-office team adequately managing all the technical issues, often on a 24/7 basis, the success of the digital services provided by the MNE would probably be more limited.

Thus, where a profit split approach is already a relevant route to follow for the traditional businesses, the profit split or apportionment models, as envisioned for digital economy taxation, may be an economically viable solution that adequately reflects the amount of profits each MNE generates in each jurisdiction, as those methods are more likely to treat the MNE's operations in an integrated way.

Based on the discussions held in the Portuguese Parliament when the Draft Law on the taxation of digital services was introduced, access to information and control of transactions is a serious constraint to the effective application of the new taxation design for this industry.

In fact, the major concerns tax administrations face are the probable absence of a traceable presence in the country (e.g., a private user in Portugal buys books from a third party through a platform managed in Germany) and the fact that the taxable basis and the definition of relevant economic presence may be distorted, especially when virtual private networks are used by the users/consumers.

These limitations are likely to be a challenge for the implementation of both the digital services tax based on a percentage of the digital services provided in the country and the profit taxation based on either the digital permanent establishment or the allocation of profits based on one of the mechanisms outlined in the current OECD workplan.

In this respect, it is of the essence to create a common global approach, whereby formal international reporting requirements should be implemented to allow adequate taxation of the digital economy based on the envisaged methodologies.

On the other hand, it is our understanding that the modified approach for profit allocation or apportionment to the digital economy should not differ significantly from the current transfer pricing framework. In fact, the profit split method, as outlined in the OECD Guidelines, should accommodate the specificities arising from the modified methods.

The main difficulties currently arising from the application of the profit split method should be no different from the difficulties that are expected to occur in applying the model to the digital economy, i.e.:

(a) Existing difficulties in defining routine and non-routine functions, and which parties of the MNE contribute to each stage of the value chain/product development;

(b) Identification of key value drivers of the business that should guide the profit allocation;

(c) Activities/presence to be taxed in each country;

(d) Availability of segmented financials, per business line/ product/region, with the necessary detail to adequately determine the profit to be split;

(e) Subjectivity of the criteria used, as each individual analyzing the situation may have a different opinion on how relevant each criterion may be;

(f) Relevance of the physical presence and key people's functions (even if limited), as opposed to the power of a digital presence only, managed abroad.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

Considering the current uncertainties on how the taxation of the digital economy will occur in the near future, MNEs in Portugal are adopting a prudent approach, mainly assessing the potential impact of both unilateral and harmonized approaches.

From a short-term perspective, MNEs in Portugal have been monitoring the proposal/adoption of the digital services tax based on turnover by the various countries and assessing the impact on their businesses.

From a long-term perspective, a distinction should be made between the MNEs with pure digital businesses and those industries which, although they are anchored in the traditional business models, also have a relevant digital component that could be significantly impacted by the redesign of the digital economy taxation.

MNEs operating in the digital economy (e.g., providers of platforms for connecting buyers and sellers, providers of software-as-a-service and platform-as-a-service, among others) have been mapping their global footprint, in order to address the following concerns:

(a) Impact of turnover taxes for the digital services;

(b) Withholding tax issues arising in connection with the characterization of: (i) infrastructure-as-a-service (IaaS) transactions, (ii) rentals of space in the cloud for cloud service providers, (iii) software-as-a-service (SaaS) transactions, and (iv) platform-as-a-service (PaaS) transactions;

(c) Existence of permanent establishments, either arising from different interpretations of the current concept of a permanent establishment connected to a physical presence, or due to the expected adoption of the digital permanent establishment concept;

(d) Estimated profits to be allocated to each jurisdiction, considering both the existence of a physical presence for taxing the activity and a model where part of the MNE's profits would be taxed worldwide based on the significant digital presence concept and nexus approach.

(e) Review of the transfer pricing policies adopted, in order to address the changes that are likely to occur.

Typically, MNEs in the digital industry already have segmented financials and other key business drivers that allow them to make management decisions and strategic options. As such, this information is already being used for tax purposes in determining the potential impact that the taxation of the digital economy may have for their activities. Nonetheless, the integration of operations and the difficulty in adequately measuring the relative contribution of each jurisdiction or entity are challenges that digital MNEs currently face.

As an example, the real economic benefit and contribution to the MNE's business may be difficult to measure in situations where the MNE has an entity in a country that performs R&D activities for developing specific components of a platform, where the fully developed platform that is used by potential customers in that country is economically managed/explored by an entity in another country.

Also, MNEs that operate in the traditional business but have a relevant digital presence have been concerned with the impact the potential new approach to taxation may have.

In fact, our experience indicates that for these industries in which the core business is not related to the digital economy, more difficulties arise in the assessment and implementation of the digital tax.

Although segmented financials isolating the digital activity could be an option, there are situations where the digital presence is still viewed as an ancillary, albeit necessary, presence for the sustainability of the traditional business. As such, having the IT systems prepared to generate financial and other data segmented between traditional activities and digital activities could be an issue.

In conclusion, the roadmap to the implementation of the digital economy taxation should be distinct in view of the maturity of the MNEs, as this significantly impacts the redesign of their business models to effectively manage the challenges arising from the upcoming changes.

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Russia

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

In 2017 the Russian government approved the state program "Digital Economy of Russia," one of the directions of which is the development of a legislative framework for the digital economy. However, as of today, the only area affected by the changes in the tax system is the VAT treatment of electronically supplied services ("e-services").

Effective from 2017, foreign companies rendering e-services to private individuals (B2C transactions) are required to register for VAT purposes in Russia. Being VAT registered, the foreign companies should charge VAT upon the provision of e-services, collect VAT from the Russian customers, remit the tax to the Russian state, and prepare and submit VAT returns on a quarterly basis.

In addition to the measures adopted in respect of e-services rendered to private individuals, starting January 2019, foreign companies that supply e-services to companies and private entrepreneurs registered with the Russian tax authorities (B2B transactions) must be registered for VAT purposes in Russia. VAT registration was due by February 15, 2019. Registration is compulsory even if the e-services supplied are VAT exempt in Russia. For example, a foreign legal entity licensing software to its Russian customers has to undertake VAT registration in Russia, even though the software licensing transaction itself may be VAT exempt under domestic VAT rules. Moreover, there are no exceptions or thresholds for VAT registration due to the e-services provision.

Foreign companies that are VAT registered must calculate VAT at the rate of 15.25% (before January 2019) and at the rate of 16.67% (starting January 1, 2019) of the VAT-inclusive value of e-services supplied to Russian taxpayers. The foreign companies must submit a quarterly VAT declaration and pay the tax to the Russian state in local currency.

Companies and private entrepreneurs that purchase e-services should be able to offset input VAT charged by a foreign service supplier, provided that certain specific VAT recoverability criteria are met. Namely, there should be settlement documents confirming payment, including VAT, to a foreign serviñe provider by a Russian buyer, and an underlying service agreement and/or invoices should reflect the amount of VAT, Taxpayer's Identification Number, and Code of Reason of Tax Registration of the foreign service supplier assigned by Russian tax authorities as a result of VAT registration.

Importantly, the VAT withholding mechanism applied upon acquisitions of goods (work, services) by Russian business customers should not be followed in relation to e-services, pursuant to the Russian Tax Code. However, business practice covering VAT application to e-services is still under development and, in practice, there may be different (sometimes even contradicting) cases in which a party in a supply chain remits VAT on e-services to the Russian state.

The above changes introduced to the Russian Tax Code in respect of e-services, allowed the Federal Tax Service to collect more than RUB 10 billion in 2018 and a similar amount in just the first three months of 2019.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

Except for the changes introduced in the Russian tax legislation associated with the VAT treatment of electronically supplied services, there are no specific measures or developments related to the taxation of the digitalized economy.

In the meantime, the Federal Tax Service of Russia (FTS) prioritizes the digitalization of tax administration process in general and is on a strong track to the developing the infrastructure, which, inter alia,

should significantly support the introduction of measures necessary to address the global challenges to taxation of the digital economy.

Over the past five years, the FTS managed to almost double the amount of tax payments while simultaneously making the interactions with taxpayers more convenient for the taxpayer. The FTS is leading the Community of Interest on Digital Transformation, under the auspices of the OECD Forum on Tax Administration, because of the considerable practical experience in the digitalization of its tax administration.

One example of how businesses have responded to the reshaped tax administration framework is the introduction of the tax monitoring regime. The tax monitoring regime, introduced from January 1, 2015, is a form of control over the accuracy of calculations, fullness, and timeliness of payment of taxes and levies. It has a number of advantages for the taxpayer, compared to the traditional forms of tax control, including exemption from desk and field audits, reduced scope of control measures and reduced number of source documents to be reviewed, reasoned opinions on complex issues, and real-time information exchange with the tax authorities. In practice, we observe considerable interest in this form of control from the business side.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

Although Russia has yet to build up the extensive practice of applying and auditing the transactional profit split method, it is a known concept that was introduced in the tax system since 2012. Therefore, we assume that this should be an advantage of using the profit split concept to address the tax challenges of the digital economy.

The fractional apportionment approach may initially appear to be a simpler concept in comparison to the profit split. However, fractional apportionment is a completely new concept for the Russian tax system which may complicate the approval and/or implementation process.

In spite of the fact that the profit split method is stipulated by the Tax Code (among other methods), it is recognized as a method of last resort and is not used in practice by most taxpayers. Therefore, Russian taxpayers basically do not have extensive experience in splitting profits between routine and non-routine, and their internal accounting systems are not customized to generate segregated data for the purpose of such analyses. Obviously, the same issues should arise as far as the global profit split method is concerned.

However, the main challenge comes not only from the level of development of the transfer pricing system, but from the significant developments required of the Russian legislation framework in order to integrate the OECD proposals.

For example, the definition of intellectual property (IP) in Russia is narrower than that adopted by the OECD. An exhaustive list of IP objects is stipulated in the Russian Civil Code. Currently, this list does not contain a definition of "marketing intangibles" and, for tax purposes, it is generally required to adhere to the legal framework for intangibles.

Nonetheless, the Russian government is actively moving toward the necessary changes relative to the legislative framework for the digital economy. For example, from October 1, 2019, amendments to the Russian Civil Code will be effective so as to lay down basic principles for Russian legislators to regulate a new market of assets in the IT network and create proper conditions for the implementation of transactions in the digital environment, including transactions conducted to transfer blocks of data/information.

Finally, the practical realization of taxing rights discussed in the OECD's Public Consultation Document is definitely a challenge for Russia in terms of the required modernization of local laws. Over the past several years, Russia made attempts to resolve the less complex matter of how to tax the profits of a foreign company's permanent establishment if the foreign company does not have a physical presence (office, bank account, etc.) in Russia, but there is still a question mark.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

It is too early to state that multinational enterprises in Russia are taking any particular actions to adapt their operations and business models in consideration of the OECD proposals. On the other hand, it is worth mentioning that the key players in the technology sector (both inbound and outbound) have been demonstrating their interest in this topic and monitoring the developments.

The main concerns for inbound enterprises may arise if Russia ultimately selects an approach that is different from the harmonized global approach, since this will lead to increased double taxation cases and overall imbalances. The outbound enterprises, in turn, will have to consider the potential implications where they have a digital presence in the EU.

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Concerning more technical issues, based on the experience gained from the revision of the VAT treatment of e-services, the splitting of particular services/activities between each other is practically difficult, especially if they are covered by the same contract and remunerated together. Furthermore, existing Russian TP rules mandate that taxpayers must rely on Russia GAAP data, which is often limited to entity-based information and do not enable detailed segmented financial reports. Therefore, businesses will have to invest in redesigning their accounting systems so that the necessary date could be easily generated.

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Spain

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

In January 2019, the Spanish government passed a draft law, with the purpose of creating a Tax on Certain Digital Services (DST) that mirrors the proposed EU Directive for the taxation of digital services.

The Draft DST Law[1] was conceived as a transitional and unilateral measure designed to bridge the gap until the entry into force of future legislation that would transpose the proposed EU Directive into Spanish law or until the adoption of the final recommendations at the OECD level on the project related to the tax challenges of the digitalization of the economy.

The government expected the tax to raise approximately 1.2 billion Euros in yearly accrual terms.

[1] Projects of Law No. 40-1, Draft Law on Tax on Certain Digital Services.

Before the Law was passed by the Parliament, a general election was called in Spain, so this project was delayed. The next step is that the new government will make a decision on the Spanish DST. Our expectation is that the new government will continue the project, but it will not be in place before 2020.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

Working on the implementation of the Spanish DST (SDST) was the main challenge faced by both the administration and the MNEs in Spain. Although the legislation is very similar to the proposed EU Directive on DST, there were many aspects that were unclear or even confusing in the draft legislation, basically because the draft introduced new concepts totally unknown in the domestic tax legislation.

As in the EU proposal, the digital services revenues under the scope of the draft SDST were: online advertising services (targeted at users), online intermediation services, and data transmission services.

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The DST was originally designed to tax "digital" companies, but the broad definition of digital services could also result in many "traditional" companies being taxed by the proposed SDST.

Companies worked internally trying to identify which of their services could fall under the scope of the SDST, and tried to estimate the income obtained from those service lines.

The reaction of the Spanish companies varied. Most of them expressed their radical opposition to unilateral measures, while a few understood the final goal of such measures but disagreed on the implementation path that seemed to be adopted by the Spanish authorities.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of "place of sales," "number of employees," or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

We are in the very early stages of evaluating which of the two options would be best accepted by Spanish companies. Both the Modified Residual Profit Split (MRPS) approach and the Fractional Apportionment (FA) approach have been described only at a high level in the OECD interim and current reports (such as the program of work issued in May). Specific details of each proposal need to be known and analyzed before issuing an informed opinion.

The MRPS approach could be easier to coordinate with the current transfer pricing rules, but there are many important issues not yet resolved, such as the distinction between routine and non-routine profits, the allocation keys, and the treatment of losses. There is also much ambiguity on the implementation side, including whether to collect data regionally or by business lines. All of the above may result in great complexity. On the other hand, the FA approach could be designed using simplified methods to determine the profit to be divided between countries and how it is to be allocated to each one. This latter approach does not appear to have the support of relevant countries and if this is the case, simplified approaches can result in situations of double taxation which could be difficult to resolve.

The challenges are well identified in the OECD's *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, released in May.

The introduction of a new approach to allocate and distribute profits in a group – i.e., by business lines or even through regional segmentation- could be very complex.

Consensus on the financial data that should be taken into account will not be a minor issue. Spain insists on implementing (or at least testing) transfer pricing policies on the basis of the local Spanish GAAP. Therefore, considering business lines or regional approaches on local GAAPs is not accepted.

Considering the treatment of losses and not only the profits will also be a significant challenge. Source countries must not only deal with the quantum of profits to be allocated to the market jurisdiction but also must agree on how to treat global loss situations.

If a consensus on the different methodologies is not reached, a possible coexistence of the two (or three) different methodologies identified in the OECD report will create many difficulties in practice, such as the distinction between routine and non-routine profits, timing issues, compliance challenges, as well as the information that may be requested.

There will likely need to be an agreement on the redesign of the current information requirements. In this new scenario, the current CbC report does not appear to be the most adequate source for providing the information that will be required by Tax Administrations to apply the new rules.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate "digital" activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

Taking into account the uncertainty regarding the final outcome of the OECD work, Spanish MNEs are now simply studying the documents that were released and analyzing their operations in order to minimize the impact of the new legislation. The general consensus among our companies is that digital activities are very difficult, if not impossible, to isolate from the rest of the operations, and the current financial and accounting information is not enough to fulfil the requirements that could be imposed by the new legislation.

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Switzerland

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

Switzerland, as a member state of the OECD, generally follows the guidance issued by the OECD in connection with various tax-related subject matters, such as in the case of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. Switzerland takes an active part in the various OECD tax policy related discussions, including the current discussions related to the tax challenges arising from the digitalization of the economy. Given the presence of a significant number of MNEs in Switzerland, many of whom operate global and highly or fully digitalized business models, the potential impact of changes to the international taxation policies is leading to increased levels of attention to this topic.

The State Secretariat for International Finance (SIF) regularly updates its position on the ongoing discussions and initiatives related to the taxation of digitalized economy. The core elements of the Swiss position[1] are focusing on the need for a multilateral, long-term solution, based on the taxation of value creation (following the existing OECD transfer pricing principles), that ensures the avoidance of double- or over-taxation, that will not impede innovation, and that will be technology-neutral. Consequently, the position expressed by SIF currently does not include proposals or recommendations for any unilateral or interim measures, such as the digital tax package proposed by the EU. A certain degree of skepticism was expressed in connection with possible turnover based taxes, or taxes limited to certain market areas, as leading to potential double- or over-taxation, and not conducive to achieving a global consensus. Switzerland recently completed an important step on the roadmap for a comprehensive update of its corporate tax system.[2] The reformed corporate tax system further aligns with the existing post-BEPS taxation principles, with new rules and policies on the tax treatment of intellectual property being a material part of the package. A number of potential future taxation approaches flowing from the current OECD discussions have the potential of undermining the tax policy as well as the intended economic effects of the currently reformed Swiss corporate tax system. While no specific tax legislative initiatives have been proposed or discussed yet, the challenges of dealing with increasingly digitalized business models are not foreign to the Swiss regulatory authorities. An example is the recently introduced update to the law on gambling, with particular focus on its online aspects. New regulations require certain online gambling houses to have a physical presence in Switzerland in order to receive a license. While not driven primarily by tax policy considerations, such changes effectively result in bringing parts of the online gambling business within the remit of the Swiss taxation system.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

Switzerland and its economy are regularly listed at the top of various rankings dealing with innovation and competitiveness in various market when it comes to the development of new technologies, patents and other intellectual property assets. A large number of MNE groups have centralized the intellectual property related parts of their value chains in Switzerland. The Swiss tax system has, for a number of years, been considered as attractive for business models where centralized development, application and exploitation of intellectual property plays a key role - from the multinational pharmaceutical companies, to various other technology or consumer product-related industries. The ongoing process of delivering the Swiss corporate tax reform has as one of its core components, the objective of safeguarding the attractiveness of Switzerland as a location for intellectual property-

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focused business models, for existing and potential inbound taxpayers. Potential adoption of new rules that would undermine this tax environment is thus met with, at best, caution expressed by SIF as well as the business community.SwissHoldings[3] (a business federation representing the interests of Swiss based multinational enterprises) and economiesuisse[4] (a federation representing approximately 100,000 companies from all business sectors and regions of Switzerland with a collective work force of approximately 2 million people) issued a joint reply as part of the public consultation process on the current OECD discussions surrounding tax challenges of the digitalization of the economy. The public comments by these two major business federations outline their reservations about the current discussions at the OECD, in which the discussions regarding the challenges arising from the digitalizing economy are not clearly separated from the concerns related to tax avoidance. Consequently, they propose a clear separation of the discussion on challenges related to the digitalization of the economy (Pillar 1) from the global anti-base erosion proposals (Pillar 2).

The federations also questioned the rationale for the potential departure from the recently finalized changes to international taxation principles, as a result of BEPS, particularly changes related to BEPS Action Items 8 – 10.

They further argued that for it to be possible for the stakeholders to provide meaningful comments, there needs to be more clarity about the actual definitions of the proposed measures and their underlying parameters, as well as the macroeconomic impacts of shifting taxing rights towards the market jurisdictions.

The user participation based approach to taxation, combined with the expansion of the scope of the proposed changes to the digital activities of traditional businesses was further criticized as potentially leading to "hyper segmentation and complexity."

In addition, the public consultation comments clearly identify the jurisdictions that stand to be materially disadvantaged by the new approaches, i.e., jurisdictions with predominantly export-focused businesses and R&D intensive business models – matching the general profile of a large part of modern Swiss economy.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy?

The existing local as well as international taxation principles, including the latest changes brought about by BEPS and the Swiss corporate tax reform, are currently considered to be a sufficient basis for appropriately capturing the value created within the digital and digitalized business models of Swiss taxpayers. As can be seen from the public consultation response by the government bodies (i.e., SIF) as well as business representations (i.e., *SwissHolding / economiesuisse*), there is no immediate identifiable need for change. While the modified residual profit split and fractional apportionment approaches could potentially be beneficial if they result in simplification and consistent international application – the underlying conditions for this, such as clarity of definitions, general consensus, and coherent implementation of underlying principles are considered to be a high threshold to meet.

Switzerland follows the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations for purposes of applying the arm's length principle, as well as the general transfer pricing best practices related to pricing and testing the compliance of transactions taking place within MNE groups. The primary challenges in connection with the new approaches are linked to the lack of clarity on their practical application, the departure from long established principles, and the potential material impact on the taxpayers and the tax revenues of the state. The existing level of detail on the proposed new taxation approaches outlined under Pillar 1 does not currently suffice for an informed discussion about the practical challenges of applying some of the concepts in practice. The warning from *SwissHolding* and *economiesuisse* about the risk of a "hyper segmentation and complexity" burden to the taxpayers illustrates some of the potential challenges. From an accounting perspective, it is unclear how the fractional apportionment approach would be applied, primarily for jurisdictions like Switzerland, where the applicability of Swiss GAAP FER, IFRS or US GAAP is possible for MNE groups. In general, a material degree of uncertainty as to the actual application of the proposed approaches remains, which has been recognized in the latest draft workplan published by the Inclusive Framework. The implementation of the proposed changes would likely lead to the abolition or material adjustment of some established taxation concepts, which took a significant amount of time to agree upon, apply, and develop experience with. Whether the concept of a permanent establishment or the increasingly popular application of the profit split method – the changes discussed by the Inclusive Framework would likely constitute the largest change to the international tax principles in a generation. For countries such as Switzerland, which follow the established definition of the arm's length principle and its application via the OECD guidelines on transfer pricing method selection and application, the cost of change as compared to potential benefits appears to be high. This is closely related to the presumed practical impact of the currently discussed approaches on the tax base and tax revenue collected. While little information is available on the details regarding the practical application of the approaches discussed under Pillar 1, there is a growing consensus that these would have a largely negative impact on export-focused and R&D intensive markets, such as Switzerland. From a Swiss perspective, this can be considered materially at odds with the currently applicable transfer pricing principles of taxing profits based on the location where the value is primarily created, taking into account the functions performed, risks assumed and valuable assets applied. Sacrificing the existing compromise, established at the conclusion of the BEPS project, appears to be a very high cost to pay – particularly considering that the proposed new approaches appear to involve a material number of practical challenges, while potentially still carrying a risk of double or over-taxation.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

The recent focus of Swiss-based MNEs has been on the future impact of the currently progressing Swiss corporate tax reform. While Swiss businesses have been closely following the developments and proposals in connection with taxation of the digitalized economy, both at the OECD as well as the EU level, until very recently there was still not enough clarity to determine the potential future impact. Considering the formal Swiss position against taking unilateral measures, and its cautious approach toward disrupting the existing established taxation principles, the majority of MNEs with presence in Switzerland are currently awaiting more clarity on the possible future approaches. As can be seen from the public consultation comments provided by the Swiss business federations, doubts are being raised about the additional burden on the taxpayers that may be brought about by the new requirements surrounding segmentation of business financial data, tracking of user related activity or determining application of the new proposed methods from an accounting perspective. The recent communication by the Inclusive Framework has brought this discussion to the attention of Swiss based MNEs, who are beginning to realize that the scope of the proposed changes will not only be linked to the MNE groups and business models operating primarily online digital business models – but will have a wide ranging impact on the global economy as a whole, including traditional business models not currently considered to be closely linked with the typical digital economy industry areas. Initial discussions are being held between select Swiss based MNEs and their advisors as to the simulation of potential impacts of the Inclusive Framework's proposals, and the effect this will have on the effective tax rates, tax compliance aspects, and the operational side of the business.

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NOTES

[1] Formally communicated in January 2019 and referred to on the official SIF website.

[2] The public vote on approval of the Corporate Tax Reform III returned a "Yes" on the 19th of May 2019.

[3] *https://swissholdings.ch/*

[4] *https://www.economiesuisse.ch/*

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United Kingdom

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

The UK has in recent years been active in pursuit of plans to address the taxation challenges created by the digitalisation of the economy, as well as being a significant contributor to the debate on the development of digital taxes in the OECD and the EU. Though the UK has repeatedly asserted that the OECD is the correct forum for the development of tax measures adapted for the digitalised economy, this has not prevented the UK's announcing unilateral measures of its own to address perceived failings in the international tax framework.[1]

The UK's enacted measures to tackle the perceived problems have taken a variety of forms, including introduction of the Diverted Profits Tax, extension of indirect tax measures and, most recently, the imposition of withholding tax on payments for IP held offshore. An interim turnover-based Digital Services Tax is currently in draft, while the UK is a strong advocate for long-term reform of the international tax rules to take account of the value created by user participation.

Nevertheless, the UK continues to express support for the principle of the international tax framework that the profits of a business should be taxed in the countries in which it creates value.[2] Its emphasis on unrecognized user-created value places it firmly in the camp of those countries identified by the OECD as taking the view that the challenges to the international tax system are confined to certain highly digitalised business models and may be addressed through targeted changes to the existing tax rules, including a reconsideration of the rules relating to profit allocation and nexus.[3]

Diverted Profits Tax ("DPT")

The UK's willingness to act unilaterally to address perceptions of corporate tax avoidance in an increasingly digitalised economy was given early expression in 2015, while the OECD was still developing a consensus approach on anti-BEPS measures, when the UK controversially introduced the DPT.[4] DPT is levied at 25%, higher than the standard corporate tax rate of 19%, targeted at profits considered to have been artificially diverted from the UK, identified under two principal rules: an avoided permanent establishment rule and an alternative provision rule. DPT was referred to colloquially as the "Google tax" by government officials, in a reference to accusations of tax avoidance made by politicians against the US internet group regarding its business in the UK. In practice, however, disclosure of the identity of a number of those companies significantly affected by the tax suggests that DPT has had a far greater impact on traditional "bricks and mortar" businesses than on its nominal target.

The anticipated Exchequer impact of DPT at the March Budget 2015 was £25 million in 2015/16, £275 million in 2016/17 and £360 million in 2017/18, comprising DPT receipts paid as a result of HMRC's intervention and additional corporation tax arising from behavioural change, where businesses have changed their structures or transfer pricing arrangements without intervention from HMRC.[5] HMRC's published statistics for 2016/17 disclosed a DPT yield of £31 million in 2015/16 and £281 million in 2016/17.[6] HMRC disclosed an equivalent figure for 2017/18 of £388 million.[7]

Indirect tax measures

The tax challenges posed by digitalisation have led the UK to adopt measures targeted at the VAT system. The EU introduced changes to VAT rules from 1 January 2015, consistent with the B2C recommendations of the OECD International VAT/GST Guidelines for the application of the destination principle to the treatment of cross-border digital services to consumers.[8] In line with its EU membership, the UK implemented the rules from 1 January 2015.[9] The rules are designed to produce a better match between tax paid and the location of consumers by taxing supplies of digital services to consumers on the basis of customer location (where the customer belongs) rather than supplier location. This change was estimated to bring in an additional £300 million per year for the UK.[10]

The UK government has also taken measures to prevent online VAT fraud, which was estimated to have cost between £1 billion and £1.5 billion in lost tax revenue in 2016/17, through the failure of online traders operating through marketplaces such as Amazon and

eBay to charge VAT on their sales.[11] Under Finance Act 2018, HMRC was given extended VAT powers from 15 March 2018 to ensure that online sellers pay the right amount of tax by making online marketplaces accountable for VAT fraud committed by online sellers on their platforms, through bringing them within the scope of joint and several liability rules.[12]

Current measures

The UK has been an active participant in the EU's attempts to develop an EU-wide digital tax, but in view of the decision of the UK's electorate in 2016 to leave the EU,[13] and the fact that the proposals for an EU digital tax have so far come to nothing, any role played by the UK in the development of a common EU digital tax and any impact on the UK of such development are not given detailed treatment below, focus being on the unilateral measures announced by the UK.

HM Treasury issued a first position paper on corporate tax and the digital economy in November 2017 as part of its Autumn Budget.[14] In this paper it set out its position that the international tax framework needs to be responsive to the changing nature of economies in the digital age, ensuring that UK corporation tax payments are commensurate with the value digital businesses generate from the UK market and specifically the participation of UK users.[15]

The UK proposed to achieve this through a threefold approach:

(a) By pushing for reforms to the international tax framework, to ensure that the value created by the participation of users in certain digital businesses is recognized in determining where these businesses' profits are subject to tax.

(b) By exploring interim options to raise revenue from digital businesses that generate value from UK users, such as tax on revenues that these businesses derive from the UK market.

(c) By taking more immediate action against multilateral groups, primarily in the digital sector, which achieve low-tax outcomes by holding their valuable intangible assets in low-tax countries where they have limited economic substance.[16]

The UK's subsequent measures may be examined within this tripartite framework.

(a) Reform to the International Tax Framework

The UK has continued to develop its thinking on the importance of user participation and its proposals for long-term reform expressed in its original 2017 position paper. HM Treasury updated its position paper on 13 March 2018 to reflect feedback from stakeholders and set out its position in more detail.[17] In this updated paper, the UK government set out its more developed view that:

- The participation and engagement of users is an important aspect of value creation for certain digital business models, likely to be reflected through several channels, such as the provision of content or as a contribution to certain intangibles such as brand.
- The international tax framework should be reformed to reflect the value of user contribution.
- In the absence of such reform, interim measures such as revenue-based taxes need to be considered.[18]

The UK's stated position is that it believes that a country should be entitled to tax the profits of a business that result from activities, human enterprise and innovation that take place within its jurisdiction, irrespective of where the business's goods and services are ultimately sold.[19] It maintains that user participation – the process by which users can create value for certain types of digital businesses through their engagement and active contribution – is an important value driver for certain types of digital businesses and one that deserves recognition in the rules for allocating taxing rights and taxable profits between countries.[20]

The government identifies four channels through which user-created value can arise, all falling under the classification of online networks: social media platforms, search engines, file-sharing platforms and online marketplaces.[21]

By way of example of user-created value, the government cites user-generated content on social media platforms, which underpins the ability of the business to attract other users and to generate revenues.[22] A contrast is drawn however with the mere collection of data on users, which may be of significant value to a business, whether sold or used to improve the targeting of advertising. The UK government does not take the view that such passive sourcing of data entitles the UK to a taxing right on business profit.[23]

To take account of the value created by users, the government seeks to recognize that the value that a business derives from user participation sits within the companies in a group that receive the residual profits of the business.[24] It proposes reallocating profits from the residual profit owners to user jurisdictions, in a way that minimises the impact on the current principle by respecting the arm's length reward for activities in the group where comparables are available.[25]

The UK's suggestion for a possible approach is to reward user-created value through a percentage share of the residual profit realized by principal companies in the group, after routine functions in the group have been remunerated with an arm's length return. The share would be designed to approximate the value that users generate for the business.[26] The user-created value would then need to be allocated to different user jurisdictions, for which purpose the UK suggests an allocation key that would take account of variations in individual user value, such as by looking at active users or at revenues attributable to users in a jurisdiction, the UK's preferred option.[27]

To achieve this, the government recognizes that modifications would be required to Articles 5, 7 and 9 of the OECD Model Tax Convention, as well as modifications to the OECD transfer pricing and profit attribution guidelines underpinning those articles.[28]

The UK's activity at the international level can be seen in the expression of the "user participation" proposal in the OECD's public consultation document *Addressing the Tax Challenges of the Digitalisation of the Economy*.[29] The first of the three proposals included in the OECD's consultation, together with the modified residual profit split approach underpinning it, represents a direct transfer of the UK's proposal for long-term reform.

(b)Digital Services Tax ("DST")

On 7 November 2018, frustrated at the slow pace of development of a long-term solution at the international level, HM Treasury published a detailed new consultation, on a proposed revenue-based Digital Services Tax, to be introduced from April 2020 as an interim measure until it is replaced by a comprehensive global solution.[30]

The tax is targeted at the revenues of certain digital business activities, aimed at ensuring that the value derived from UK users is reflected in tax paid. It is intended to be a narrowly targeted 2% tax on the UK revenues of digital businesses that are considered to derive significant value from the participation of their users and will be legislated in Finance Bill 2019-20.[31]

The UK government introduced draft legislation on 11 July 2019, which confirms many of the details seen in the consultation document:[32]

- The tax will be applied by reference to specific digital business activities, which the government considers to derive significant value from users;

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- The business activities within scope will be the provision of a social media platform, search engine or online marketplace;[33]
- The tax will apply to the revenues generated by these taxable business activities, where those revenues are linked to the participation of a UK user base;
- A UK user is defined as an individual who "is normally in the United Kingdom" or otherwise a person who "is established in the United Kingdom";[34]
- A business will only be subject to the Digital Services Tax if it:

o generates more than £500 million in global annual revenues from in-scope business activities;

o generates more than £25 million in annual revenues from in-scope business activities linked to the participation of UK users;[35]

- Businesses will not have to pay tax on their first £25 million of UK taxable revenues;
- Where one party to an online marketplace transaction is a UK user, all revenues will be treated as from the UK, unless another user is in another country with its own equivalent of the DST, in which case the UK revenue will be reduced to 50% ;[36]
- The tax will include a 'safe harbour' which will allow businesses to elect to make an alternative calculation of their DST liability, and will be of value to those with very low profit margins;[37]
- The tax will be deductible against UK corporation tax under existing principles, but it will not be creditable.[38]

The draft legislation contains a clause requiring formal review of the tax in 2025.[39] HM Treasury has stated that the DST will be disapplied if an appropriate global solution has been successfully agreed and implemented by that date.[40] HM Treasury claims that the DST will raise £1.5 billion over four years.[41] The Exchequer impact is assessed to be £5 million in 2019/20, £275 million in 2020/21, £370 million in 2021/22, £400 million in 2022/23 and £440 million in 2023/24.[42]

(c) Offshore Receipts in respect of Intangible Property ("ORIP")

With respect to the last of the measures announced in the 2017 Budget, the UK government launched a consultation on 1 December 2017 on extending the royalty withholding tax regime.[43] This policy targets payments for the exploitation of certain property or rights in the UK made to connected parties in low- or no-tax jurisdictions, which will now be subject to withholding tax. It is aimed at addressing situations predominantly seen in digital businesses, whereby large multinationals, often US, reduce their effective tax rate by holding their IP in low tax offshore jurisdictions.[44]

A summary of responses was published in October 2018, together with draft legislation on the treatment of offshore receipts in respect of intangible property.[45] This was introduced in Finance Act 2019, resulting in a new UK withholding tax on royalties, coming into effect on 6 April 2019.[46] Targeted anti-avoidance rules will have effect for arrangements entered into on or after 29 October 2018. The legislation applies a 20% UK income tax liability on payments to associated companies relating to the exploitation of IP and other property rights in the UK, where UK sales exceed £10 million annually and the recipient company is in a country which does not have a full double tax convention with the UK containing a non-discrimination article. Included within the income in scope of the measure are embedded royalties and income from the indirect exploitation of intangible property in the UK market through unrelated parties.

Following further engagement with stakeholders, on 24 May 2019 HMRC released draft secondary legislation amending the ORIP legislation and launched a technical consultation, with responses due by 19 July 2019.[47] This includes extension of the scope of the income tax charge to cover payments to no- or low-tax jurisdictions, even where there is a full double tax convention in place. Draft guidance has been released for inclusion in HMRC's International Manual.[48] Final Regulations are expected in the autumn 2019.

The anticipated Exchequer impact of ORIP at Budget 2018 was £475 million in 2020/21, £275 million in 2021/22, £220 million in 2022/23 and £165 million in 2023/24.[49]

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalised economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

HM Treasury has identified the overarching challenge posed by the digitalisation of the economy as the failure of the international tax framework to achieve the principle that the profit of an MNE should be taxed in the countries in which it creates value, particularly in the context of certain highly digitalised business models that derive value from the participation of their users, leading to a mismatch between where business profits are taxed and where value is created.[50]

The Treasury set out the challenges that it perceived to the current international tax framework in its original 2017 position paper on *Corporate tax and the digital economy*.[51] These were described under three broad areas:

(a) The continued risk of Base Erosion and Profit Shifting.

While the impact of the BEPS recommendations and the unilateral action undertaken by the UK through DPT (for which, see below) on MNEs' behaviour are acknowledged, the UK government believes that there remain important weaknesses in the international tax framework, particularly challenges associated with the transfer pricing rules, e.g. difficulties in administering the rules where no comparable uncontrolled arrangements exist for applying the arm's length principle to intra-group arrangements.[52]

(b) Increased business centralization.

The government identified further challenges in the administration of the transfer pricing rules and how best to deal with those challenges as a result of increased integration of MNEs and the ability for groups to manage their global operations from a central location. In particular, the government has sought clarification of how those challenges might be exacerbated in business models that are highly digitalised in terms of their inputs, processes and outputs.[53]

(c) User participation in digital businesses.

The failure to capture user-generated value under the existing international tax framework is considered fundamental by the UK government, identifying the need to consider the active participation of users, and the value that their participation creates, in determining how the taxable profits of certain digital businesses are allocated between countries for tax purposes, even where the business does not have a physical presence in the user's jurisdiction.[54]

The specific challenges associated with individual unilateral measures adopted or proposed by the UK are addressed in more detail below.

DPT

Of the unilateral measures introduced by the UK identified above, only DPT has been in place for sufficient time to allow a considered assessment of the consequences. The main challenge of DPT has been to counteract contrived arrangements used by MNEs with business activities in the UK to divert profits from the UK by avoiding a UK taxable presence and/or by other contrived arrangements between connected entities.

HMRC has devoted very significant resources and focus on this tax. As at 31 March 2017, HMRC revealed that it had around 40 specialists dedicated to DPT.[55] While an equivalent figure has not been disclosed for the subsequent year, as at 30 April 2018, there were 365 full time equivalent staff working on international risks, including transfer pricing and DPT.[56]

As identified in government statistics, DPT has proven a useful generator of revenue, with the actual tax yield exceeding the estimates made at the time of introduction. However, in spite of DPT's label as the "Google tax", it is questionable whether its impact on highly digitalised MNEs has been as great as its impact on traditional "bricks and mortar" companies. HMRC issued DPT charging notices to only 22 businesses in 2017/18, but the companies publicly revealed as subject to DPT charging notices are of a very different kind from the high-profile digital giants. These include the beverages business Diageo plc, the trading and mining company Glencore plc, the London Stock Exchange, computer networking equipment business Netgear, Inc. and medical devices company The Cooper Companies, Inc.

Nevertheless, HMRC has claimed significant success in the form of behavioural change, where businesses have changed their structures or transfer pricing arrangements without HMRC's intervention. Of the £388 million additional corporation tax collected in 2017/18, £169 million was attributable to behavioural change. HMRC assesses such spontaneous behavioural change through analysis of corporation tax receipts from businesses considered "high risk" by HMRC's Diverted Profits Project, but to what extent these includes the highly digitalised businesses is not disclosed by HMRC.[57]

Whether DPT has been a successful measure in addressing some of the tax challenges of the digitalised economy or not, there is no doubt that the tax has surpassed HMRC's expectations for generating revenue. MNEs have increased the number of DPT notifications made to HMRC year on year, from 48 in 2015/16 to 145 in 2016/17 and 220 in 2017/18, suggesting that they are adopting an increasingly cautious approach in notifying HMRC of potential liabilities.

HMRC's ongoing investment in DPT is revealed by HMRC's disclosure of a planned programme of investigation into a number of MNEs that may be diverting profits and the unveiling of a new Profit Diversion Compliance Facility on 10 January 2019, through which HMRC encourages MNEs to review and to bring their transfer pricing and DPT compliance up to date.[58] It is still too early to say what level of uptake this facility will receive from MNEs.

ORIP

The challenge identified by HM Treasury in terms of the design of the ORIP was how to level the playing field for businesses competing in the UK market, where MNEs, primarily in the digital sector, have been reducing their effective tax rate by holding their valuable intangible assets in low-tax countries where they have limited economic substance and thereby gaining an unfair competitive advantage.[59]

Respondents to the original consultation raised several challenges over the use of withholding tax as a collection mechanism, particularly with respect to economic double taxation and compliance burdens on businesses.[60]

The primary ORIP legislation was introduced only in April 2019, while the regulations and HMRC guidance relating to ORIP are still in draft form. Consequently, most MNEs potentially affected are still likely to be assessing the impact of the new rules. As with DPT, these rules will have a wider impact than just on highly digitalised businesses.

It is to be expected that some groups may have moved intangible property out of an affected territory already to avoid the withholding tax, while others may still be planning to do so. The proposed inclusion of certain low-tax jurisdictions in scope of the regulations even where the UK has a full double tax convention means that MNEs that had previously analysed the impact of the primary legislation may need to reassess whether they are impacted.

DST

In terms of the development of DST, HM Treasury has identified the fundamental challenge posed by the failure of the international tax framework to take account of the value that highly digitalised business models derive from the participation of their users to be the mismatch between where business profits are taxed and where value is created.[61]

HM Treasury acknowledges the limitations and challenges of revenue-based taxes and recognizes that the DST does not represent a sustainable long-term solution to the issue.[62] Nevertheless, it believes that revenue-based taxation has a purpose, in demonstrating the importance that the government attaches to the issue and in helping to address what it perceives as the unfair and distortive market outcomes that will persist until a multilateral solution is agreed and implemented.[63]

Within the DST consultation, the government sought views on the detailed design, implementation and administration of the DST, covering a range of issues, including:

- Identification of whether business activities are in-scope or not.[64]
- Administrative challenges associated with isolating in-scope business activities integrated with other activities undertaken by the group.[65]
- Identification of revenues attributable to in-scope business lines.[66]
- Definition of a user.[67]
- Identification of the location of the user.[68]
- Division of taxing rights to a transaction involving a UK and a non-UK user with other countries also implementing a DST.[69]
- Design of a safe harbour.[70]
- Deductibility of DST as an expense for corporation tax purposes.[71]
- Compatibility of DST with double tax conventions.[72]
- How to ensure compliance by non-resident businesses without a UK permanent establishment.[73]

The consultation closed on 28 February 2019, and draft DST legislation was only released on 11 July 2019. It remains too early to assess how MNEs will react in practice. However, the reaction of the trading partner most affected by the action has been swift, exposing the reality that the tax is effectively targeted at US multinationals.

In response to the announcement of Chancellor of the Exchequer Philip Hammond in the Autumn 2018 Budget of the introduction of DST, Kevin Brady, Chairman of the US House of Representatives' Ways and Means Committee, released the following statement on 31 October 2018:

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The United Kingdom's introduction of a new tax targeting cross-border digital services – which mirrors a similar proposal under consideration in the European Union – is troubling. Singling out a key global industry dominated by American companies for taxation that is inconsistent with international norms is a blatant revenue grab.

The ongoing global dialogue on the digital economy through the OECD framework should not be pre-empted by unilateral actions that will result in double taxation. If the United Kingdom or other countries proceed, that will prompt a review of our U.S. tax and regulatory approach to determine what actions are appropriate to ensure a level playing field in global markets.[74]

At a time when the UK is struggling to extricate itself from the EU, while exploring the possibility of a new trade deal with the US, the timing of the introduction of the DST is likely to be perceived as provocative. US Senator Ron Wyden, the most senior Democrat on the Senate Finance Committee, was quoted on 11 July 2019, following the introduction of the draft DST legislation, as saying, "I met with the UK officials earlier and said, 'You expect a trade agreement with the United States and the UK. It will not happen with your digital services tax. Period. Full stop.' "[75]

The significance of the launch on 10 July 2019 of the US Trade Representative's 301 investigation, a trade probe, into France's digital services tax, holding out the possibility for the US to take retaliatory action, including tariffs, for discrimination against US commerce, is unlikely to be lost on the UK government.

In that context, the resignation on 24 July 2019 of Philip Hammond, a man deeply committed to the UK's remaining within the EU, in anticipation of his dismissal as Chancellor by new pro-Brexit Prime Minister Boris Johnson, removes the principal proponent of the DST. The new leadership is likely to be more closely aligned with US interests, though the government holds power by the narrowest of margins, with a number of dissenting pro-EU individuals in its midst. In the face of such political discord, it would be idle to speculate on the future passage of the DST.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalisation of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

As described above, the modified residual profit split (MRPS) approach forms part of the mechanics of the UK's "user participation" proposal, selected for further examination in the OECD's work plan.[76] It may be assumed therefore that the MRPS method is favoured by the UK as the means of tackling the tax challenges of the digitalisation of the economy, given HM Treasury's promotion of the user contribution approach. A version of the MRPS is described in the March 2018 position paper on *Corporate tax and the digital economy*.[77]

HM Treasury sees the advantage of MRPS as delivering the alignment of taxable profits and value creation in a way that minimises changes to the relevant articles of the Model Tax

Convention and remains aligned with the existing arm's length principle by awarding an arm's length return to companies undertaking activities for which comparables are available and allocating a share of residual profits to user jurisdictions to recognise the value created through user participation.[78]

The main difference between MRPS and fractional apportionment is that the former singles out the routine profit and then allocates the residual (in accordance with a yet to be determined allocation key), whereas the latter seeks to allocate the whole system profit. Depending on the allocation keys chosen, it is possible that both approaches would largely resemble each other in practice (if some proxy were found for routine activities). From a practical perspective, fractional apportionment may eliminate the compliance burden of applying the arm's length principle for routine activities, if no safe-harbour rules are included for routine profits under MRPS.

While the application of the arm's length principle to determine an appropriate return to routine activities under MRPS allows a semblance of accuracy and benefits from following established principles in part, the major challenge – how to treat the residual profit or loss – exists for both proposals.

HM Treasury itself acknowledges that there are a number of challenges associated with its proposed MRPS method in its March 2018 position paper. It recognises that it is not likely to be possible to use the arm's length approach for measuring the share of the residual profit attributable to user-created value, or for determining how that share then breaks down between specific user jurisdictions.[79]

Specifically, HM Treasury identifies three challenges:

1. The risk that an approach that links users with a company different from the principal companies could lead to significant divergence between those entities' tax and accounting profits.[80]

2. MRPS assumes the existence of a principal company in the group that remunerates related service providers and then realises the residual profits of the business. However, HM Treasury notes that:

o There could be multiple companies in the group taking a share of residual profit.

o There could be a number of reasons for those companies taking a share in the results of the business e.g. the management of IP or the control of important risks.

o There would be practical challenges in measuring residual profit for a specific business line within a group, and coping with currency differentials and differences between countries in the calculation of taxable profit.

o There could be residual losses within a business, and/or significant variation between the contributions of different countries to a global residual profit figure.[81]

3. There could be administrative burdens if the approach taken resulted in multiple companies within a digital business being affiliated with users and having permanent establishments in a user jurisdiction.[82]

Both MRPS and fractional apportionment are effectively an iteration of formulary apportionment, so fundamental challenges are common to both. It is hard to conceive that countries' self-interest has diminished to such a degree as to render the relevant concerns detailed in Chapter I of the OECD Transfer Pricing Guidelines with respect to global formulary apportionment invalid. [83] The Guidelines state that "OECD member countries [. . .] do not consider global formulary apportionment a realistic alternative to the arm's length principle",[84] and hold that "it would not be acceptable in theory, implementation or practice".[85]

Among the reasons given for this, the OECD identifies above all the difficulty of implementing a system that will protect against double taxation and ensure single taxation, owing to the level of international coordination and consensus required, noting:

- The difficulty of achieving global consensus on adoption of the approach, the global tax base of the MNE group, the use of a common accounting system and apportionment factors.[86]
- The expectation of disagreement between countries over the weighting of formulae, so as to favour factors maximising each country's own revenue.[87]
- The arbitrariness of predetermined formulae.[88]
- The absence of a clear mechanism to deal with exchange rate movements.[89]
- Potentially intolerable compliance costs and data requirements.[90]
- The valuation of intangibles would remain a key contentious area if costs or assets were used as an allocation key.[91]
- Taxation on consolidated profits may be conceptually incompatible with withholding taxes.[92]
- Customs (and other) rules may still require the application of the arm's length principle.[93]

The principles underlying these concerns remain applicable to MRPS and fractional apportionment. The difficulty of reaching consensus on agreed factors for the apportionment of the tax base and the weighting to apply is no closer to resolution now than when the OECD Guidelines were first devised. The questions of what is to be treated as routine and what non-routine, the relative weighting of intangibles and identification and weighting of allocation keys pose as much difficulty now as ever in terms of achieving consensus. It will be necessary to agree at what level the approaches are to be applied (globally, by geographical region or by business line), given how different the outcomes will be if a business is at different stages of development and profitability in different markets. Similarly, consensus will need to be achieved on the treatment of losses and historic investment.

To the extent that the proposals foresee a parallel existence of the arm's length principle and formulary apportionment, a potential new arena of conflict is created over priority of application of the arm's length principle or formulary apportionment.

Of all the issues, the key problem will be consensus over revenue allocation. While anti-BEPS measures and proposals such as the Global anti-base erosion proposal[94] may well enlarge the global tax base, there will be winners and losers in any new revenue allocation scheme, if the proposals to award more revenue to market jurisdictions are effective. If every country participating in the Inclusive Framework wants to be at least as well off under a new regime as under the status quo, and if at least some countries want to increase revenue, by definition this will be at the expense of the taxpayer. The concern in the business community is that a large part will in fact arise from economic double taxation. Countries may no longer argue over what is "arm's length" but will rather fight over the definition and interpretation of the allocation keys.

It is not at all clear that moving away from a principles-based approach towards a rules-based approach will bring the effect desired by those countries pressing for a solution to increasing digitalisation, particularly in an environment where business models are evolving more quickly than regulators are able to draw up new rules.

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4. As the OECD works to develop a harmonized global approach to the taxation of the digitalised economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

The most pressing uncertainty currently facing MNEs in the UK stems from the UK's long-drawn-out exit from the EU rather than from any of the various proposals tabled at the OECD concerning the taxation of the digitalised economy. The UK was originally scheduled to leave the EU on 29 March 2019; even so, many MNEs are still adopting a wait-and-see attitude before acting. The terms of the UK's departure from the EU, now set back to 31 October 2019, remain undecided. The failure of former Prime Minister Theresa May to negotiate terms of departure from the EU acceptable to Parliament and the success of the newly formed Brexit Party in the European elections have combined to see off the erstwhile Prime Minister. The appointment of Boris Johnson, who campaigned vigorously in favour of leaving the EU at the time of the 2016 referendum, as the new Prime Minister on 24 July 2019 may yet result in significant policy changes.

To the extent that MNEs in the UK are preparing for uncertainty, most of those that may be affected are presently more focused on preparing for the possible outcomes of Brexit. Even so, many have still not made any changes to their business models, owing to the level of uncertainty over what outcome to prepare for. As such, the evolution of a global approach to the taxation of the digitalised economy is still at far too theoretical a stage for MNEs to be adapting their operations or business models. It would be premature for most of them to undertake major changes now, without at least an indication of which, if any, of the various proposals will prevail.

That said, the proliferation of double taxation that would likely result from a potpourri of unilateral measures imposed by different countries is of concern to MNEs in the UK, with the result that many companies are active in the ongoing consultation process.

Nevertheless, Brexit planning has required some companies, particularly those operating in regulated industries at particular risk of business interruption in the event of a "no-deal Brexit", to adapt their business models in preparation for such an eventuality, so as to maintain access to the EU single market and to provide an uninterrupted service to their clients. Where this has involved some form of transfer of digital activities, it has allowed us to observe in practice some of the challenges that can be anticipated for the segmentation now being spoken of for digital taxation purposes.

Some MNEs have been required to segment certain digital activity from other business activities as they transfer discrete operations to member states of the reduced EU in preparation for the departure of the UK. What is clear is that such digital activity is often integrated with more conventional activities, both for reporting purposes and in terms of the functions of employees, whose roles may cross boundaries that are not to be defined in simple terms of digital and non-digital. It can be a very difficult and arbitrary task to isolate the one from the other, as the reality of the operation of the business may not fall neatly into the classifications for tax purposes. Where there has been no business need for segmentation, financial reporting systems are typically not set up for such purposes.

In the absence of specific requirements, it is not to be expected that MNEs currently assemble or report information in a way that segments digital activities in a form consistent with as yet unformed standards. Clearly, MNEs can, if required, take steps to segment their financial information in any way that is specified, but it is rare that the information will already be segmented in the exact way that tax requires and the necessary changes will usually not be achievable without very significant investment, both in time and in cost.

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[15] *Id.*, 1.5.
[16] *Id.*, 1.6.
[17] HM Treasury (March 2018).
[18] *Id.*, p.3
[19] *Id.*, para. 1.3.
[20] *Id.*, para. 2.1.
[21] *Id.*, para. 2.45.
[22] *Id.*, para. 2.11.
[23] *Id.*, para. 2.40.
[24] *Id.*, para. 3.11.
[25] *Id.*, para. 3.14.
[26] *Id.*, para. 3.18.

[27] *Id.*, para. 3.26.
[28] *Id.*, para. 3.54.
[29] OECD (13 February 2019), *Addressing the Tax Challenges of the Digitalisation of the Economy*, 2.2.1.
[30] HM Treasury (November 2018).
[31] *Id.*, 1.17.
[32] HM Revenue & Customs (11 July 2019), *Introduction of the new Digital Services Tax*.
[33] Draft Finance Bill 2019-20 (11 July 2019), Digital services tax, s.4.
[34] *Id*., s.5.
[35] *Id*., s.7.
[36] *Id*., s.11.
[37] *Id*., s.9.
[38] Digital Services Tax Draft Guidance (11 July 2019), DSTXXXX: Interaction with Corporation tax.
[39] Draft Finance Bill 2019-20 (11 July 2019), Digital services tax, s.31.
[40] HM Treasury (November 2018), 1.20.
[41] HM Treasury (October 2018), *Digital Services Tax:Budget 2018 brief*.
[42] HM Treasury (November 2018), Ch. 13.
[43] HM Revenue & Customs/HM Treasury (1 December 2017), *Royalties Withholding Tax: Consultation document*.
[44] *Id.*, 1.4.
[45] HM Revenue & Customs/HM Treasury (29 October 2018), *Offshore receipts in respect of intangible property (previously Royalties Withholding Tax): Summary of Responses*.
[46] Finance Act 2019, Sch. 3 inserted a new Chapter 2A into Part 5 of the Income Tax (Trading and Other Income) Act 2005.
[47] (Draft) Income Tax (Trading and Other Income) Act 2005 (Amendments to Chapter 2A of Part 5) Regulations 2019.
[48] INTM870000 – Offshore Receipts in respect of Intangible Property (ORIP).
[49] HM Treasury (29 October 2018), *Budget 2018,Table 2.2: Measures announced at Autumn Budget 2017 or earlier that will take effect from November 2018 or later (£ million)*.
[50] HM Treasury (November 2018), 1.4.
[51] HM Treasury (November 2017), Chapter 3.
[52] *Id.*, 3.5.
[53] *Id.*, 3.13.
[54] *Id.*, 3.22.
[55] HM Revenue & Customs (13 September 2017).
[56] HM Revenue & Customs (31 July 2018).
[57] HM Revenue & Customs (31 July 2018), *Diverted Profits Tax Yield: methodological note*.
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[59] HM Treasury (November 2017), 1.6.
[60] HM Revenue & Customs/HM Treasury (29 October 2018), p.5.
[61] HM Treasury (November 2018), 1.6.
[62] *Id.*, 1.13.
[63] *Id.*, 1.14.
[64] *Id.*, 3.34.
[65] *Id.*, 3.25.
[66] *Id.*, 4.7.
[67] *Id.*, 5.3.
[68] *Id.*, 5.20.
[69] *Id.*, 5.29.
[70] *Id.*, 7.20.
[71] *Id.*, 8.2.
[72] *Id.*, 10.3.
[73] *Id.*, 12.30.
[74] The Committee on Ways and Means (31 October 2018), *Brady Statement on U.K. Tax on Digital Services*.
[75] Bloomberg Tax, Daily Tax Report: International (11 July 2019), *Digital Tax Would Kill Hope for U.S.-U.K. Trade Deal: Lawmakers*.
[76] OECD (13 February 2019), para. 22.
[77] HM Treasury (March 2018), 3.18.
[78] *Id.*, 3.58.
[79] *Id.*, 3.60.
[80] *Id.*, 3.46.
[81] *Id.*, 3.49.
[82] *Id.*, 3.51.
[83] OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, 1.15-32.
[84] *Id.*, 1.21.
[85] *Id.*, 1.15.
[86] *Id.*, 1.22.
[87] *Id.*, 1.23.
[88] *Id.*, 1.25.
[89] *Id.*, 1.26.
[90] *Id.*, 1.27.
[91] *Id.*, 1.28.
[92] *Id.*, 1.30.
[93] *Id.*, 1.31.
[94] OECD (2019), *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, Ch. III.

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United States

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1. Please describe your jurisdiction's (i) preliminary discussions or consultations; (ii) proposed measures; and/or (iii) enacted legislation associated with the taxation of digital activities. The discussion should include income tax and/or value added tax measures. Is there an estimation of the tax revenues that would be collected as a result of the enactment of these measures?

While we are not directly privy to the negotiations and discussions between the United States government and other government organizations or with industry, from the various reported comments and letters and our work in this area we can draw the following broad inferences on the US position:

- The United States economy has been very successful at developing its digital economy, and has been at the heart of the international discussion of proposed changes to the taxation of this now significant part of the global economy and its future development. Discussions have been held with other governments, individually and collectively, through the Organization for Economic Co-operation and Development (OECD), as well as with industry through various forums.
- The wheels of tax change in the United States move slowly, the Tax Cuts and Jobs Act (TCJA) of 2017 was the first major overhaul of the US tax system in over 30 years. No specific measures were proposed or enacted within TCJA related solely to the digital economy for income tax. However, many changes in US tax reform targeted low-taxed foreign income and other operating structures used by digital and other intangible-driven companies, consistent with calls for reform under the OECD Base Erosion and Profit Shifting (BEPS) initiative. In addition, some aspects of TCJA (in particular Global Intangible Low Tax Income, or "GILTI" provisions) effectively impose a minimum tax on global profits for US companies. This type of approach is in line with the focus of Pillar 2 of the OECD taxation of the digital economy initiative. Pillar 2 addresses the development of rules that would permit jurisdictions to tax income where other jurisdictions have not exercised their primary taxing rights or where tax payments on income due are otherwise determined to be low.
- With regard to Pillar 1, nexus and profit attribution questions within the BEPS work plan on the Tax Challenges Arising from Digitalization of the Economy, our view is that the position of the United States might be summarized as follows:
  - o The United States feels strongly that changes should be discussed, negotiated and agreed through international consensus, and not through unilateral actions or the targeting of a subgroup of companies in the digital economy.
  - o Many areas of the economy (and not just the digital economy) are changing and being affected by technology. Therefore a solution to the types of problems being addressed within this initiative should, if they are to have longevity, consider or be adaptable to meet the changes arising as a result of the broader digitizing economy, rather than just a ring-fenced digital economy — a point most countries can agree on.
  - o In the interim, the United States understands that in many countries there is strong domestic political pressure for some form of interim digital economy-specific incremental taxation, and low patience to wait for more fundamental adjustments to the international tax system which may take more time to develop. The United States is, for this reason, in agreement with the 2020 deadline for this G20 project in order to help mitigate risks of unilateral actions by individual countries.
  - o Based on various public statements by current and former negotiators, the United States sees the issue largely as one of recognition and fair taxation of the contributions made to the success of these businesses (and potentially other businesses) by factors at the local market level.
  - o Consistent with this view, the United States was reportedly supporting the "Marketing Intangibles" proposal within the Pillar 1 proposals issued in the February 2019 discussion draft (and discussed at the March 2019 public consultation), rather than the "user participation" or the "significant economic presence" proposals which were also outlined. The marketing intangibles proposal would apply local market contribution-based principles to the recognition of income and taxation for a broader group

of companies and industries than just the digital economy, potentially bringing into its scope other major consumer brand-driven companies with significant interests in the US economy.

  - o This proposal advocated consideration of existing definitions of market intangibles and transfer pricing frameworks where possible, and the consideration of more general attribution methods outside of that framework only where necessary to reach consensus.
  - o The latest OECD Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy (May/June 2019), narrows the focus of development on Pillar 1 questions of nexus profit attribution to (i) a modified residual profit approach method, (ii) a fractional apportionment method and (iii) distribution based approaches, details of which can be read in the OECD paper itself and are not repeated here. The United States is open to any of these as a potential solution if found to be appropriate. At least two of these proposals are in some form connected to transfer pricing concepts while leaving room for divergence to reach consensus.
  - o In terms of a preference between these methods by the United States, we note that the Advanced Pricing and Mutual Agreement (APMA) division of the IRS recently issued a model that they will, in some instances, ask taxpayers requesting APAs or mutual agreement procedures under competent authority to use. This model looks at the issue of contributions from the perspective of a sharing of profits based on the relative value of economic assets which themselves are developed from capitalized historical and current intangible development spend (i.e., a modified residual profit split).

- Given the current international climate of duties and tariffs that seem to be a large part of the current White House administration's international trade strategy, it is worth noting that some US politicians have been vocal on their concerns related to unilateral digital taxation. In an October 2018 letter to the European Commission, the Chairman of the US Senate Committee on Finance, Orrin Hatch, and a ranking member of the committee, Ron Wyden, urged the EU to abandon the EU DST Proposal and use restraint on imposing new taxes on digital companies until consensus is reached within the OECD on the way forward. Hatch and Wyden noted that "[t]he EU DST Proposal has been designed to discriminate against US companies and undermine the international tax treaty system, creating a significant new transatlantic trade barrier that runs counter to the newly-launched US and EU member states to delay unilateral action, and instead refocus efforts on reaching consensus with other leading economies within the OECD on any new digital taxation models." Most recently, in response to the advancement of the proposed French Digital Service Tax (DST), United States senators Chuck Grassley and Wyden, called for US Treasury Secretary Steven Mnuchin to consider using US tax code Section 891 to block France from implementing its digital tax plan. Specifically, in the letter to Mnuchin, they suggested the code Section 891 would enable the Internal Revenue Service to double the US tax rate on French citizens and companies operating in the United States.
- The United States does not have a value added tax system but rather has state level gross sales tax (GST). Issues with GST relating to the digital economy (and in particular responsibility for collecting GST in the absence of nexus) have been part of several US tax controversy cases with the *Wayfair vs South Dakota* decision being the latest such decision.
- Because the United States did not enact any new tax measures specific to the digital economy, there is no scorecard or estimate of the additional costs or tax revenues that might be raised by such measures.

2. What challenges has your jurisdiction faced in the (i) development; (ii) implementation; and/or (iii) tax audit of measures related to the taxation of the digitalized economy? What has been the reaction of multinational enterprises (MNEs) to any of these unilateral measures?

The United States is not trying to implement a non-consensus or unilateral tax system for the digital economy, but rather working within the OECD Inclusive Framework with other nations to develop a solution. US multinationals, within and outside of the digital economy, have been weighing in with comments and proposals, which can be read on the OECD's website landing page for the initiative. While there are strong feelings among digital economy companies that their businesses should not be singled out, a growing number of companies are resigned to some form of change occurring and view a consensus solution as far better than the cacophony of unilateral measures and uncoordinated taxation that seems likely in its absence.

The OECD suggested three proposals in its public consultation document titled, "Addressing the Tax Challenges of the Digitalization of the Economy". Each of the proposals differ in range and scope, but the impact of these proposals in potentially moving away from the arm's length principle, which has successfully underpinned the world tax system for so long, should not be underestimated. There are concerns related to the considerable time it will likely take to achieve consensus between taxing authorities on any of the proposals. Impatience with this consensus-building process has led many countries to act unilaterally or to try to expedite the OECD's consideration of the issue. These proposals are viewed by many in the United States as very blatant and targeted attempts to increase the tax burden on US-based digital companies. Due to these unilateral measures, US digital businesses potentially face a plethora of uncoordinated, unilateral, country-specific digital taxes that are largely, and intentionally, outside the international and tax treaty framework. This potentially leaves them having to navigate three or more different overlapping taxation systems in various countries where their services are used. Until a consensus is reached, the U.S. and a few other countries with large international digital businesses will almost inevitably need to deal with double taxation of profits, or even taxation of "manufactured" or deemed profits that do not in fact exist in these businesses under current approaches to allocation of taxation rights.

The United States government and industry feel that it is important that any solution must be able to:

- Dovetail with the existing international tax framework for tax nexus and transfer pricing as these will continue to apply to all businesses including the participants in the digital economy.
- Be administrable for taxpayers and tax administrations.
- Avoid overlaps and double taxation of profits or recognition of losses.

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- Provide a robust framework for resolving disputes and alleviating double taxation, including arbitration where necessary.

3. (a) In light of the proposed guidance outlined in the OECD's Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, what do you perceive are the key advantages of the i) profit split approach or the ii) fractional apportionment approach in tackling the challenges of the digitalization of the economy? (b) What are the challenges that you see, in practice, when applying these approaches considering the existing transfer pricing framework (e.g., feasibility of splitting profits between routine and non-routine, and then isolating those profits derived from a subset of marketing intangibles; reliability of the use of ''place of sales,'' ''number of employees,'' or other factors to spread the profit among jurisdictions; necessary information that should be available to taxpayers and tax administrations)?

Many challenges for both a residual profit approach and a fractional apportionment approach are similar.[1] Both approaches are a move towards global formulary apportionment, which the OECD has historically rejected for the reasons given in Chapter I of the OECD Transfer Pricing Guidelines.

Profit splits have become a common method used (or referenced) in an increasingly complex transfer pricing environment. Assuming a consensus could be met related to the application of a profit split approach to the taxation of the digital economy, the profit split could allow for ease in global implementation. Further, the profit split has basis in commonly applied arm's length principles, which have been a mainstay of the world tax systems for a long time. The 2017 OECD Transfer Pricing Guidelines discuss the recommended use of profit splits being most appropriate when multiple parties of multinational enterprises (MNEs) make unique and valuable contributions, when business operations are highly integrated (such that independent contributions evaluation cannot be performed in a meaningful manner), and/or when multiple parties share the assumption of economically significant risks under the accurately delineated transaction. Profit splits are also a recognized method in the US Section 482 transfer pricing regulations. The US Treasury deputy assistant secretary for international tax affairs, Chip Harter, has stated that ". . .to the extent you get consensus, it will be around something that leaves the arm's-length standard in place."[2] The basis in the arm's-length standard may improve the likelihood of the acceptance and adoption of a profit split approach to addressing the digital economy.

Fractional apportionment relies on an allocation of worldwide profit based on a set(s) of allocation key(s) to apportion profit to countries in which an MNE operates or, potentially, has nexus. Assuming a (near) global consensus on accounting standards for determining worldwide profit and consistency in the implementation process and application of allocation metrics, a fractional apportionment approach could provide a simplified process for MNEs to execute and tax administrations to verify and audit as it relates to calculating global taxation for these companies.

Interested parties in the United States generally agree that the modified residual profit split method and fractional apportionment methods both need to adequately take into account:

- o The role of historical capital investments made by digital economy innovators that underpin their later success.
- o Symmetrical treatment of losses or loss-sharing (only a few digital companies' make significant profits in their businesses).
- o The changing nature of contributions to business success over the development and growth of these businesses.
- o The need for common, verifiable and auditable bases for determining profits and / or allocation keys.

A search for a globally agreed, commonly applied and accepted solution to the tax treatment of digital profits is a worthy endeavor in contrast to the potentially numerous and inconsistent unilateral measures that result in multiple tax systems and double taxation for many digital companies. The risks of all the measures proposed remain the same as those identified in the OECD Transfer Pricing Guidelines, the most significant being the challenge of protecting against double taxation and ensuring single taxation. Conflicts can be anticipated in establishing apportionment factors, in agreeing on the relative valuation of assets and contributions, on approaches to give the appropriate recognition to geographical differences and the lack of conformity of accounting standards, and lastly on the appropriate definition of profits to be attributed. None of this is new or unexpected.

For the purpose of apportioning profit, it will be important that the establishment of a suitable accounting basis is well founded. An MNE group's global profit and loss account is likely to be too far removed from the circumstances of the individual market to serve as a valid basis for apportionment of residual profit. If, for example, one market is at the early stages of penetration and still incurring costs, whereas another market is more mature and is generating overall profits, apportionment based on global results is likely to lead to serious distortions. Additionally, it should be noted that the allocation of risk in arm's length arrangements is rarely apportioned evenly among participants but rather some parties will bear a disproportionate amount of the risk commensurate with their ability to bear that risk in exchange for additional returns. The appropriate segmentation of profits for apportionment will be heavily dependent on the MNE's business model but is likely to be the closest segment to the level of the market. In agreeing to an allocation of profits between market and home territory, it will also be necessary to agree to a weighting between the market and home-grown intangibles. The latter may well have provided the platform or technology for use by all users and customers and therefore contributed significantly to apparently standalone local profitability. This may be no easy task.

As such there is considerable risk of historical asymmetry inherent within the proposals, that one or other tax jurisdiction may well have borne these losses, while other countries may well tax the subsequent benefits. Observable arm's length principles in some industries (e.g., the pharmaceutical industry), where this type of bimodal outcome (failure or shades of success) and investment fact pattern is also prevalent, as well as established principles of finance used by actual investors, may well offer useful insights on how to equitably reflect this type of historical investment and should not be ignored.

4. As the OECD works to develop a harmonized global approach to the taxation of the digitalized economy (anticipated in 2020), what are multinational enterprises (MNEs) in your jurisdiction doing to adapt their operations and business models, in light of the uncertainty during this period? Is it feasible for MNEs to isolate ''digital'' activity or to segment financial information by activity, product line, or region? Is this already done for purposes other than tax? If not, what would be the main obstacles to producing such information?

In general, we think it is fair to say that MNEs in the United States are watching developments closely and making changes where those changes clearly address a direct issue or where other elements of BEPS warrant a change, but many are also waiting to see the outcome of these international tax deliberations before making significant moves to avoid the need to reorganize more than once.

An example of changes that some companies are making has been the move to local revenue-based remuneration structures for local sales support and marketing affiliates to address diverted profit tax issues or perceived desires of local tax administrations. If additional layers of DST are also added to the tax burden from the local market, the overall tax burden at the local level is likely to be disproportionate to the overall profits in the business and the local market contribution to those profits compared to the contributions made in its home country. For some countries where DSTs or similar measures have been imposed, some digital companies have passed the cost directly on to the local users through price increases.

Many MNEs already have the ability to isolate a certain level of segmented financial information by activity, product line, or region. Publicly-traded or -held companies are required to prepare certain levels of segmented data for financial reporting purposes and some segmented data is made publicly available in annual reports or other filings. Privately-held corporations, while not required to provide the same level of detail for financial reporting, may prepare segmented financials for purposes of planning or providing information to its shareholders. The measure of "digital activity" is a much more difficult task and can have a much different meaning and impact on companies depending on the industry in which they operate.

The issue of coming to a consensus and clearly defining "digital activity" is one that is made clearly apparent as each new unilateral DST proposal is released. The various DST proposals take different approaches to applying a tax and, as previously noted, many of the proposed approaches target a specific subset of MNEs and disproportionately affect US-based companies, subjecting them to double taxation. For example, the UK's proposed digital tax focuses on user-based value creation on digital platforms in which one additional user on the platform increases the value of the platform to other users. This proposal, as well as others, fails to adequately reflect the significant historical investments and risks that many digital companies faced in establishing a successful platform-based business, including developing business models, expanding into international markets and building user/customer bases. Businesses in emerging industries must take a long view, investing in a market and incurring costs often without the realistic prospect of making any profits, annually or cumulatively, for many years. These investments are inherently risky and are rewarded only after years of efforts, failures, and restarts. Failure to recognize the role of these investments in the generation of current profits is an ahistorical view that endangers business innovation and fair taxation among tax jurisdictions.

The costs and risks of investing in and building a global network of users or customers is not to be underestimated. There are examples of MNEs that have historically incurred very significant costs in their home jurisdiction to make a sustained investment in overseas markets, while their operations in local market jurisdictions have been subsidized with limited risk returns. If markets are to be entitled to a share of the residual profits, it should be reasonable to factor in the historic investment made in the home territory in developing the market and the significant losses that have been incurred and which are reported on the balance sheet in the home territory.

Furthermore, it should not be overlooked in this discussion that these investments are not only the investments of taxpayers willing to take on outsize risks in exchange for long term, but highly uncertain, potential returns. There are investments by the tax authority in the home jurisdiction (e.g., in the form of tax relief related to net operating losses) that must also be compensated. If a home jurisdiction has reasonably supported a growing business or industry through its nascent period, it has done so with an investor's mindset and should not be deprived of its rights to additional tax in later years without consideration for those investments.

Consequently, any proposals taken forward will need to take into account the stage of development in any multinational group's evolution, since even a business that is now profitable overall may have taken many years to reach that point. The business may have current or exhausted loss allowances from the original home jurisdiction, and such investment should be matched with the profits earned by the enterprise to ensure a holistic view of the return to that enterprise before allocating additional revenues to a market jurisdiction.

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NOTES

[1] The views expressed herein are those of the authors and may not represent the views of Duff & Phelps LLC or its clients.

[2] *https://www.taxnotes.com/editors-pick/us-hopeful-global-digital-tax-deal-after-oecd-breakthrough*

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Rahul has been consistently rated among the leading transfer pricing professionals & tax litigators in the world, by Euromoney and International Tax Review, since 2010.

Rahul has handled several APAs in India, involving clients from across industries, and also covering complex transactions, e.g. industrial franchise fees/variable royalties under non-integrated principal structures, contract R&D service provider model, distribution models with related marketing intangible issues, financial transactions, profit split models for royalties, etc.

Rahul is a longtime Member of the Bloomberg Tax Transfer Pricing Forum Advisory Board. He has been a visiting faculty of the National Law School teaching classes on transfer pricing & international tax treaties.

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Yves de Groote has an LL.M from King's College London, MSc. HUB; he joined KPMG in 2004 and has over 10 years of experience in advising multinational organizations on transfer pricing issues. He has been involved in and conducted various tax planning and transfer pricing assignments, ranging from the preparation of European and global transfer pricing documentation (including functional and economic analyses and comparables searches) and domestic and international transfer pricing audit defense to the negotiation of (uni-, bi-, and multilateral) rulings and advance pricing arrangements (APAs).

Brazil

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Jerry Levers de Abreu is a Partner at TozziniFreire Advogados, Sao Paulo. A specialist in tax law, Jerry has over 18 years of experience in tax consulting and administrative litigation. He counsels both domestic and foreign clients, with an emphasis on indirect taxes and taxation in the automotive, information technology, telecommunications, intellectual property, food, and cosmetics sectors. Prior to building his tax practice at TozziniFreire, Jerry worked as a tax manager in global audit and consulting companies. He is recognized as an Indirect Tax Leader by the *International Tax Review* and recommended by *The Legal 500* and *Best Lawyers*. Jerry's education includes a law degree from Universidade São Francisco and a specialized degree in Tax Law from Pontifícia Universidade Católica de São Paulo. He frequently publishes articles on tax law in major national publications.

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China

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Based in Shanghai, Cheng Chi is the Partner-in-Charge of KPMG's Global Transfer Pricing Services for China and Hong Kong S.A.R. Mr. Chi has led many transfer pricing and tax efficient supply chain projects in Asia and Europe, involving advance pricing arrangement negotiations, cost contribution arrangements, Pan-Asia documentation, controversy resolution, global procurement structuring, and headquarters services recharges for clients in the industrial market, including automobile, chemical, and machinery industries, as well as the consumer market, logistic, communication, electronics, and financial services industries.

In addition to lecturing at many national and local training events organized by the Chinese tax authorities, Mr. Chi has provided technical advice on a number of recent transfer pricing legislative initiatives in China. A frequent speaker on transfer pricing and other matters, his analyses are regularly featured in tax and transfer pricing publications around the world (i.e., *International Tax Review*). Mr. Chi has been recommended as a leading transfer pricing advisor in China by the Legal Media Group.

Mr. Chi started his transfer pricing career in Europe with another leading accounting firm, covering many of Europe's major jurisdictions while based in Amsterdam until returning to China in 2004.

Denmark

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Arne Møllin Ottosen is the Head of Kromann Reumert's tax law group. He specializes in contentious tax, including transfer pricing, tax litigation, and business taxation advisory work. Arne is the author of numerous Danish and international articles on tax and company law. Arne is listed in the *International Tax Review*, *European Legal 500*, and *Chambers*. He holds a law degree from Aarhus University (cand.jur. 1993) and an LL.M. from King's College, University of London (1999).

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Julien Monsenego specializes in international taxation, tax treatment of M&A, and restructurings. He assists French and foreign companies in their international investments, as well as in the course of their tax audits and litigations. He particularly focuses on Life Science and R&D-intensive industries. He has extended the practice of transfer pricing and has intervened for French and non-French groups in setting up intra-group flows, IP companies, and business restructurings.

Julien Monsenego previously worked at Gowling WLG, Olswang, Arthur Andersen International, Ernst & Young, Coudert Brothers, and Dechert LLP. He is a member of the Paris Bar.

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Guillaume Madelpuech holds an MBA from the ESSEC Business School and an MSc in Economics from the Paris Dauphine University. He is a principal within NERA Economic Consulting in Paris. He is an economist with 10 years of experience in transfer pricing, including in particular intangible valuation, business restructuring, transfer pricing policy design, and litigation. Guillaume has conducted a number of transfer pricing projects for multinationals in a wide range of industries, including high-tech, consumer goods, automotive, luxury goods, financial services, health care, real estate, media and entertainment, and energy. He is a regular contributor to the OECD and a frequent contributor to journals and trade publications. Prior to joining NERA, Guillaume was an economist with EY in both Paris and in New York City in the transfer pricing and valuation groups.

Germany

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During more than 25 years advising international corporations and leading law firms on transfer pricing issues, Alexander Voegele has specialized in the development of innovative economic structures for transfer pricing strategies and for the defense of major international transfer pricing cases. He has led hundreds of large transfer pricing projects and defense cases for a variety of clients in a range of industries. Prior to joining NERA, Alexander was a partner at PriceWaterhouse and KPMG, where he was in charge of their German transfer pricing practices.

He holds a doctorate in economics and a Master of Tax and Business Administration from the University of Mannheim. He is a certified German auditor and tax adviser and a French Commissaire aux Comptes.

Alexander has received numerous awards as a transfer pricing adviser and has frequently been ranked as a leading tax and transfer pricing professional.

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Philip de Homont specializes in complicated transfer pricing audits and the valuation of intellectual property for international corporations and law firms. He has defended major transfer pricing cases throughout Europe and the Americas in a wide range of industries from consumer goods to financial services.

He holds an MSc in Economics from the University of Warwick and a Masters-equivalent in Physics from the Technische Universität München.

Philip de Homont is the co-author of dozens of articles and two books on transfer pricing and intellectual property valuation. He has participated in various transfer pricing conferences.

Hong Kong

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Irene Lee has practiced tax for 11 years, the last 7 specializing in transfer pricing matters involving the financial services sector. She joined KPMG in Hong Kong in 2013 and advises banking, asset management, and insurance clients on transfer pricing policies, documentation, and risk management in the Asia region. She earned a Bachelor of Business Administration (B.B.A.) degree from the Chinese University of Hong Kong and has studied at the University of North Carolina (Chapel Hill).

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Jeffrey Wong is a senior manager of Global Transfer Pricing Services at KPMG in Hong Kong. He is an experienced financial services transfer pricing advisor and works with clients from the banking, insurance, and asset management sectors. Jeffrey joined KPMG in Hong Kong in 2014 and has been based in Hong Kong for over seven years. He also worked as a transfer pricing specialist in New York for over two years. He holds a Bachelor of Science in Finance and International Business (Magna Cum Laude) from the NYU Stern School of Business.

India

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Rahul K. Mitra is currently a partner at Dhruva Advisors LLP, India. Prior to joining Dhruva Advisors, Rahul was the National Head of Transfer Pricing & BEPS for KPMG in India and the national leader of PwC India's transfer pricing practice between 2010 and 2014. Rahul was a partner in the tax and regulatory services practice of PwC India between April 1999 and February 2015. Rahul has over 22 years of experience in handling taxation and regulatory matters in India. He specializes in transfer pricing, particularly inbound and outbound planning assignments and advises on profit/cash repatriation planning, value chain transformation or supply chain management projects, profit attribution to permanent establishments, and others. Rahul independently handles litigation for top companies before the Income Tax Tribunals. At least 50 of the cases independently argued by Rahul have been reported in leading tax journals of India. Some of Rahul's major wins before the Tax Tribunals in transfer pricing matters have set precedents, both in India and globally.

In his personal capacity, Rahul has handled several APAs in India, involving clients from across industries and also covering complex transactions, e.g., industrial franchise fees/variable royalties under non-integrated principal structures; contract R&D service provider model; distribution models, with related marketing intangible issues; financial transactions; and profit split models for royalties. He has been consistently rated as one of the leading transfer pricing professionals and tax litigators in the world by *Euromoney* and *International Tax Review* since 2010.

Rahul has been a visiting member of the faculty of the National Law School in the subject of transfer pricing and international tax treaties and the country reporter on the topic "Non Discrimination in international tax matters" for the IFA Congress held in Brussels in 2008. He was invited by the OECD to speak in the 2012 Paris roundtable conference on developing countries' perspective on APAs.

Ireland

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Catherine O'Meara is a partner in the tax department at Matheson. Catherine has over ten years' experience advising multinational corporations doing business in Ireland on Irish corporate tax. Catherine has a particular interest in transfer pricing, competent authority matters, and business restructurings and also has extensive experience in structuring inward investment projects, mergers and acquisitions, and corporate reorganizations. Catherine's clients include many of the leading multinational corporations established in Ireland, primarily in the pharmaceutical, healthcare, ICT, and consumer brand sectors. Catherine has published articles in leading tax journals. She is a co-author on the Ireland section of the Bloomberg BNA Transfer Pricing Forum and a co-author of the Ireland chapter of the International Fiscal Association Cahiers on Cross Border Business Restructuring.

Catherine is a Chartered Tax Advisor and a member of the Law Society of Ireland.

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Yariv Ben-Dov is Head of Transfer Pricing at Lion Orlitzky & Co. – Moore Stephens Israel. Prior to that, he was Head of the Transfer Pricing and Valuations Department at Herzog, Fox & Neeman. He is an expert in drafting and defending transfer pricing studies and intercompany agreements, with over 15 years of experience. Yariv counsels both multinational conglomerates and small start-ups on their transfer pricing matters, including multinationals which have no activity in Israel. Before working at HFN, Yariv was a co-founder of Bar-Zvi & Ben-Dov, a boutique law firm specializing in transfer pricing and high-tech and, before that, Yariv served as the Head of the Transfer Pricing Unit at Teva Pharmaceuticals. Yariv has published articles on the subject of transfer pricing and has been asked to keynote as an expert in transfer pricing at several conventions in Israel, Europe, and the U.S. Yariv is a member of Transfer Pricing Associates, the world's largest network of independent transfer pricing experts; the Israeli Bar Tax Commit-

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tee; and the Board of the Israeli-LATAM Chamber of Commerce. Yariv is also a Board member of the Arthur Rubinstein Music Society and the head of the Society's NYC branch. Yariv provides counsel (pro bono) to the Israeli Navy Association. Yariv speaks Hebrew, English, French, and Italian and has often advised global clients in their local language.

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Marco Valdonio was admitted to the Association of Chartered Accountants in 2002. He joined Maisto e Associati in 2000 after working for another tax law firm. He headed the London office from 2002 to 2004 and has been a partner in the firm since 2011. Marco's areas of expertise include transfer pricing, tax controversies and settlements, mergers and acquisitions, financial instruments, and international taxation.

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Aurelio Massimiano is a partner at Maisto e Associati, where he has practiced since 2005, after having worked for the International Tax Office of the Italian Revenue Agency and, prior to that, for a Big 4 accounting firm. His areas of expertise are international taxation and transfer pricing. He is the permanent assistant of Professor Guglielmo Maisto at the EU Joint Transfer Pricing Forum. A member of the Association of Chartered Accountants, he holds degrees from Luiss Guido Carli University in Rome and an LL.M. in International Tax Law from the University of Leiden in the Netherlands.

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Mirko Severi joined Maisto e Associati in 2011 after obtaining a Master Diploma in Tax Law at IPSOA. He graduated (cum laude) in Economics from the University of Parma in 2010. His areas of expertise include corporate taxation and group taxation.

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Takuma Mimura is the managing director of Cosmos International Management, a transfer pricing boutique consulting firm in Japan. He has more than 14 years of transfer pricing experience, including 6 years at Deloitte Touche Tohmatsu (both Tokyo and New York) and international banking experience prior to transfer pricing. He has worked extensively on transfer pricing issues worldwide and is especially experienced in Japan, U.S., and China TP matters. He has also worked with a broad range of clients in manufacturing, financial services, and telecommunications and has assisted many taxpayers in negotiations with the Japanese tax authorities on transfer pricing audit examinations. Takuma has authored articles for professional journals, including BNA's *Transfer Pricing Report* and *Monthly International Taxation of Japan*, and is a frequent speaker on transfer pricing topics.

Korea

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Dr. Tae Hyung Kim is a former senior partner and national leader of the Global Transfer Pricing Group at Deloitte Korea. Over more than 14 years, Dr. Kim has represented multinational corporations in various industries in transfer pricing audit defense, advance pricing agreement negotiations, mutual agreement procedures, and planning and documentation studies.

Prior to his previous position, Dr. Kim headed the national transfer pricing practice at other Big Four firm in Korea and the Law and Economics Consulting Group in Korea. Before specializing in transfer pricing, Dr. Kim was a research fellow for the Korea Institute for International Economic Policy (KIEP). During his tenure at the KIEP, he advised the Ministry of Finance and Economy, the Ministry of Commerce, Industry, and Energy and the Ministry of Foreign Affairs in the area of international trade and investment policies.

Dr. Kim's recent publications appear in IBFD's *International Transfer Pricing Journal*, Bloomberg Tax's *Transfer Pricing Reports*, and Euromoney's *Transfer Pricing Reviews*. His economics publications also appear in *Canadian Journal of Economics* and *Review of International Economics*.

He holds a Ph.D. in economics from the University of Washington and is a graduate of Advanced Management Programs of both Harvard Business School and Seoul National University.

Luxembourg

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Peter Moons is a partner in the tax practice of Loyens & Loeff Luxembourg since 2004, with a focus on corporate tax advice for multinationals and funds and, in particular, private equity funds, their initiators, and their investors. Before joining the Luxembourg office in 2004, he practiced in the Rotterdam and Frankfurt offices of Loyens & Loeff, specializing in real estate funds and cross-border tax structuring. Peter is also active in the Loyens & Loeff German and Eastern European desks and heads the Luxembourg transfer pricing team. Peter is a member of the Luxembourg Bar, the International Fiscal Association (IFA), and the tax committee of the Luxembourg Private Equity and Venture Capital Association. Peter is the author of the *Tax Management Portfolio, Business Operations in Luxembourg*, published by Bloomberg Tax. He received a Business economics and tax law degree from Erasmus University in Rotterdam in 1996 and a Tax law degree from University of Cologne in 1997.

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Gaspar Lopes Dias is an associate in the tax practice group of Loyens & Loeff Luxembourg. He specializes in international taxation and transfer pricing, Gaspar advises on financial transactions (e.g., cash pool, debt pricing) and intragroup services. Prior to joining Loyens & Loeff Luxembourg, Gaspar worked at a big 4 company in Belgium, having gained experience in several industries and in a broad range of transfer pricing matters, including TP documentation, IP structuring and arm's length license fees, relocation of functions, MAP/EU Arbi-

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Mexico

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Moises Curiel is a member of the Baker & McKenzie's transfer pricing practice group. He is recognized by *International Tax Review* as one of Mexico's top tax advisers and has served as the Transfer Pricing Audits and Resolutions administrator of Mexico's Ministry of Finance and Public Credit for seven years. Mr. Curiel helped prepare and implement various tax transfer pricing rules in Mexico, including the Income Tax Law, the Omnibus Tax Ruling, and the Federal Tax Code. He also led the Advance Pricing Agreements Program in Mexico, where he negotiated over 300 unilateral agreements and 34 bilateral agreements. His impressive track record also includes proposing amendments to legislation on various matters for Latin American countries and representing Mexico before the OECD for the transfer pricing party (WP6).

The Netherlands

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New Zealand

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Leslie Prescott-Haar is the managing director of TP EQuilibrium | AustralAsia LP ("TPEQ") (formerly, Ceteris New Zealand). TPEQ provides transfer pricing services in Australia and New Zealand across an extensive range of industries, transactions, and engagements, including APAs; independent second opinions and expert advice; tax authority reviews, investigations, and audit defense; global, regional, and country-specific documentation. Leslie has over 22 years of specialized transfer pricing experience based in the APac Region (Sydney and Auckland) and an additional 10 years of corporate taxation experience in Big Four accounting firm practices, specializing in mergers, acquisitions, bankruptcies, and reorganizations based in the United States (New York City and Chicago). Prior to forming TPEQ, Leslie commenced the transfer pricing practice of Ernst & Young New Zealand, where she served as the National Leader for a number of years. Leslie frequently provides "thought leadership" contributions to various international publications and associations.

Stefan Sunde
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Stefan Sunde is a senior analyst at TPEQ. He joined TPEQ in 2013 in a university internship role, and since then has worked on major projects for most of the practice's major client base and all industries, and has managed some more recent projects. Stefan completed his tertiary studies in 2014 and has since worked for the firm in a full-time capacity.

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Sophie Day is a senior analyst at TPEQ. She has several years of transfer pricing experience since joining TPEQ in July 2015, working across various industries and projects for TPEQ's client base. Sophie completed her tertiary studies in 2016 and has since worked for the firm in a full-time capacity.

Portugal

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Patrícia Matos is currently an associate partner in Deloitte's Lisbon office in the transfer pricing department.

Patrícia has a business degree and is a chartered accountant. She started her professional career in Arthur Andersen (Arthur Andersen, S.A., presently Deloitte & Touche, as result of an effective association of both firms since April 2002) in 1997 and was promoted to Associate Partner in 2008.

Patrícia has extensive experience in tax planning, due diligence, and tax compliance for Portuguese and multinational companies. In 2002, she began working exclusively in transfer pricing. She advises clients in several aspects of transfer pricing, ranging from tax audits to comprehensive transfer pricing planning, structuring of intercompany transactions, and defensive documentation.

Her experience spans a wide range of industries, including communications, technology, media, financial services, automotive, consumer goods, tourism, and pharmaceuticals.

Patrícia has been a speaker at several seminars and conferences on tax, economic, and transfer pricing issues.

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Henrique Sollari Allegro is currently a manager in Deloitte's Lisbon office in the transfer pricing department.

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Evgenia Veter joined the Transfer Pricing Group of Ernst & Young as a partner in March 2011, coming from another major accounting firm. She has extensive experience in providing advisory services to Russian and international companies on various areas of taxation and conducting business in Russia, structuring investments, and coordinating approaches to tax planning. Since 2007 Evgenia has been focusing on transfer pricing. She has led transfer pricing planning and documentation projects for multinational and Russian clients in various industry sectors, including structuring of entry/exit strategies of clients from the transfer pricing perspective, adaptation of global transfer pricing policies to Russian requirements, business restructuring, development of sustainable transfer pricing methodologies, etc. Evgenia specializes in serving companies working in retail, consumer products and life science industries.

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Singapore

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An economist with 16 years of experience in transfer pricing consulting and academia, Michael Nixon's experience includes transfer pricing and business restructuring projects in the U.K., Germany, the Netherlands and Singapore, where he has been based for the last six years. He has advised multinationals across various industries throughout the planning, compliance, and audit cycle. His practice is focused on transfer pricing controversy, intellectual property valuations, and business restructuring. He is a member of the Singapore transfer pricing consultation group with the Inland Revenue Authority of Singapore (IRAS) and has undertaken training for the IRAS Tax Academy. He also consults with Singaporean academic institutions on transfer pricing and business restructuring matters. Mr. Nixon has a Bachelor of Arts Economics degree from Nottingham Trent University and a Master of Science Economics (with distinction) from the University of London. He is a member of the Chartered Institute of Taxation in the U.K. and the Society of Financial Advisors in the U.K..

Spain

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Ms. Trapé joined KPMG in 2007 and has worked on numerous transfer pricing projects, including transfer pricing policy design, documentation work, and APA negotiations, as well as audit defense and recourse in transfer pricing cases and international taxation. Her work has spanned the financial, consumer products, energy, and pharmaceutical sectors.

Prior to joining KPMG, Montserrat Trapé worked at the Spanish Revenue Service. As Co-Director of International taxation, she was responsible for negotiating several multilateral and bilateral APAs and judicial defense of TP assessments, as well as actively participating in the new transfer pricing legislation. Ms. Trapé was also Vice-Chair of the European Union Joint Transfer Pricing Forum for four years. During this period, the JTPF worked on recommendations for the effective implementation of the Arbitration Convention, on a transfer pricing model documentation to simplify documentation compliance requirements, and on a report on best practices for the APA within Europe.

Montserrat Trapé is also a visiting professor at ESADE Instituto de Estudios Fiscales, where she has conducted several training courses for Spanish & Latin American Tax Authorities in Madrid. She is a frequent public speaker and contributor to articles and books on transfer pricing, dispute resolution mechanisms, and international taxation issues.

Ms. Trapé has been included in the list of 2009 and 2010 "Best lawyers" in Spain.

Switzerland

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Benjamin is a Partner in the Transfer Pricing and Value Chain Transformation Team in Zurich, Switzerland. Benjamin is leading the Transfer Pricing and Value Chain Transformation practice within PwC's Tax & Legal Services in Switzerland. His experience includes advising multinational companies on structuring of global value chains, development of global core documentation, migration of intangible property, establishing global trademark royalty schemes and the development of franchising and service fee concepts. Benjamin Koch has substantial experience assisting companies in preventing tax audits and managing international tax controversies through the proactive use of Advance Pricing Arrangements (APAs), tax rulings and Mutual Agreement Procedures (MAPs). Furthermore, Benjamin Koch is PwC's Territory Leader for Tax Controversy and Dispute Resolution and represents PwC Switzerland in the technical working groups of the Swiss Corporate Tax Reform III.

United Kingdom

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Andrew Cousins is an international tax practitioner in the Duff & Phelps Transfer Pricing practice, with more than 20 years of cross-border experience in private practice, industry and in government. He brings a comprehensive regulatory, commercial and advisory perspective to the fields of transfer pricing and business restructuring, with a focus on practical implementation. Before joining Duff & Phelps Andrew was Deputy Comptroller of Taxes in the Jersey tax authority, acting as competent authority for all of Jersey's international tax agreements. He also served as Jersey's delegate to the Global Forum on Transparency and Exchange of Information for Tax Purposes, as well as representing Jersey at the OECD's Global Forums for Transfer Pricing and for Tax Treaties. Andrew spent eight years in industry as a global head of transfer pricing, and has led the transfer pricing practice in two FTSE 100 FMCG multinationals.

Andrew is a graduate of Oxford University and is a fellow of the Institute of Chartered Accountants in England and Wales. He qualified as a chartered accountant at Deloitte before focusing on transfer pricing at Ernst & Young, where he was a member of its Tax Effective Supply Chain Management team.

United States

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Jeffrey S. Korenblatt is a tax attorney with more than 15 years of experience. He has a broad-based transactional tax practice and focuses on international tax planning and transfer pricing. Jeff delivers tax solutions to clients in multiple industries, including, but not limited to, manufacturers, retailers, franchisors, web-based providers of goods and services, and taxpayers in life-sciences industries.

Patrick McColgan
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Patrick McColgan is a managing director in Duff & Phelps' Atlanta office and part of the transfer pricing team. He has a strong focus on assisting growth companies with their global transfer pricing needs through the design of defensible and pragmatic solutions. Patrick has more than 11 years of transfer pricing experience and has worked across several industries, including automotive, chemical, consumer products, medical products, pharmaceutical, software, internet, and manufacturing.

Transfer Pricing Forum Country Contributors

Country Contributors

Argentina

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Cristian Rosso Alba heads the tax law practice of Rosso Alba, Francia & Asociados. He has a well-recognized expertise in tax law, with particular emphasis on domestic and international tax matters. Mr. Rosso Alba has served as professor of Tax Law at the Pontifical Catholic University of Argentina; visiting professor at the University of Buenos Aires, School of Economics; professor of Tax Law at Austral University; and professor of postgraduate courses at the Torcuato Di Tella University. Additionally, he has been a regular lecturer in the United States and speaker in domestic and international tax conferences and is the author of more than 80 articles appearing in specialized publications. Cristian Rosso Alba holds an LL.M. from Harvard Law School and a Certificate in International Taxation jointly from Harvard Law School and the J.F. Kennedy School of Government at Harvard, a Masters in Taxation from Buenos Aires University School of Economics, and the degree of Abogado from the University of Buenos Aires Law School. He is a member of the American Bar Association (ABA), the Canadian Tax Foundation, and the Advisory Board of the Argentine Chamber of Commerce. He has been recommended as one of the "Leaders in their Field" (Tax – Argentina) by *Chambers Latin America*.

Austria

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Alexandra Dolezel is a tax director at BDO Austria GmbH in Vienna, Austria. She has over 22 years of experience and specializes in international taxation and transfer pricing. Her expertise includes the conceptual design of international tax structures and business models, defense in tax audits, litigation and mutual agreement procedures, as well as the optimization of value chains from a transfer pricing point of view. In addition, she is a lecturer on European Union tax law and comparative tax law at FH Campus Wien, the largest university in Austria. Prior to joining BDO, Alexandra was a tax director at PricewaterhouseCoopers, where she specialized in transfer pricing, international tax structuring and value chain transformation, and mergers and acquisitions. Prior to that, she was Head of Corporate Taxes for Borealis AG, where she had overall responsibility for group corporate tax, including matters affecting tax risk management, transfer pricing, and international structures. Alexandra received her education at the Vienna University of Economics and Business Administration, and she is also a member of the Austrian Chamber of Accountants.

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Kori Weinwurm is a manager in transfer pricing at BDO Austria GmbH in Vienna, Austria. Prior to moving to Austria in 2018, she earned her Canadian CPA designation at Deloitte in Vancouver, Canada and gained further experience in the tax department of a publicly listed company. She has a broad background in Canadian and international tax, as well as transfer pricing.

Belgium

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Since 1996, Dirk has been a visiting professor at the University of Antwerp (Faculty Applied Economics, UA) teaching Tax to Master's students. He has been named in *International Tax Review*'s "World Tax –The comprehensive guide to the world's leading tax firms, *Euromoney*'s (Legal Media Group) "Guide to the World's Leading Transfer Pricing Advisers," and *Euromoney*'s "Guide to the World's Leading Tax Advisers."

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Jerry Levers de Abreu is a Partner at TozziniFreire Advogados, Sao Paulo. A specialist in tax law, Jerry has over 18 years of experience in tax consulting and administrative litigation. He counsels both domestic and foreign clients, with an emphasis on indirect taxes and taxation in the automotive, information technology, telecommunications, intellectual property, food, and cosmetics sectors. Prior to building his tax practice at

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TozziniFreire, Jerry worked as a tax manager in global audit and consulting companies. He is recognized as an Indirect Tax Leader by the *International Tax Review* and recommended by *The Legal 500* and *Best Lawyers*. Jerry's education includes a law degree from Universidade São Francisco and a specialized degree in Tax Law from Pontifícia Universidade Católica de São Paulo. He frequently publishes articles on tax law in major national publications.

Mateus Tiagor Campos
Tax Associate, TozziniFreire Advogados, Sao Paulo

Mateus Tiagor Campos is a tax associate at TozziniFreire Advogados, Sao Paulo.

Lucas Araujo Barcellos Pinheiro
Tax Associate, TozziniFreire Advogados, Sao Paulo

Lucas Araujo Barcellos Pinheiro is a tax associate at TozziniFreire Advogados, Sao Paulo. Specializing in tax litigation issues, Lucas has been assisting in the administrative and judicial defense of individuals and legal entities regarding various aspects of tax law. He graduated from the Law School of the University of Sao Paulo in 2018.

Canada

Richard Garland
Partner, Deloitte LLP, Toronto

Richard Garland is a partner in the Toronto office of Deloitte. He is a Chartered Professional Accountant and has over 25 years of accounting experience focused in the area of corporate international taxation. Richard has assisted clients in all aspects of international taxation, with particular emphasis on tax treaty issues, cross-border financing structures, and transfer pricing. Over the past several years, Richard's work has been focused in the area of transfer pricing, and he has been repeatedly been recognized in *Euromoney*'s guide to leading transfer pricing practitioners.

Simon Gurr
Senior Manager, Deloitte LLP, London

Simon Gurr is a senior manager in the London, Canada office of Deloitte. He is a transfer pricing economist with 10 years of experience assisting multinational clients set, implement, and defend transfer pricing policies.

China

Cheng Chi
Partner-in-Charge for China and Hong Kong, KPMG, Shanghai

Based in Shanghai, Cheng Chi is the partner-in-charge of KPMG's Global Transfer Pricing Services for China and Hong Kong. Mr. Chi has led many transfer pricing and tax efficient supply chain projects in Asia and Europe, involving advance pricing arrangement negotiations, cost contribution arrangements, Pan-Asia documentation, controversy resolution, global procurement structuring, and headquarters services recharges for clients in the industrial market including automobile, chemical, and machinery industries, as well as the consumer market, logistic, communication, electronics, and financial services industries. In addition to lecturing at many national and local training events organized by the Chinese tax authorities, Mr. Chi has provided technical advice on a number of recent transfer pricing legislative initiatives in China. A frequent speaker on transfer pricing and other matters, his analyses are regularly featured in tax and transfer pricing publications around the world (i.e., *International Tax Review*). Mr. Chi has been recommended as a leading transfer pricing advisor in China by the Legal Media Group. Mr. Chi started his transfer pricing career in Europe with another leading accounting firm, covering many of Europe's major jurisdictions while based in Amsterdam until returning to China in 2004.

Conrad Turley
Partner, KPMG, Beijing

Conrad Turley is a tax partner with KPMG China and heads the firm's national tax policy and technical center. Now based in Beijing, Conrad previously worked for the European Commission Tax Directorate in Brussels, as well as for KPMG in Ireland, the Netherlands, and Hong Kong.

Choon Beng Teoh
Senior Tax Manager, KPMG, Shanghai

Choon Beng Teoh is a senior tax manager with the Global Transfer Pricing Team of KPMG China, based in Shanghai.

Choon Beng has experience in multi-jurisdictional planning studies, dispute resolution, value chain analysis, and restructuring of operating models, as well as leading and managing global transfer pricing documentation projects. His client portfolio includes top-tier multinational companies across a variety of industries, including the pharmaceutical, retail, and IT industries. He also occasionally co-authors articles on China-related transfer pricing topics for publications.

Choon Beng graduated with a law degree from the London School of Economics and is a chartered accountant with the Institute of Chartered Accountants in England and Wales. Prior to joining KPMG China, Choon Beng practiced in another leading accounting firm in London in the area of international tax and transfer pricing.

France

Julien Monsenego
Tax Partner, Delsol Avocats

Julien Monsenego specializes in international taxation, tax treatment of M&A, and restructurings. He assists French and foreign companies in their international investments, as well as in the course of their tax audits and litigations. He has extended the practice of transfer pricing and has intervened for French and non-French groups in setting up intragroup flows, IP companies, and business restructuring. Before joining Delsol Avocats, Julien worked at Gowling WLG, Olswang, Arthur Andersen International, Ernst & Young, Coudert Brothers, and Dechert LLP. He is a member of the Paris Bar.

Margot Lasserre
Associate, Delsol Avocats

Margot Lasserre is an associate at Delsol Avocats. Her areas of expertise include corporate tax, transaction tax, international tax, tax structuring, transfer pricing, and tax audits/disputes.

Guillaume Madelpuech
Principal, NERA Economic Consulting, Paris

Guillaume Madelpuech is a Principal within the Paris Transfer Pricing Practice. He is an economist specializing in transfer pricing, economic modeling, and intercompany valuation. For a number of years, he has advised multinational enterprises with regard to their transfer pricing policy design, documentation, and defense, particularly in projects related to business restructuring, intangible-related transactions, and intellectual property migration. He has conducted a number of transfer pricing projects for multinationals in a wide range of industries. Prior to joining NERA, Mr. Madelpuech was an economist with EY transfer pricing and valuation groups for eight years, working in both the Paris and New York City offices. He was praised by the French publication Décideurs as one of the lead economists for the EY Paris team in 2011 and 2014. Mr. Madelpuech is a frequent contributor to the OECD policymaking related to the Base Erosion and Profit Shifting (BEPS) Action Plan and has been invited to represent NERA at OECD public consultations. He has been a lecturer on transfer pricing at the University of Vienna and at ESCP Europe. Mr. Madelpuech also frequently contributes to journals and trade publications.

Germany

Alexander Voegele
NERA Economic Consulting, Frankfurt

For more than 25 years, Dr. Alexander Voegele has been advising international corporations and leading law firms on transfer pricing issues, specializing in the development of innovative economic structures for transfer pricing strategies and for the defense of major international transfer pricing cases. He has led hundreds of large transfer pricing projects and defense cases for a variety of clients in a range of industries. Prior to joining NERA, Alexander was a partner with PriceWaterhouse and KPMG, where he was in charge of their German transfer pricing practice. He holds a doctorate in Economics and a Masters of Tax and Business Administration from the University of Mannheim. He is a certified German auditor and tax adviser and is a French Commissaire aux Comptes. He has received numerous awards as a transfer pricing adviser and has frequently been ranked as a leading tax and transfer pricing professional.

Philip de Homont
NERA Economic Consulting, Frankfurt

Philip de Homont is an expert in NERA's global Transfer Pricing practice, where he provides transfer pricing advice to international corporations and law firms. He specializes in the transfer pricing of intellectual property in tax audits and litigation cases, as well as in the digital economy. His recent projects have focused on DEMPE analysis and relocations of functions (*Funktionsverlagerung*), and he has extensive experience in the defense of licensing and valuation arrangements for intangibles. Philip is a frequent speaker at international tax conferences and regularly publishes articles on transfer pricing developments and on defense and planning cases. He authored two chapters on valuation for leading German textbooks on Transfer Pricing and Intellectual Property. He has repeatedly been listed as a "Rising Star" in transfer pricing by *Euromoney*'s Expert Guides.

India

Rahul Mitra
Partner, Dhruva Advisors LLP, India

Rahul K. Mitra is currently a Partner at Dhruva Advisors LLP, India. Prior to joining Dhruva Advisors, he was the National Head of Transfer Pricing & BEPS for KPMG in India and, before then was the National Leader of PwC India's transfer pricing practice between 2010 and 2014. Rahul was a Partner in the tax & regulatory services practice of PwC India between April 1999 and February 2015.

Rahul has over 22 years of experience in handling taxation & regulatory matters in India. He specializes in transfer pricing, particularly inbound & outbound planning assignments, and advises on profit/cash repatriation planning, value chain transformation or supply chain management projects, profit attribution to permanent establishments, etc. Rahul independently handles litigation for top companies at the level of the Income Tax Tribunals. At least 50 of the cases independently argued by Rahul have been reported in leading tax journals of India. Some of the major wins of Rahul before the Tax Tribunals in transfer pricing matters have set precedents, both in India and globally.

Rahul has been consistently rated among the leading transfer pricing professionals & tax litigators in the world, by Euromoney and International Tax Review, since 2010.

Rahul has handled several APAs in India, involving clients from across industries, and also covering complex transactions, e.g. industrial franchise fees/variable royalties under non-integrated principal structures, contract R&D service provider model, distribution models with related marketing intangible issues, financial transactions, profit split models for royalties, etc.

Rahul is a longtime Member of the Bloomberg Tax Transfer Pricing Forum Advisory Board. He has been a visiting faculty of the National Law School teaching classes on transfer pricing & international tax treaties.

Rahul was the Country Reporter on the topic, "Non Discrimination in international tax matters", for the IFA Congress held in Brussels in 2008. Rahul was invited by the OECD to speak in the 2012 Paris roundtable conference on developing countries' perspective on APAs.

Aditya Hans
Partner, Dhruva Advisors LLP, India

Aditya Hans is a Fellow Member of the Institute of Chartered Accountants of India. He was formerly a partner with KPMG and, in his 14-year tax consulting career, has worked with Big 4 firms PwC & EY. His focus area has been International Taxation, including Transfer Pricing (TP audit defense and litigation, APA, MAP, Global TP Documentation, Value Chain Assessment, Value Chain Structuring, and BEPS), PE attribution, Inbound & Outbound entry/exit & profit/cash repatriation strategies. He has worked on several complex transactions in Transfer Pricing, including Industrial Franchise Arrangements, Principal Structures, Marketing Intangibles, CAPM-based pricing models, Financial Transactions Transfer Pricing, and a variety of IP arrangements. He has served clients in the Metal & Mining, Automobile, Engineering, Pharma, and FMCG sectors. He is also a frequent speaker at technical forums on taxation and regularly contributes articles to Indian and International Tax Journals.

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Ashish Jain is a senior associate at Dhruva Advisors LLP, India and a member of the Institute of Chartered Accountants of India. He has over seven years of experience in transfer pricing, assisting clients in their compliance documentation, litigation support, and business restructuring for inbound and outbound assignments. He has hands-on work experience on international transfer pricing planning projects and has assisted in framing several transactions and specific tax advice for India's largest homegrown automobile company, steel manufacturer, chemicals manufacturer, and company dealing in IT/ITeS. He has also assisted in filing an Advance Pricing Agreement application for certainty in transfer pricing policy and audit scrutiny. He has undertaken extensive research on arm's length pricing for transactions involving intercompany financing, including loans, preference shares, and guarantees. He has also undertaken research in the area of intragroup services and its interplay with arm's length pricing. Currently, he is assisting clients with value creation assessment and value chain structuring.

Nischal Agarwal
Senior Associate, Dhruva Advisors LLP, India

Nischal Agarwal is a Senior Associate at Dhruva Advisors LLP.

Ireland

Catherine O'Meara
Partner, Matheson, Dublin

Catherine is a partner in the tax department at Matheson. Catherine has over ten years' experience advising multinational corporations doing business in Ireland on Irish corporate tax. Catherine has a particular interest in transfer pricing, competent authority matters, and business restructurings and also has extensive experience in structuring inward investment projects, mergers and acquisitions, and corporate reorganizations. Catherine's clients include many of the leading multinational corporations established in Ireland, primarily in the pharmaceutical, healthcare, ICT, and consumer brand sectors. Catherine has published articles in leading tax journals, is a co-author on the Ireland section of the Bloomberg BNA Transfer Pricing Forum and a co-author of the Ireland chapter of the International Fiscal Association Cahiers on Cross Border Business Restructuring.

Catherine is a Chartered Tax Advisor and a member of the Law Society of Ireland.

Israel

Yariv Ben-Dov
Head of Transfer Pricing at Lion Orlitzky & Co. – Moore Stephens Israel

Yariv Ben-Dov is Head of Transfer Pricing at Lion Orlitzky & Co. – Moore Stephens Israel. Prior to that, he was Head of Transfer Pricing and Valuations Department at Herzog, Fox & Neeman. He is an expert in drafting and defending transfer pricing studies and intercompany agreements, with over 15 years of experience. Yariv counsels both multinational conglomerates and small start-ups on their transfer pricing matters, including multinationals which have no activity in Israel. Before working at HFN, Yariv was a co-founder of Bar-Zvi & Ben-Dov, a boutique law firm specializing in transfer pricing and high-tech and, before that, Yariv served as the Head of the Transfer Pricing Unit at Teva Pharmaceuticals. Yariv has published articles on the subject of transfer pricing and has been asked to keynote as an expert in transfer pricing at several conventions in Israel, Europe, and the U.S. Yariv is a member of Transfer Pricing Associates, the world's largest network of independent transfer pricing experts; the Israeli Bar Tax Committee; and the Board of the Israeli-LATAM Chamber of Commerce. Yariv is also a Board member of the Arthur Rubinstein Music Society and the head of the Society's NYC branch. Yariv provides counsel (pro bono) to the Israeli Navy Association. Yariv speaks Hebrew, English, French, and Italian and has often advised global clients in their local language.

Italy

Marco Valdonio
Partner, Maisto e Associati, Milan

Marco Valdonio was admitted to the Association of Chartered Accountants in 2002. He joined Maisto e Associati in 2000 after working for another tax law firm. He headed the London office from 2002 to 2004 and has been a partner in the firm since 2011. Marco's areas of expertise include transfer pricing, tax controversies and settlements, mergers and acquisitions, financial instruments, and international taxation.

Aurelio Massimiano
Partner, Maisto e Associati, Milan

Aurelio Massimiano is a partner at Maisto e Associati, where he has practiced since 2005, after having worked for the International Tax Office of the Italian Revenue Agency and, prior to that, for a Big 4 accounting firm. His areas of expertise are international taxation and transfer pricing. He is the permanent assistant of Professor Guglielmo Maisto at the EU Joint Transfer Pricing Forum. A member of the Association of Chartered Accountants, he holds degrees from Luiss Guido Carli University in Rome and an LL.M. in International Tax Law from the University of Leiden in the Netherlands.

Mirko Severi
Associate, Maisto e Associati, Milan

Mirko Severi joined Maisto e Associati in 2011 after obtaining a Master Diploma in Tax Law at IPSOA. He graduated (cum laude) in Economics from the University of Parma in 2010. His areas of expertise include corporate taxation and group taxation.

Japan

Takuma Mimura
Managing Director, Cosmos International Management Co., Ltd, Nagoya

Takuma Mimura is the managing director of Cosmos International Management, a transfer pricing boutique consulting firm in Japan. He has more than 14 years of transfer pricing experience, including 6 years at Deloitte Touche Tohmatsu (both Tokyo and New York) and international banking experience prior to transfer pricing. He has worked extensively on transfer

pricing issues worldwide and is especially experienced in Japan, U.S., and China TP matters. He has also worked with a broad range of clients in manufacturing, financial services, and telecommunications and has assisted many taxpayers in negotiations with the Japanese tax authorities on transfer pricing audit examinations. Takuma has authored articles for professional journals, including BNA's *Transfer Pricing Report* and *Monthly International Taxation of Japan* and is a frequent speaker on transfer pricing topics.

Korea

Dr. Tae Hyung Kim
Transfer Pricing, Korea

Dr. Tae Hyung Kim is a former senior partner and national leader of the Global Transfer Pricing Group at Deloitte, Korea. Over more than 14 years, Dr. Kim has represented multinational corporations in various industries in transfer pricing audit defense, advance pricing agreement negotiations, mutual agreement procedures, and planning and documentation studies. Prior to his previous position, Dr. Kim headed the national transfer pricing practice at other Big Four firms in Korea and the Law and Economics Consulting Group in Korea. Before specializing in transfer pricing, Dr. Kim was a research fellow for the Korea Institute for International Economic Policy (KIEP). During his tenure at the KIEP, he advised the Ministry of Finance and Economy; the Ministry of Commerce, Industry, and Energy; and the Ministry of Foreign Affairs in the area of international trade and investment policies.

Dr. Kim's recent publications appear in IBFD's *International Transfer Pricing Journal*, BNA Tax Management's *Transfer Pricing Reports*, and Euromoney's *Transfer Pricing Reviews*. His economics publications also appear in *Canadian Journal of Economics* and *Review of International Economics*. He holds a Ph.D. in economics from the University of Washington and is a graduate of Advanced Management Programs from both Harvard Business School and Seoul National University.

Mexico

Moises Curiel Garcia
Transfer Pricing Partner, Baker & McKenzie, Mexico City

Moises Curiel heads Baker & McKenzie's Latin America Transfer Pricing and Valuation practice in Mexico. He has more than 23 years of experience in transfer pricing and international taxes and, currently, among other aspects of his practice, tax counsel for the maquiladora industry and the Employers' Confederation of the Mexican Republic. He is recognized by *International Tax Review* as one of Mexico's top tax advisers. Mr. Curiel has previously served as the transfer pricing audits and resolutions administrator of Mexico's Ministry of Finance and Public Credit for almost eight years. He helped prepare and implement various transfer pricing rules in Mexico, including the Income Tax Law, the Temporary Tax Ruling and the Federal Tax Code. He also led the country's Advance Pricing Agreements Program and conducted the first transfer pricing audits in Mexico and Latin America. He has represented Mexico before the OECD for the transfer pricing party (WP6). Mr. Curiel's educational certifications include degrees in public accounting from the Universidad ISEC in Mexico City and in taxation from the Universidad Panamericana, as well as certifications from Anahuac University (International Expert Transfer Pricing) and Instituto Mexicano de Contadores Puý'blicos de Meý'xico, A.C. (Tax Specialization Certificate).

Brenda Garcilita-Romero
Associate, Baker & McKenzie, Guadalajara

Brenda Garcilita-Romero is an associate in Baker McKenzie's Tax Practice Group in Guadalajara. She joined the firm's Transfer Pricing sub-practice Group in 2010. She spent a year and a half in the Chicago office. She focuses her practice on transfer pricing matters, including compliance, benchmarking analysis, transfer pricing audits, APA procedures, financial valuations and business restructurings in Mexico and across Latin America. She has participated in transactions in the food, apparel, retail, technology, electronics, and services industries.

The Netherlands

Danny Oosterhoff
Partner, Ernst & Young Belastingadviseurs LLP, Amsterdam, Netherlands

Danny Oosterhoff is a partner at Ernst & Young Belastingadviseurs LLP. He has specialized in transfer pricing services since 1996 and has worked both in the Netherlands and the United States. He has worked with many multinational enterprises in the broader field of transfer pricing planning, including risk and controversy management. His experience covers a wide range of industries, including the chemicals, pharmaceutical, high-tech and technology, consumer products, media, and telecommunication sectors. He has been involved in a significant number of advance pricing agreements, both on a unilateral and multilateral level and has been involved in many mutual agreement procedures with many different countries across the European, Asian, and American continents. He has also effectively used APAs and rollback mechanisms to resolve transfer pricing disputes.

He works with many companies on transfer pricing risk management to assist in defining the overall transfer pricing policy, the corporate transfer pricing function, and associated processes for ensuring sustainable and manageable transfer pricing models. Danny has also worked with many international companies on the transfer pricing aspects of acquisitions and divestures. For many multinational enterprises, he has assisted in the field of due diligence and post-merger integration of transfer pricing policies, establishing arm's length financing conditions, and integration of operating models.

Danny regularly speaks at forums and events about transfer pricing, business restructuring, and international developments in taxation, including BEPS and state aid. He holds a degree in tax law from the University of Tilburg.

Bo Wingerter
Senior Manager, Ernst & Young Belastingadviseurs LLP, Amsterdam, Netherlands

Bo Wingerter is a member of EY's Transfer Pricing and Operating Model Effectiveness (OME) group in Amsterdam, Netherlands. He recently spent a couple of years working for EY in the International Tax Services group in Chicago, United States, before returning to the Dutch practice in early 2017. He has over 12 years of experience in international tax, transfer pricing, and OME planning projects, covering a wide range of industries, including different sectors within industrial products, steel, agriculture, chemicals, pharmaceuticals, life sciences, oil and gas, consumer products, logistics, and media.

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New Zealand

Leslie Prescott-Haar
Managing director, TP EQuilibrium | AustralAsia LP ("TPEQ")

Leslie Prescott-Haar is the managing director of TP EQuilibrium | AustralAsia LP (TPEQ) (formerly Ceteris New Zealand). TPEQ provides transfer pricing services in Australia and New Zealand across an extensive range of industries, transactions, and engagements, including APAs; independent second opinions and expert advice; tax authority reviews, investigations, and audit defense; global, regional, and country-specific documentation. Leslie has over 22 years of specialized transfer pricing experience based in the APac Region (Sydney and Auckland) and an additional 10 years of corporate taxation experience in Big 4 accounting firm practices, specializing in mergers, acquisitions, bankruptcies, and reorganizations based in the United States (New York City and Chicago). Prior to forming TPEQ, Leslie commenced the transfer pricing practice of Ernst & Young New Zealand, where she served as the National Leader for a number of years. Leslie frequently provides "thought leadership" contributions to various international publications and associations.

Stefan Sunde
Senior Analyst, TPEQ

Stefan Sunde is a senior analyst at TPEQ. He joined TPEQ in 2013 in a university internship role and since then has worked on major projects for most of the practice's major client base and all industries, while managing some of the more recent projects. Stefan completed his tertiary studies in 2014 and has since worked for the firm in a full-time capacity.

Sophie Day
Senior Analyst, TPEQ

Sophie Day is an analyst at TPEQ. She has several years of transfer pricing experience since joining TPEQ in July 2015, working across various industries and projects for TPEQ's client base. Sophie completed her tertiary studies in 2016 and has since worked for the firm in a full-time capacity.

Portugal

Patrícia Matos
Associate Partner, Deloitte & Associados SROC, S.A., Lisbon

Patrìcia Matos is currently an Associate Partner in Deloitte's Lisbon office in the transfer pricing department.

Patrìcia has a business degree and is a chartered accountant. She started her professional career in Arthur Andersen (Arthur Andersen, S.A., presently Deloitte & Touche, as result of an effective association of both firms since April 2002) in 1997 and was promoted to Associate Partner in 2008.

Patrìcia has extensive experience in tax planning, due diligence, and tax compliance for Portuguese and multinational companies. In 2002, she began working exclusively in transfer pricing. She advises clients in several aspects of transfer pricing, ranging from tax audits to comprehensive transfer pricing planning, structuring of intercompany transactions, and defensive documentation.

Her experience spans a wide range of industries, including communications, technology, media, financial services, automotive, consumer goods, tourism, and pharmaceuticals.

Patrìcia has been a speaker at several seminars and conferences on tax, economic, and transfer pricing issues.

Sofia Margarida Jorge
Manager, Deloitte & Associados SROC, S.A., Lisbon

Sofia Jorge is a manager in Deloitte's Lisbon office, where she started her professional career in 2007 as a transfer pricing specialist. She has a law degree from Universidade Nova de Lisboa, with a specialization in tax and economic law. Sofia assists multinational clients operating in a wide range of industries, typically operating in the pulp and paper manufacturing, energy, software and technology, automotive, life sciences, and healthcare industries. Her professional experience includes providing assistance in transfer pricing matters, including documentation, intercompany pricing definition, redesign of transfer pricing systems, and international business restructurings. Sofia has also been regularly involved in transfer pricing controversy and dispute issues, support in tax audits, administrative claims, and negotiation of advanced pricing agreements (APA) with the Portuguese Tax Authorities.

Henrique Sollari Allegro
Manager, Deloitte & Associados SROC, S.A., Lisbon

Henrique Allegro has over 10 years of international transfer pricing experience, which includes planning, coordinating, and setting up worldwide transfer pricing documentation projects for Portuguese multinational companies. He specializes in advising clients on Business Model Optimization projects (including comprehensive transfer pricing planning, structuring of intercompany transactions, and international business restructurings) and risk assessments, as well as litigation and defensive documentation projects. Henrique works across a wide range of industries in Portugal and Angola, including automotive, pharmaceuticals, real estate and tourism, consumer goods, agri-food, technology and communications, industrial markets, and retail. Henrique holds a degree in Economics from Faculdade de Economia do Porto (Oporto University), and he has been involved as an instructor and a participant of several professional training programs in Portugal (Porto and Lisbon) and Europe (Prague, Amsterdam, London).

Russia

Evgenia Veter
Partner, Ernst & Young, Moscow

Evgenia Veter joined the Transfer Pricing Group of Ernst & Young as a partner in March 2011, coming from another major accounting firm. She has extensive experience in providing advisory services to Russian and international companies on various areas of taxation and conducting business in Russia, structuring investments, and coordinating approaches to tax planning. Since 2007 Evgenia has been focusing on transfer pricing. She has led transfer pricing planning and documentation projects for multinational and Russian clients in various industry sectors, including structuring of entry/exit strategies of clients from the transfer pricing perspective, adaptation of global transfer pricing policies to Russian requirements, busi-

ness restructuring, development of sustainable transfer pricing methodologies, etc. Evgenia specializes in serving companies working in retail, consumer products and life science industries.

Lyusine Satiyan
Partner, Ernst & Young Valuation and Advisory Services LLC, Moscow

Lyusine Satiyan has over 13 years of experience in providing transfer pricing and corporate tax services to large Russian and international corporations. Lyusine leads projects in various transfer pricing and corporate tax areas, including TP and CbCR compliance, review, and optimization of operating models; defense of TP policies in response to an increasing number and magnitude of Russian TP audits, as well as an increasing number of bilateral APA projects and MAPs; internal TP strategy and all elements of an effective TP function responding to best practices; and integration and optimization of new operating models, TP, and indirect tax structuring.

Yulia Kolesnikova
Director, Ernst & Young (CIS) B.V., Moscow

Yulia Kolesnikova has over 12 years of experience in advising on indirect taxation, including both domestic and international VAT advisory projects. Her recent tax advisory projects include an analysis of VAT implications during an investment project driven by Chinese/Korean companies in Russia and an analysis of potential VAT optimization opportunities to improve the tax efficiency of taxpayers in a supply chain as well as issues related to the VAT treatment of e-services.

Spain

Rufino de la Rosa
Partner, KPMG Abogados, Madrid

Rufino de la Rosa is Head of Digital Taxation of KPMG Abogados. He is in charge of the Digitalization of the Tax Function, helping companies to automatize, speed up, and improve their internal fiscal processes. He is also an expert in digital taxation, including the Digital Service Tax announced by the Spanish government. Before joining KPMG, he developed a 24-year career as a State Tax Inspector. From 2013 to 2018, he ran the Management Tax Department of the AEAT (Spanish Tax Administration). Rufino was named by the *International Tax Review* as one of the "Global Tax 50" leaders in 2017. He designed and directed the implementation of the SII (Immediate Supply of Information), an on-line VAT reporting system for large taxpayers. He led the modernization of the taxpayer services concerning the Personal Income Tax, implementing an online software to help taxpayers fill out their forms and introducing an innovative APP to allow mobile submissions.

Previously, Rufino worked as Head of the Central Information Team in the AEAT, the Spanish Competent Authority in international exchange of information. He was Chief of the Cabinet of the State Secretary of Finance and Budget, Ministry of Economy and Finance (2009-2011) and an Advisor in the Cabinet of the Minister of Economy and Finance (2000-2009).

Switzerland

Jacob Parma
Director, Transfer Pricing & Value Chain Transformation, PwC Switzerland

Jacob Parma is a director on the Transfer Pricing and Value Chain Transformation team at PwC Switzerland. Jacob works with globally present clients on all aspects of transfer pricing planning, compliance, and dispute resolution. He currently assists a wide range of groups in preparing for and adjusting to the incoming wave of regulatory changes surrounding the digitalization of the economy and other hot topic tax policy developments.

Felix Kunkat
Consultant, Transfer Pricing & Value Chain Transformation, PwC Switzerland

Felix Kunkat is a consultant on the Transfer Pricing and Value Chain Transformation team at PwC Switzerland. Felix is involved in a wide variety of transfer pricing projects supporting Swiss as well as inbound MNEs in this challenging but interesting regulatory environment.

United Kingdom

Andrew Cousins
Director, Duff & Phelps, London

Andrew is an international tax practitioner in the Duff & Phelps Transfer Pricing practice, with more than 20 years of cross-border experience in private practice, industry and in government. He brings a comprehensive regulatory, commercial and advisory perspective to the fields of transfer pricing and business restructuring, with a focus on practical implementation. Before joining Duff & Phelps Andrew was Deputy Comptroller of Taxes in the Jersey tax authority, acting as competent authority for all of Jersey's international tax agreements. He also served as Jersey's delegate to the Global Forum on Transparency and Exchange of Information for Tax Purposes, as well as representing Jersey at the OECD's Global Forums for Transfer Pricing and for Tax Treaties. Andrew spent eight years in industry as a global head of transfer pricing, and has led the transfer pricing practice in two FTSE 100 FMCG multinationals.

Andrew is a graduate of Oxford University and is a fellow of the Institute of Chartered Accountants in England and Wales. He qualified as a chartered accountant at Deloitte before focusing on transfer pricing at Ernst & Young, where he was a member of its Tax Effective Supply Chain Management team.

Daniel Othmann
Vice President, Transfer Pricing, Duff & Phelps, London

Daniel Othmann is a Vice President in Duff and Phelps' London office.

He has more than seven years of experience in international taxation and transfer pricing. In particular, Daniel has worked with clients from various industries such as the automotive industry, the pharmaceuticals industry and the financial services industry and has managed various projects focusing on tax audit defence, tax effective supply chain management, transfer pricing documentation and planning, advance pricing agreements, mutual agreement procedures and M&A. Daniel also gained experience as a tax auditor trainee with a German tax authority and qualified as a tax inspector. In the recent years he

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has focused on clients from the financial services industry and has gained extensive experience in the pricing of intercompany loans, guarantees and other complex financial transactions.

He holds a German undergraduate degree in tax law and accounting as well as a M.Sc. in Quantitative Finance from the University of Strathclyde in Glasgow and also passed the German Certified Tax Advisor ("Steuerberater") Examination. Previously Daniel worked for EY in Munich as a Transfer Pricing Economist and Manager.

United States

TJ Michaelson
Vice President, Transfer Pricing Advisory Services, Duff & Phelps LLC, San Francisco

TJ Michaelson is a vice president of transfer pricing at Duff & Phelps. TJ has over 9 years of experience advising clients' senior management on a variety of transfer pricing and valuation matters, including the design, implementation, documentation, and defense of their global transfer pricing strategies. TJ's clients range from startup businesses to Fortune 100 companies across a broad range of industries, including biopharmaceuticals, entertainment, medical devices, mining, non-for-profit, payment processing and solutions, power management, retail, semiconductors, technology, and telecommunications. TJ is a co-editor of the *Wolters Kluwer Guide to International Transfer Pricing: Law, Compliance and Tax Planning Strategies*, and he has contributed to publications, including BNA's Tax Management Portfolio on ASC 740-10 (FIN 48). Prior to joining Duff & Phelps, TJ worked at Ceteris and obtained his bachelor's degrees in Economics and Finance from Marquette University.

Simon Webber
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Simon Webber is a managing director in the Silicon Valley office of Duff & Phelps LLC. Simon provides global transfer pricing advice to organizations that range from Fortune 50 companies to startup businesses. He has a particular focus and expertise on internet, tech, fintech, and biotech industries and is a recognized expert in intangibles valuation and planning, acquisition integration, and related tax valuations under BEPS and TCJA. Simon has 25 years of experience in all aspects of transfer pricing across a variety of industries. Prior to joining Duff & Phelps, he was a managing director for Ceteris and a partner in Big 4, and has previously worked in Asia and Europe with Big 4 firms. Simon is a member of the Institute of Chartered Accountants in England and Wales and an honors graduate in Business and Managerial Administration (finance major) from the University of Aston in Birmingham, England. Simon is a regular speaker on transfer pricing issues and developments. He has also written or contributed to a number of transfer pricing articles, spoken at the OECD on Blockchain transfer pricing issues, and participates in policy debates and public commentaries on changes in transfer pricing, both directly and with his membership and contributions through the San Francisco Foreign Tax Club.

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