

# Comparing Tax Policy Responses for the Digitalizing Economy: Fold or All-in

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*This article elaborates on the tax policy responses in the area of direct taxation that are currently on the table at both the OECD and EU levels. The digital economy cannot be seen in isolation from the rest of the economy; it is the overall economy that is becoming increasingly digitalized. As any ring-fencing of the digital parts of the economy would seem infeasible, the fact that all the tax reform initiatives contemplated seem to be pursuing that exact objective is rather anomalous. Such a move would seem to bring little to the table other than market distortions, inequities, arbitrary taxation, tax cascading, legal uncertainties, and red tape. When it comes to fixing the broken international tax framework, there seems to be no such thing as a readily available 'quick fix'. So the real question on the table would seem to be whether we should instead consider breaking away from status quos in company taxation and proceeding to explore genuine and fundamental corporate tax reform.*

## I INTRODUCTION

On Friday 16 February 2018, the Instituto de Direito Económico, Financeiro e Fiscal (IDEFF) of the University of Lisbon's Law School, together with *Intertax* and the University of Lausanne, organized a conference at the Complexo Interdisciplinar in Lisbon, Portugal, on *Taxation and the Digital Economy*,<sup>1</sup> a subject

that is both very interesting and that has become a topical and politically relevant issue in recent years.<sup>2</sup> I had the honour to participate in the conference and to elaborate on the tax policy responses in the area of direct taxation that are currently on the table at both OECD and EU levels. This conference paper is the result of my endeavours.

## Notes

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<sup>1</sup> See <https://www.cideeff.pt/> (accessed 1 Mar. 2018).

<sup>2</sup> A considerable body of literature has been produced on the topic, particularly in recent years; here a non-exhaustive overview: M. P. Devereux & J. Vella, *Response to the EU Commission's Consultation – Fair Taxation of the Digital Economy* (Oxford University Centre for Business Taxation 3 Jan. 2018); M. P. Devereux & J. Vella, *Implications of Digitalization for International Corporate Tax Reform* (Oxford University Centre for Business Taxation WP 17/07 July 2017); S. de Jong, W. Neuvel & Á. Uceda, *Dealing with Data in a Digital Economy*, 25(2) *Int'l Transfer Pricing J.* (2018); G. W. Kofler, G. Mayr & C. Schlager, *Taxation of the Digital Economy: A Pragmatic Approach to Short-Term Measures*, 58(4) *Eur. Tax'n* (2018); A. Mehta, 'Equalization Levy' Proposal in Indian Finance Bill 2016: Is It Legitimate Tax Policy or an Attempt of Treaty Dodging?, 22(2) *Asia-Pac. Tax Bull.* (2016); K. Andersson, *Taxation of the Digital Economy* 45(10) *Intertax* 590–592 (2017); J. Á. G. Requena & S. M. González, *Adapting the Concept of Permanent Establishment to the Context of Digital Commerce: From Fixity to Significant Digital Economic Presence*, 45(11) *Intertax* 732–741 (2017); Y. Brauner & P. Pistone, *Adapting Current International Taxation to New Business Models: Two Proposals for the European Union*, 71(12) *Bull. Int'l Tax'n* (2017); G. W. Kofler, G. Mayr & C. Schlager, *Taxation of the Digital Economy: 'Quick Fixes' or Long-Term Solution?*, 57(12) *Eur. Tax'n* (2017); M. Olbert & C. Spengel, *International Taxation in the Digital Economy: Challenge Accepted?*, 9(1) *World Tax J.* (2017); U. Schreiber & L. M. Fell, *International Profit Allocation, Intangibles and Sales-Based Transactional Profit Split*, 9(1) *World Tax J.* (2017); M. K. Singh, *Taxation of Digital Economy: An Indian Perspective*, 45(6/7) *Intertax* 467–481 (2017); M. Agrawal, *India at the Forefront in Implementing BEPS-Related Measures: Equalization Levy in Line with Action 1*, 23(4) *Int'l Transfer Pricing J.* (2016); W. J. G. Paardekooper, M. van de Ven, A. van Esdonk & Y. C. Cattel, *Tax Considerations for the European Union's Digital Single Market Strategy*, 44(6/7) *Intertax* 513–524 (2016); C. H.J.I. Panayi, *International Tax Law Following the OECD/G20 Base Erosion and Profit Shifting Project*, 70(11) *Bull. Int'l Tax'n* (2016); O. Popa, *Taxation of the Digital Economy in Selected Countries – Early Echoes of BEPS and EU Initiatives*, 55(1) *Eur. Tax'n* (2016); S. Wagh, *The Taxation of Digital Transactions in India: The New Equalization Levy*, 70(9) *Bull. Int'l Tax'n* (2016); D. W. Blum, *Permanent Establishments and Action 1 on the Digital Economy of the OECD Base Erosion and Profit Shifting Initiative – The Nexus Criterion Redefined?*, 69(6/7) *Bull. Int'l Tax'n* (2015); Y. Brauner & A. Baez, *Withholding Taxes in the Service of BEPS Action 1: Address the Tax Challenges of the Digital Economy*, IBFD White Paper (2 Feb. 2015); L. Cerioni, *The New 'Google Tax': The 'Beginning of the End' for Tax Residence as a Connecting Factor for Tax Jurisdiction?*, 55(5) *Eur. Tax'n* (2015); J. Pelfegue, *Transfer Pricing Economics for the Digital Economy*, 22(2) *Int'l Transfer Pricing J.* (2015); M. Stewart, *Abuse and Economic Substance in a Digital BEPS World*, 69(6/7) *Bull. Int'l Tax'n* (2015); M. de Wilde, *Tax Jurisdiction in a Digitalizing Economy: Why 'Online Profits' are so Hard to Pin Down*, 43(12) *Intertax* 796–803 (2015); A. Bal, *The Sky's the Limit – Cloud-Based Services in an International Perspective*, 68(9) *Bull. Int'l Tax'n* (2014); T. Falcão & B. Michel, *Assessing the Tax Challenges of the Digital Economy: An Eye-Opening Case Study*, 42(5) *Intertax* 317–324 (2014); N. Gaoua, *Taxation of the Digital Economy: French Reflections*, 54(1) *Eur. Tax'n* (2014); P. Gupta, 'Cloud' – A Technological Odyssey, 20(5) *Asia-Pac. Tax Bull.* (2014); W. Hellerstein, *Jurisdiction to Tax in the Digital Economy: Permanent and Other Establishments*, 68(6/7) *Bull. Int'l Tax'n* (2014); M. K. Singh, *Taxing E-Commerce on the Basis of Permanent Establishment: Critical Evaluation*, 42(5) *Intertax* 325–333, 325 (2014); L. Quarantino, *New Provisions Regarding the Taxation of the Digital Economy*, 54(5) *Eur. Tax'n* (2014); B. Westberg, *Taxation of the Digital Economy – An EU Perspective*, 54(12) *Eur. Tax'n* (2014); A. Bal, *Tax Implications of Cloud Computing – How Real Taxes Fit into Virtual Clouds*, 66 *Bull. Int'l Tax'n* 335 (2012); D. Pinto, *The Need to Reconceptualize the Permanent Establishment Threshold*, 60(7) *Bull. Int'l Tax'n* (2006); R. M. Bird, *Taxing Electronic Commerce: The End of the Beginning?*, 59(4) *Bull. Int'l Tax'n* (2005); A. J. Cockfield, *The Law and Economics of Digital Taxation: Challenges to Traditional Tax Laws and Principles*, 56(12) *Bull. Int'l Tax'n* 606–619 (2002); C. E. McLure, *Implementing State Corporate Income Taxes in the Digital Age*, 53(4) *Nat'l Tax J.* (2000); W. Hellerstein, *State Taxation of Electronic Commerce*, 52 *Tax L. Rev.* 425 (1996/1997); and R. S. Avi-Yonah, *International Taxation of Electronic Commerce*, 52 *Tax L. Rev.* 507 (1996/1997).

Taxation issues arising as a result of our increasingly digitalizing economy have rapidly moved up the political agendas in recent years. Their ascent includes being part of the Base Erosion and Profit Shifting (BEPS) initiative of the G20/OECD (Action 1),<sup>3</sup> the outcomes of which – the BEPS Package – were published on 5 October 2015.<sup>4</sup> The BEPS Package included the final report on Action 1, in which it was stated that the digital parts of the economy cannot be segregated – or, in other words, ring-fenced – from the rest of the economy, either technically or conceptually.<sup>5</sup> The report also stated that solutions for the tax challenges raised by digitalization should be sought within the existing tax framework, at least for the short to medium term. Since then, discussions on the most appropriate way to tax ‘virtual profits’ have continued to rage, and these discussions prompted the G20 Finance Ministers in April and July 2017 to request the OECD’s BEPS 1 Task Force on Digital Economy (TFDE) to commence preparations, once more, on a discussion draft on the matter.<sup>6</sup> The OECD subsequently held a public consultation event on 1 November 2017 at the University of California, Berkeley, United States, with the interim report expected to be published ahead of the G20 meeting in April 2018.

Within the EU, Estonia placed the matter high on the political agenda in summer 2017 during its presidency of the Council of the European Union.<sup>7</sup> Mid-September 2017 saw a French-led initiative, comprising France, Germany, Italy and Spain and supported by six other EU Member States (Austria, Greece, Portugal, Bulgaria, Romania and Slovenia), that requested the European Commission to examine opportunities for tax reform in this area in the form of an ‘equalisation tax’, i.e. some sort of turnover tax that would subject tech firms to tax on the gross proceeds from their digital supplies in the EU.<sup>8</sup> This initiative was

discussed at the informal ECOFIN in Tallinn, Estonia on 16 September 2017.<sup>9</sup> On 21 September 2017, the European Commission released a communication entitled ‘A Fair and Efficient Tax System in the European Union for the Digital Single Market’, in which it set out a reform agenda with a view to devising tax measures for the digital economy.<sup>10</sup> This was followed on 26 October 2017 by the European Commission’s launching of a public consultation.<sup>11</sup> Suggestions put forward in the Commission’s consultation include options for both short-term and long-term measures, all seeking to move beyond the outcomes of the G20/OECD BEPS Project. Measures suggested in the consultation range from the introduction of specific turnover-based taxes for the tech sector to modifications to the permanent establishment rules, transfer pricing rules and rules on attributing permanent establishments’ profits. The reform options put forward in the consultation even go as far as suggesting a generic overhaul of the current corporate tax framework, as well as proposals for modifying the pending proposals for a C(C)CTB or even introducing a worldwide unitary taxation model apportioning tax base to sales jurisdictions.

On 5 December 2017 the ECOFIN Council reached conclusions with a view to outlining a common EU approach in discussions at an international level.<sup>12</sup> Urging the OECD to come forward with solutions for tax treaties, transfer pricing and attributing permanent establishments’ profits, the Council also invited the European Commission to forward appropriate reform proposals by early 2018. These are expected to be launched shortly, i.e. before the ECOFIN meeting on 23 March 2018, ahead of the OECD’s expected TFDE interim report, and are likely to include a proposal for an EU-wide equalization tax, at least for the short term. Indeed, a

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- <sup>3</sup> OECD, *Addressing Base Erosion and Profit Shifting, Action Plan on Base Erosion and Profit Shifting* (OECD Publishing 2013). In this regard reference should also be made to P. Collin & N. Colin, *Task Force on Taxation of the Digital Economy*, Report to the Minister for the Economy and Finance, the Minister for Industrial Recovery, the Minister Delegate for the Budget and the Minister Delegate for Small and Medium-Sized Enterprises, Innovation and the Digital Economy (Jan. 2013) and European Commission, *Report of the Commission Expert Group on Taxation of the Digital Economy* (28 May 2014).
- <sup>4</sup> OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report* (OECD Publishing 2015). The OECD already performed work on the challenges raised by digitalization around the turn of the millennium; see OECD Committee on Fiscal Affairs, *Clarification on the Application of the Permanent Establishment Definition in E-Commerce: Changes to the Commentary on the Model Tax Convention on Article 5* (OECD 22 Dec. 2000).
- <sup>5</sup> OECD, *supra* n. 4, at 12. The OECD already stated in its ‘September 2014 deliverable’ that the digital economy could not be treated separately from the rest of the economy. See OECD, *Addressing the Tax Challenges of the Digital Economy, OECD/G20 Base Erosion and Profit Shifting Project 12* (OECD Publishing 2014).
- <sup>6</sup> OECD, OECD Secretary-General Report to G20 Leaders (OECD Publishing July 2017), <http://www.oecd.org/ctp/oecd-secretary-general-tax-report-g20-leaders-july-2017.pdf> (accessed 1 Mar. 2018).
- <sup>7</sup> Council of the European Union, Note from Presidency to High Level Working Party on Tax Issues, *BEPS: Presidency Roadmap on Future Work*, 10998/17, FISC 157 (7 July 2017).
- <sup>8</sup> Ministers of Finance of France, Germany, Italy and Spain, Political statement, *Joint Initiative on the Taxation of Companies Operating in the Digital Economy, September 2017*, [http://www.mef.gov.it/opencms754/opencms/inevidenza/banner/170907\\_joint\\_initiative\\_digital\\_taxation.pdf](http://www.mef.gov.it/opencms754/opencms/inevidenza/banner/170907_joint_initiative_digital_taxation.pdf) (accessed 1 Mar. 2018).
- <sup>9</sup> Presidency Issues Note for the informal ECOFIN Tallinn, Discussion on corporate taxation challenges of the digital economy (16 Sept. 2017).
- <sup>10</sup> European Commission, Communication from the Commission to the European Parliament and the Council, *A Fair and Efficient Tax System in the European Union for the Digital Single Market*, COM(2017) 547 final (21 Sept. 2017).
- <sup>11</sup> European Commission, Consultation, *Fair Taxation of the Digital Economy* (26 Oct. 2017–3 Jan. 2018), [https://ec.europa.eu/info/consultations/fair-taxation-digital-economy\\_en](https://ec.europa.eu/info/consultations/fair-taxation-digital-economy_en) (accessed 1 Mar. 2018).
- <sup>12</sup> Council of the European Union, ‘A’ Item Note from General Secretariat of the Council to Council, *Council Conclusions on ‘Responding to the Challenges of Taxation of Profits of the Digital Economy’*, 15175/17, FISC 320, ECOFIN 1064 (30 Nov. 2017).

Commission services document to this end was already circulating in late February 2018.<sup>13</sup>

Just listing the recent developments in the area reveals the great sense of political urgency. The matter needs to be addressed, and fast. The question, then, is how? This article, drawing from and building on some of my earlier articles<sup>14</sup> and co-authored writings,<sup>15</sup> delves into the operation of the international tax framework as it currently stands, with the purpose of identifying what exactly the issue is that the digitalization of our economies has revealed (section 2). The article firstly seeks to discover some underlying policy rationale when it comes to taxing corporate profit in a multi-jurisdictional environment, with a key question in this regard being how to geographically divide company profits between jurisdictions from a tax policy perspective (section 3). The article then assesses how the matter is being addressed (in policy terms, that is) under the reform options currently on the table (section 4). The subsequent comparative assessment of the reform options creates some room for manoeuvre and allows the author to express some critical observations and suggestions, with the aim of contributing to the debate.

## 2 THE INCREASINGLY DIGITALIZING ECONOMY IS EXPOSING A FAILING INTERNATIONAL TAX FRAMEWORK

The real problem in company taxation is that today's international corporate tax systems have long become outdated, and updates to the international tax framework in its current form have not kept pace with the evolution of present-day business models and practices.<sup>16</sup> Contemporary corporate tax systems date back to the 1920s – the early days of international taxation. Basically, all the updates and modifications that have

been made to the system since – including those under the umbrella of the BEPS initiative and its transposition, for instance, in the EU – have been made with the aim of addressing and countering undue behaviour of taxpayers (aggressive tax planning) and countries (harmful tax competition). The basics of the international tax regime, the building blocks of company taxation, have thus been left intact for over a century. A disconnect has consequently arisen between taxation on the one hand and market realities on the other. This gap is widening and is being fuelled by an ongoing and ever-increasing internationalization and digitalization of businesses and markets that have left company taxation regimes struggling to achieve their public financing and redistribution functions, and consequently struggling to maintain their legitimacy.<sup>17</sup>

The corporate tax systems inherited from the past are based on the concept of locally organized businesses operating in close proximity to their customers and with a strong physical presence in the country.<sup>18</sup> Back in the old days, when international business revolved primarily around bulk trade and bricks-and-mortar industries, it certainly made sense to levy tax on a company's profit in such a way. Today's markets, however, increasingly operate in a different reality. Driven by profit-optimization objectives, multinational enterprises now structure their businesses on a regional or even global basis, mostly commercializing intangible resources, and fragmenting production (capital and labour) and sales (goods and services) locations across the world. And it is the internet above all that has enabled businesses to sell their tangible and intangible products remotely, thus allowing them to service markets without the need to establish a local physical or legal presence in the country.<sup>19</sup> Unlike in the past, there is now no longer any need for production and consumption to occur within the same jurisdictions. The internet has expanded business opportunities in terms

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<sup>13</sup> Commission services, Taxation of Digital Activities in the Single Market (26 Feb. 2018). As forwarded in European Commission, *supra* n. 10, the document outlines that the pursued strategy includes a short-term solution (turnover levy on certain digital supplies at a rate in the region of 1% to 5%; the tax would be levied by reference to a one-stop-shop model similar to that in EU VAT and the CCCTB proposal), and a long-term solution (modification to permanent establishment thresholds and profit attribution rules). The Commission services document mentions that the turnover tax is not envisaged to target the entire tech sector but would focus on those tech firms that operate business models where user participation is a key source of value creation. The tax would only apply to companies with annual global sales exceeding EUR 750 million of which at least EUR 10 (or 50) million are made in the EU. Targeted digital supplies include the provision of online advertisement space, user data, or a digital platform/marketplace. Digital content supplies (streaming video or music content, cloud computing, online gaming, IT solutions) would fall outside the confines of the envisaged turnover levy. The tax liability would be geographically localized by reference to advertisement display, user data supply, platform access (*where the eyeballs are*). The document gives as an example two US firms where one (Coca Cola) buys advertising space from another (Facebook) to target EU users; that would lead to tax liability of the latter mentioned even in the absence of any other local economic presence.

<sup>14</sup> De Wilde, *supra* n. 2, at 796–803; M. F. de Wilde, *Sharing the Pie; Taxing Multinationals in a Global Market* (IBFD 2017); M. F. de Wilde, *The CCCTB Relaunch: A Critical Assessment and Some Suggestions for Modification*, Group for Research on European and International Taxation (GREIT), 11th GREIT Congress, *European Tax Integration: Law, Policy and Politics*, Ischia, Italy, 8–10 Sept. 2016, Conference Proceeding (in press).

<sup>15</sup> The Dutch Association of Tax Advisers (de Nederlandse Orde van Belastingadviseurs; NOB), *NOB Commentary Digital Economy Consultation*, European Commission Public Consultation on 'Fair Taxation of the Digital Economy' (26 Oct. 2017–3 Jan. 2018); M. F. de Wilde & J. B. Schober, *Consultation Regarding the Fair Taxation of the Digital Economy*, European Commission Public Consultation on 'Fair Taxation of the Digital Economy' (26 Oct. 2017–3 Jan. 2018); and M. F. de Wilde, J. B. Schober, P. Klethi, & R. van der Wilt, *Tax Challenges of the Digitalised Economy*, OECD public consultation meeting on the tax challenges of digitalization (University of California 1 Nov. 2017).

<sup>16</sup> Falcão & Michel, *supra* n. 2, at 317–324.

<sup>17</sup> R. S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 Harv. L. Rev. 1573 (2000); R. S. Avi-Yonah & H. Xu, *Evaluating BEPS*, 2017(1) Erasmus L. Rev. 3–11 (2017), and see for a comparison also I. J. J. Burgers & I. J. Mosquera Valderrama, *Corporate Taxation and BEPS: A Fair Slice for Developing Countries?*, 1 Erasmus L. Rev. 29–47 (2017).

<sup>18</sup> De Wilde, *Sharing the Pie; Taxing Multinationals in a Global Market*, *supra* n. 14, at Ch. 1.

<sup>19</sup> De Wilde, *supra* n. 2, at s. 1 and The Dutch Association of Tax Advisers, *supra* n. 15, at s. 1.1.

of size and magnitude in a way never seen before. There is virtually no limitation in the ability to upscale digital business models, or, as referred to in the Commission services document, we now have ‘*scale without mass*’.<sup>20</sup>

Corporate taxation, however, has not kept pace with these changes, and the shortcomings seem particularly evident in the case of profits generated by internet-related business activities.<sup>21</sup> The concept of the permanent establishment in company taxes requires a permanent physical presence in a country, while this is obviously not that relevant for a webstore. The ‘backstop’ of residency for corporate tax purposes – i.e. the place of incorporation and the place of effective management – now seems to have become as geographically mobile as the relevant country’s company laws governing the company concerned and the effective manager (s) of the company or group of affiliated companies operating the internet business. When company profits become increasingly intangible and virtual, effective taxation of business proceeds becomes particularly difficult in a tax framework where the jurisdiction to tax is established on the basis of legal, physical and geographical points of references. In other words, where the points of reference for subjecting profits to tax are all based on the idea that an enterprise needs to be legally and physically present in a market in order to earn money there, an idea reflecting the bricks-and-mortar market realities of the past.

This holds true both for digital and for more traditional companies, despite the emphasis being put on the tech sector in the current political and public debates. It is the overall economy that is increasingly becoming digital. Ultimately, no analytical difference exists between tech and non-tech. Tech firms also use tangible value drivers in their business operations, while non-tech firms also make use of intangible and virtual value drivers. Long before everyone went online, we already had distance sales operations (mail order companies), agents and broker companies, and advertisement-selling (advertising brochures) and marketing data collection operations (loyalty programmes, for instance). Such business operations had been commonplace for decades before the internet and the online retail businesses, online intermediation services platforms, online marketing data-selling and online advertisement-selling businesses emerged as a corollary. The OECD was right to observe in its final report on

BEPS 1 in October 2015 that digital and non-digital cannot be isolated from one another.<sup>22</sup>

In fact, the problems in the international tax framework seem to have been there more or less from the start.<sup>23</sup> There were already difficulties in the past when seeking, for instance, to tax distance sellers in the market jurisdiction. What the internet has done represents merely a change in terms of size and magnitude – a gradual rather than an analytical matter, that is – and, with that, a change in terms of the economic relevance of the faults in the tax system. The challenges facing company taxation do not ultimately seem to be the result of the digitalizing economy. Instead, it seems the other way around. The tax challenges raised by digitalization seem to be the result of an ill-equipped international tax framework and the arbitrary taxation that these faults have produced in consequence. And that is exactly what the internationalization and digitalization of the economy seem to be exposing: a failing international company taxation model. And as the digital part of the economy becomes increasingly relevant in terms of its size, magnitude and economic dominance, the more pressing the problems in international taxation are becoming.

### 3 GEOGRAPHICAL TAX BASE DIVISION; SOME WORDS ON TAX POLICY

The geographical separation between supply and demand that economic globalization and digitalization have enabled – perhaps even encouraged – now seems to be forcing us to come clean and to decide which side we are on when it comes to assigning tax base to countries.<sup>24</sup> With regard to taxing business proceeds in a multi-jurisdictional environment, there is a broad understanding, both internationally and at an EU level, that business income tax systems should be designed to operate equitably and efficiently and should seek to tax business investment returns once at a geographical location of value creation: in other words, single taxation at a location that makes some economic sense.<sup>25</sup> Both the G20/OECD’s BEPS initiative and the European Commission have resorted to these notions of taxing business profit at the locations of entrepreneurial presence.<sup>26</sup> The difficult and

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<sup>20</sup> Commission services, *supra* n. 13, at s. 1.

<sup>21</sup> See also E. E. López, *An Opportunistic, and Yet Appropriate, Revision of the Source Threshold for the Twenty-First Century Tax Treaties*, 43(6) *Intertax* 6–13 (2015).

<sup>22</sup> OECD, *supra* n. 4, at 12.

<sup>23</sup> De Wilde, *supra* n. 2, at s. 2.1.

<sup>24</sup> P. B. Musgrave, *Principles for Dividing the State Corporate Tax Base*, in *The State Corporation Income Tax: Issues in Worldwide Unitary Combination* 228 et seq. (C. E. McLure, Jr. ed., Hoover Institution Press Publication 1984). For a comparison, see E. C. C. M. Kemmeren, *Source of Income in Globalizing Economies: Overview of the Issues and a Plea for an Origin-Based Approach*, 60 *Bull. Int’l Tax’n* 430 (2006).

<sup>25</sup> For in-depth assessments and literature references supporting the analysis in this section, see De Wilde, *Sharing the Pie: Taxing Multinationals in a Global Market*, *supra* n. 14, at Ch. 6.

<sup>26</sup> Communiqué of the G20 Meeting of Finance Ministers and Central Bank Governors in Moscow of 19–20 July 2013, at para. 18: Profits should be taxed where functions driving the profits are performed and where value is created’. See for a comparison also European Commission, Communication from the Commission to the European Parliament and the Council, *A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*, COM(2015) 302 final (SWD(2015) 121 final), (17 June 2015), at 9: ‘A fully-fledged CCCTB would make a major difference in reinforcing the link between taxation and where profits are generated.’

yet to be answered question is then how to determine where that location of value creation is geographically situated. The lack of any international consensus on this fundamental matter of policy lies at the heart of the current digital-economy-and-taxation issue.

The international tax regime in its current form is dominated by the transfer pricing model, which focuses on dividing tax base among production locations.<sup>27</sup> The tax model is basically geared towards assigning tax jurisdiction and tax base to those jurisdictions where the relevant people functions and assets (capital and risks) are deployed. In practice, and particularly since the embracing of the BEPS outcomes concerning Action items 8–10,<sup>28</sup> the geographical locations of functions performed are essential in this regard since the geographical attribution of assets aligns with the locations where these assets are effectively managed and functionally utilized in the respective firms' business processes. This means, ultimately, that taxable profit is, or at least should be, allocated for company tax purposes to those places in which the people relevant to the enterprise perform the activities relevant to the enterprise, and thus to the supply side (labour) and the country of origin.<sup>29</sup> The same basically holds true when it comes to establishing the tax jurisdiction, given that there, too, the primary focus is on business inputs: the place of effective management (labour), the physical permanent establishment (a physical presence: capital and tangible assets), the services permanent establishment (labour) and the dependent agency permanent establishment (performance of representative functions: labour).<sup>30</sup> All these places relate to the supply side of income production, with the demand side of income – the location of the market, that is – playing no role in this regard.<sup>31</sup> The transfer pricing model ultimately seeks to apportion tax base by reference to a fair market value for each unit of the various functions performed.

The lingering public discussion on devising tax reform options for the tech sector seems to be focusing on the question of whether the tech firms involved and the business models they deploy create scope for assigning tax base, under the operation of the current tax model, to the jurisdiction in which the customer or content user resides (referred to in the Commission services document as '*user value creation*').<sup>32</sup> The basic argument for an

affirmative position in this respect would be that these tech firms make a profit from advertising, basically by extracting valuable marketing data from their content user bases in return, for instance, for a discount on the sale made, or the online service provided. Or in return for free-of-charge use of the online content provided in the form of, say, a freely available social media platform or streaming content. The accordingly mined and processed marketing data is subsequently sold to the market. This begs the question as to whether the transfer pricing model is sufficiently equipped – analytically, that is – to assign any tax base to any such user or customer jurisdictions.

In my view, no convincing argument exists for basing attribution of the tax base under the current transfer pricing model to user and customer locations, regardless of the business model employed by the firm involved, and regardless of whether the business is a tech or non-tech enterprise.<sup>33</sup> Online content users and customers are third parties vis-à-vis the supplying tech firms involved. These users cannot and should not be considered to perform any functions for these firms. Data mining by tech firms in return, for instance, for content usage that is free (or at a discounted rate) for customers is ultimately merely a (reciprocal) payment for a (reciprocal) supply of services in kind in a third-party transaction. Assuming that the raw data mined from content usage have economic value, it is not the tech firm that owns these data. Rather, it is the content users who own, and surrender – or supply for that matter – such data in return for the right to use content. In other words, tech firms pay to obtain such data by supplying free content, while content users – perhaps unwittingly – pay for the 'free' use of the content by surrendering personal or other information on their behaviour patterns, habits, customer-decision processes, views, and preferences. Utilizing information technology resources (e.g. 'cookie files') and algorithms, the raw data mined by the tech firm are subsequently aggregated, processed and transformed into market knowledge or marketing intangibles. These intangible assets are subsequently commercialized and exploited as a marketable product to be sold in the marketplace to the online advertisement selling tech firm's actual customers (we notably seem to also be making the mistake here that we are looking at online platform users rather than the tech firm's actual customers). Ultimately, there is not

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<sup>27</sup> Kemmeren, *supra* n. 24.

<sup>28</sup> OECD, *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8–10 – 2015 Final Reports*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing 2015).

<sup>29</sup> Kemmeren, *supra* n. 24.

<sup>30</sup> De Wilde, *supra* n. 2, at s. 2.3.

<sup>31</sup> The Dutch Association of Tax Advisers, *supra* n. 15, at s. 1.3.

<sup>32</sup> Commission Services, *supra* n. 13, at s. 1. For analyses on the transfer pricing aspects involving digitalization see De Jong et al., *supra* n. 2; Pellefigue, *supra* n. 2; Olbert & Spengel, *supra* n. 2; and Schreiber & Fell, *supra* n. 2.

<sup>33</sup> See also De Wilde & Schober, *supra* n. 15, at s. 4.

much difference between an old-fashioned loyalty programme, an intermediation service or advertisement sale, or a mail order company's remote sale. The only thing the internet has changed in this respect is size and scale; i.e. mass. This simultaneously explains why it is inappropriate to separate tech from non-tech for the purposes of devising tax rules. Under the international tax regime, remote sales, including those performed by an online content provider or an e-tailer, simply do not create a taxable presence in the market jurisdiction. And even if some taxable presence were to be constructed in this regard by means, for instance, of a modification of the permanent establishment threshold, the transfer pricing model subsequently provides no basis to assign any tax base to that market jurisdiction, given the lack of functions performed in that jurisdiction by the respective firm, tech or otherwise. This is because these functions are performed elsewhere: in the production jurisdiction, for instance, where the mined data are transformed into marketing intangibles and, therefore, a marketable product.

Given that the transfer pricing model provides no room for taxing the tech industry – or any branch of economic activity, for that matter – in the market jurisdiction, analytical connections for pursuing such an objective perhaps need to be found elsewhere in the international tax regime. A link for establishing a tax base division by reference to market jurisdictions may be recognized in the withholding tax model.<sup>34</sup> Albeit not explained in those terms, there are withholding taxes or source taxes in the international tax arena that assign tax jurisdiction to destination countries, i.e. to the demand side of income production. Resorting to '*income arising in*' terminology in the tax treaties, such source taxes consistently refer, when establishing the service provider's tax jurisdiction, to the location where the recipient of the service is located, or at least has its place of residence or operates business activities through a permanent establishment. In other words, the tax base is allocated to market jurisdictions. The production jurisdiction is accordingly irrelevant in the withholding tax model in terms of establishing where the service provider geographically derives its income from for tax purposes. The withholding tax model directs tax base (on a gross basis) to market locations, while the transfer pricing model directs tax base (on a net basis) to production locations.<sup>35</sup> To that extent, the withholding tax model and the transfer pricing model accordingly operate in a mutually exclusive manner, at least from a

perspective of geographical tax base division. This is particularly interesting, considering that both models resort to a notion of 'source' as a justification for their existence in the international tax framework. A noteworthy point in this regard is that any levying of source taxes on a gross rather than net basis makes the imposition of withholding taxes on outbound payments for inbound supplies operate in a way conceptually and economically akin to the internationally well-known destination-based turnover taxes, excises taxes, and sales taxes in a cumulative cascade system, albeit with an ordinary tax credit in the origin jurisdiction.

Should society have any desire to extend tax base attribution to market jurisdictions, the question then to be examined should be whether we ought to start thinking of fundamentally reforming the international tax regime. In that event, I think we should. The law cannot be considered in splendid isolation or as an end in itself. The law, and the tax law it includes, is embedded in an economic and socio-political context that shapes it, and hence should cater to needs and developments in society. The question then is whether we should move away from the dominant transfer pricing model? Should we move to broaden the withholding tax model in one way or another? And, if so, should we impose tax on a gross or a net basis? So far, we have not really engaged in such a fundamental discussion, at least not in the political arena. This does not mean, however, that there is no merit in assigning taxable profits to (or also to) the market jurisdiction. On the contrary, I would think. Both production (origin) and market (destination) jurisdictions may be considered to constitute geographical sources of income since profit is the result of both supply *and* demand. There is no profit without supply. But, equally well, there is no profit without demand. The problem then, however, is to determine *how much* of a multinational firm's profit to assign to these production jurisdictions and market jurisdictions, and *in what ratio*? 30% demand, 70% supply? Or maybe the other way round? Or 50/50? As income lacks geographical characteristics, there is not much else to say other than that, in the end, matters are more of a political rather than an analytical nature.<sup>36</sup> With regard to tax base definition I would nevertheless argue for taxing on a net basis rather than for taxing turnover (i.e. on a gross basis). Gross turnover-based taxes can easily transform profitable pre-tax returns into post-tax losses, particularly when business is large-scale and low-margin,

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<sup>34</sup> See for a comparison and some analysis R. Millar, *Echoes of Source and Residence in VAT Jurisdictional Rules*, in *Value Added Tax and Direct Taxation: Similarities and Differences* (M. Lang et al. eds, IBFD 2009) and R. Millar, *Intentional and Unintentional Double Non-Taxation Issues in VAT*, in *Value Added Tax and Direct Taxation: Similarities and Differences* (M. Lang et al. eds, IBFD 2009). On withholding taxes for the digital economy see e.g. Brauner & Pistone, *supra* n. 2 and Brauner & Baez, *supra* n. 2.

<sup>35</sup> Economically, this particularly is true in the event and to the extent that the commercial transactions concerned engaged into have been made between third parties. The economic reality within the group of companies – the world of transfer pricing – economically is a different one (and not further discussed in this article).

<sup>36</sup> See for a comparison M. J. McIntyre, *The Use of Combined Reporting by Nation-States*, in *The Taxation of Business Profits under Tax Treaties 253* (B. J. Arnold et al. eds, Canadian Tax Foundation 2003). Considering that profit ultimately has no location this means that any attempt to allocate profits geographically may therefore be seen as inherently arbitrary; cf. R. M. Bird & J. S. Wilkie, *Source vs. Residence-Based Taxation in the European Union: The Wrong Question?*, in *Taxing Capital Income in the European Union: Issues and Options for Reform* 91 (S. Cnossen ed., Oxford University Press 2000).

as is often the case with e-tailers, and hence distort an efficient operation of markets.

Considering, however, that tech cannot be ring-fenced from non-tech, this also means that any proper reform of company taxation should address all industries so as to avoid introducing further inequities and inefficiencies into countries' company taxation models. If branches of economic activity cannot be segregated from one another in any meaningful way in real life, taxes, too, should not pursue such an objective by introducing taxes specifically for the tech sector. I understand the political pressure to deliver something that is feasible. And, of course, I also understand that only the halfway-house measures that have been tabled so far for targeting the tech sector are viable in the short term. That may be particularly the case if such measures are presented as an interim solution – even though interim measures sometimes have a tendency to stick around. For that reason in particular I would suggest that if such measures are to be adopted, they should in any event be accompanied by a sunset provision limiting the horizon of any such taxes.<sup>37</sup> I do see the political viability of introducing turnover-based equalization taxes for digital activities or services,<sup>38</sup> regardless of the arbitrariness that the scoping of such a 'digital' supply would produce. In that respect, the success rates could very well be relatively higher if such levies were to fall outside the existing tax treaties' scope of application. This would be even more so if such taxes were to apply only to those giant tech companies with high global turnover volumes by being paired, for instance, with a country-by-country-reporting threshold of EUR 750 million of annual global turnover ('Tax them, not me!').<sup>39</sup> And I also see the political viability, to a certain extent at least, of introducing market-based threshold criteria in the permanent establishment test, such as turnover volumes tests or active users volumes tests and the like.<sup>40</sup> Such criteria may be considered particularly viable within the EU if they were to be introduced by means of a Council Directive and to be applied only within the EU and/or in third-country scenarios where no tax treaty applies.<sup>41</sup> In my view, however, political viability and the chances of any tax reform operation's political success should not be confused or interfere with – or trump, for that matter – conceptual soundness and inherent fairness arguments. As

with the law, political viability, too, should not be seen as an end in itself.

Company tax reform should, in my view, be seen as something to pursue with consciousness. A politically viable yet inequitable and inherently distortive tax is not the answer to the tax challenges raised by digitalization. The discussion on the table is a fundamental one. Do we want to reform the international tax framework, beyond BEPS that is, or do we not? And if so, do we want to redistribute tax base among countries beyond existing practices, with the objective of further extending the apportionment of taxation rights towards market jurisdictions, or do we not? Do we really want to push forward in the direction of taxing turnover? Or do we consider company taxes still to revolve around net returns? These are the fundamental, underlying policy issues that should be put onto the agenda and examined in open and transparent discussions that include consideration of the redistribution of tax revenues and related budgetary and macro- and micro-economic effects, however politically difficult and intractable such discussions may be.<sup>42</sup> Only after consensus has been reached on these policy matters, preferably on a global basis and only alternatively on a regional (for instance, within the EU) or even unilateral basis, should we proceed to an assessment of tax design aspects and matters of a more technical nature. First, the policy should be set and then reflected in legislation; it should not be the other – dangerous – way around. In summary, the real policy matter does not concern specific taxes for the tech industry and the technicalities of the tabled reform options. Instead, it is about something else, namely whether or not we should pursue true corporate tax reform.<sup>43</sup>

#### 4 A COMPARATIVE ASSESSMENT OF THE TABLED REFORM OPTIONS AND SOME SUGGESTIONS TO ADD TO THE DEBATE

All the reform measures put forward internationally and at an EU level, both for the short and the longer term, move beyond the existing international tax framework, and all of them tend towards assigning the tax base to market jurisdictions. This applies, as said, despite the absence of a clear policy consensus on whether we actually agree on moving from an origin-based model to a tax

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<sup>37</sup> The Dutch Association of Tax Advisers, *supra* n. 15, at s. 2.1.

<sup>38</sup> On equalization taxes see Mehta, *supra* n. 2; Singh, *Taxation of Digital Economy: An Indian Perspective*, *supra* n. 2; Agrawal, *supra* n. 2; and Wagh, *supra* n. 2.

<sup>39</sup> Commission services, *supra* n. 13, at s. 3.4.

<sup>40</sup> On suggested modifications to the permanent establishment threshold see Blum, *supra* n. 2; Requena et al., *supra* n. 2; Brauner & Pistone, *supra* n. 2; Hellerstein, *Jurisdiction to Tax in the Digital Economy: Permanent and Other Establishments*, *supra* n. 2; Singh, *Taxing E-Commerce on the Basis of Permanent Establishment: Critical Evaluation*, *supra* n. 2; Gaoua, *supra* n. 2; and see Pinto, *supra* n. 2.

<sup>41</sup> Commission services, *supra* n. 13, at s. 2.4.

<sup>42</sup> Cf. The Dutch Association of Tax Advisers, *supra* n. 15, at s. 1.5.

<sup>43</sup> Cf. De Wilde & Schober et al., *supra* n. 15, at s. E.

system more geared to a destination-based conception (regardless of the analytical merits of such a move). A closer look at the measures put forward also reveals that all the measures would be highly problematic from an analytical point of view, except perhaps for any contemplated scenarios of generically overhauling and remodeling the system, and a clean-slate introduction of a sales-only apportionment or other destination-based company taxation model.

The new taxes that have been suggested as a short-term measure specifically seek to target the tech sector or even specific segments of this sector (such as those segments whose business models focus on ‘user value creation’<sup>44</sup>). This applies in the case of the turnover-based equalization levies (as suggested by France, India, the OECD and the European Commission), the gross-based withholding taxes on digital goods and services (as suggested by the OECD and the European Commission), the transaction taxes on revenues from collecting digital data (as suggested by the European Commission) and also the envisaged digital advertising taxes (as suggested by Commission services and Hungary) and digital marketplaces/platforms taxes (as suggested by Commission services). Quite remarkably, these ‘digitaxes’ all seek to achieve the impossible, which is to ring-fence the economy’s digital component or parts of this from the rest of the economy and to isolate them for tax purposes. As stated before, any such slicing of the economy for business income tax purposes is simply analytically infeasible, in the real world, that is, and hence also in the world of taxation. Ultimately, it is simply uncalled for to target or scope any taxes to a specified group of tech firms or their digital supplies, regardless of the legal criteria adopted, definitions used and volume thresholds embraced. The only thing these sales-tax-like taxes would bring is trouble: multiple taxation, inequities, market distortions, legal uncertainty, and red tape, both for tax authorities and taxpayers alike. That applies regardless of any opportunities contemplated or envisaged to allow, or not to allow, such taxes to be credited against corporate taxes (as excess credit positions would inevitably be created), to allow these to be deducted as a cost from any corporate tax bases of the targeted firms involved, or to have such taxes apply equally to both domestic and cross-border business operations.<sup>45</sup> The drawbacks and limitations of these digitaxes are obvious, irrespective of the political viability of any of the taxes that have been suggested. As said, political viability is not an end in

itself. We should not forget that digitalization is an accelerator for growth.<sup>46</sup> The economic merits of digitalization should not just be taxed away and, in consequence, hamper growth and job creation.

Long-term solutions include suggestions to revise the permanent establishment threshold in the tax treaties.<sup>47</sup> Depending on how such a modification to the permanent establishment threshold is designed, it could either be considered a targeted or ring-fenced tax measure, or a measure of a more generic nature directing tax jurisdiction towards the destination jurisdiction. All the suggestions put forward mirror to some extent VAT-style approaches towards distance sales and lead to tax jurisdiction being established by reference to a certain amount of turnover derived from sales in the market jurisdiction (say EUR [x] million) during a certain period (say [x] months).<sup>48</sup> If the turnover test were not to further specify the nature of these sales, such a test could be considered to constitute a generic measure. In that case, it would not matter whether the sale was of an intangible nature (e.g. services, digital supplies) or tangible nature (e.g. supplies of goods). If the threshold test were to specifically include the nature of activities by referring, for instance, to a ‘turnover from digital supplies test’ or the like, the test would be transformed into a criterion ring-fencing tech (or varieties of ‘tech’) from non-tech for tax purposes, and would hence introduce scoping issues and ensuing arbitrariness similar to those described in the previous paragraph. On top of that, such a test would also give rise to issues of delineation and concurrent application. The permanent establishment threshold has so far been geared towards establishing jurisdiction for tax purposes in the origin country, while the envisaged turnover-based modifications are geared towards establishing tax jurisdiction in the destination country. Any introduction of such a modification would immediately create tension between origin and destination jurisdictions. Which country would get the first bite of the tax pie? Say we had a case where a taxpayer resident in country X produced a digital product in origin country A (functions performed), where it operated a ‘traditional’ permanent establishment, and subsequently sold the product involved in destination country B (products sold), where it operated a ‘new’ permanent establishment under the envisaged threshold test. Which of the countries would win the tax base division poker game? Nobody knows, it seems. It should be noted that no such issues and accompanying tensions

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<sup>44</sup> Commission services, *supra* n. 13.

<sup>45</sup> Commission services, *supra* n. 13, at s. 3.9.

<sup>46</sup> See also Olbert & Spengel, *supra* n. 2.

<sup>47</sup> See e.g. European Commission, *supra* n. 10; and European Commission, *supra* n. 11; and see for a comparison BEPS 1 Report 2015, *supra* n. 4. For reading and analyses in this regard see Blum, *supra* n. 2; Requena et al., *supra* n. 2; Brauner & Pistone, *supra* n. 2; Hellerstein, *Jurisdiction to Tax in the Digital Economy: Permanent and Other Establishments*, *supra* n. 2; Singh, *Taxing E-Commerce on the Basis of Permanent Establishment: Critical Evaluation*, *supra* n. 2; and Gaoua, *supra* n. 2.

<sup>48</sup> See for a comparison Commission services, *supra* n. 13, at s. 2.5.



arise today, either in corporate taxation or in VAT, as these taxes are so far all exclusively directed either towards origin jurisdictions or towards destination jurisdictions.

With regard to this sought-after long-term solution, it is also envisaged amending the manner in which taxable profit is attributed to any such newly formed permanent establishments.<sup>49</sup> Assuming it were to be possible to arrive at a more or less workable method of establishing jurisdiction by reference to such a new type of destination-oriented definition of permanent establishment, the subsequent attribution of tax base would be very likely to give rise to a whole new world of intricate issues. Today, tax base allocation rules disregard customer locations. Any sticking to old profit attribution rules would leave such newly formed permanent establishments profitless, given the lack of functions performed in these market jurisdictions. If any consideration were to be given under some newly established attribution mechanism – resulting from revision of the transfer pricing model – that assigns tax base or part of a tax base to customer locations, the question would then arise as to what extent such re-apportioning should apply: 10%, 50%, 30%, 70%? The Commission services document refers to data collected, numbers of users, and user-generated content, among others, as a stepping stone for this purpose.<sup>50</sup> The real issue, however, is how to quantify such items or parameters, and this has so far been left completely open. It is not about discovering parameters, it is about tax base division. Who gets what, and how much of it? Any move towards such a re-apportionment would lead to a dramatic and paradigmatic change in the way tax base is allocated to countries, and would essentially lead to the introduction of some indistinct variant of formulary apportionment. On top of that, if something like this were to be introduced only in the context of attributing the profits of permanent establishments (Article 7 of the relevant tax treaty) and not simultaneously also for allocating the tax base to group companies (Article 9 of the relevant tax treaty), any such move would introduce differentials in the tax treatment of permanent establishments compared with that of group companies and hence create all kinds of distortions and inequities involving the choice of legal form and – in cases where EU law applies – all kinds of EU law impediments. Any

modifications to the division of multi-jurisdictional tax bases should therefore be addressed with utmost care. Otherwise, the cure could very well turn out to be even worse than the disease. To be honest, this is exactly what seems to be happening here.

Within the EU, these reform options envisaged for the longer term are paired with considerations of including them in the negotiations on the currently pending proposal for a Common Consolidated Corporate Tax Base (CCCTB<sup>51</sup>), a solution for the longer term.<sup>52</sup> Replacing the current tax framework within the EU by a formulary model, through a CCCTB, would constitute a systemic and generic corporate tax reform for the internal market. One may ask, however, whether the CCCTB in its current form should be the way forward, i.e. in the absence of any political agreement on the adoption of a formulary system apportioning tax base by reference to an equally weighted, three-factor (payroll-assets-sales) formula. On previous occasions I have elaborated on certain vulnerabilities of the CCCTB system to BEPS strategies across the water's edge, and subsequent intra-EU profit shifting via factor manipulation strategies, due to some faults in the design of the apportionment formula.<sup>53</sup> Rather than revisiting these vulnerabilities, I will limit myself here to commenting that any modifications to the permanent establishment test in the CCCTB proposal that specifically target the tech sector would not alter matters in that regard. My observation would be that any such modification to the permanent establishment test in the pending CCCTB proposals would also do little else but introduce the same delineation and concurrence issues as those discussed in the paragraphs directly above.

The Commission consultation also refers to the potential to introduce a worldwide unitary taxation model.<sup>54</sup> Such a unitary model as mentioned in the consultation would operate in a way akin to the CCCTB, unless, importantly, its application were not to be limited to the geographical territories of the EU (i.e. no water's edge limitation; global formulary apportionment), and in the event of a sales-only apportionment mechanism being adopted instead of the equally weighted, three-factor (payroll-assets-sales) formula as currently proposed. The desirability of replacing the current international tax framework by such a unitary model (for instance, within

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<sup>49</sup> *Ibid.*, at s. 2.6.

<sup>50</sup> *Ibid.*

<sup>51</sup> European Commission, *Proposal for a Council Directive on a Common Corporate Tax Base (CCTB)*, COM(2016) 685 final, 2016/0337 (CNS) (25 Oct. 2016); European Commission, *Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)*, COM(2016) 683 final, 2016/0336 (CNS), (25 Oct. 2016); and European Commission, *Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)*, (COM(2011) 121/4, 2011/0058 (CNS) (16 Mar. 2011).

<sup>52</sup> European Commission, *supra* n. 10.

<sup>53</sup> De Wilde (2018), *supra* n. 14, s. 3; and see M. F. de Wilde, *Tax Competition Within the European Union Revisited: Is the Relaunching CCCTB a Solution?*, in *The EU Common Consolidated Corporate Tax Base: Critical Analysis*, Eucotax Series 205–234 (D. Weber & J. van de Streek eds, Wolters Kluwer 2017); and M. F. de Wilde, *Tax Competition Within the European Union – Is the CCCTB-Directive a Solution?*, 7(1) Erasmus L. Rev. 24–38 (2014).

<sup>54</sup> European Commission, *supra* n. 11, also makes reference to a 'residence tax base with destination tax rate' model. This is not further discussed. For some remarks see The Dutch Association of Tax Advisers, *supra* n. 15, at s. 2.2.3.

the EU) is of course, to a great extent, a political and societal matter, with the micro-economic, macro-economic and budgetary implications all having a role to play in the debate. This said, however, I am a proponent of a destination-based company tax model on analytical grounds.<sup>55</sup>

With a view to true tax reform, it may well be worth considering remodelling the current international tax regime into a unitary tax system based on sales-only apportionment.<sup>56</sup> Without going into detail at this place, I would add that it would then be worth considering building the tax base definition on the basis of the concept of economic profit (infra-marginal business returns). If well-designed, any move in such a direction would mean that tax would no longer interfere in financing and investment location decisions. Simultaneously, countries would then be entirely free to structure their national governments and fund their public expenditure as they choose because of such a tax system's immobile, inelastic and hard-to-avoid properties (the reason for this being that as firms do not control output locations, the tax base division would be hard to dodge). If such a destination-based system were to be introduced by countries unilaterally or in concert on a regional basis, for instance within the EU, the race to the bottom would be brought to an end within the inner circle of the adopting countries as the tax system would then operate completely neutrally on the supply side. The first country or region to move in this direction would encourage others to follow suit as that would serve their interests. Driven by competitive country responses, this could initiate a transition of the international tax regime into a new, destination-based company tax paradigm that operates completely neutrally and non-discriminatorily on the supply side. The final destination would be an efficient and inelastic mechanism for taxing infra-marginal multinational business returns. That, in turn, would produce a result that, as I see it, would not only be fair but also – and primarily – economically efficient. These efficiency-enhancing properties of a destination-based company tax model are known and well-established in literature.<sup>57</sup>

## 5 FINAL REMARKS

I now arrive at my final remarks. The digital economy cannot be seen in isolation from the rest of the economy; rather, it is the overall economy that is becoming increasingly digitalized. As any ring-fencing of the digital parts of the economy seems infeasible, the fact that all the tax reform initiatives currently on the table seem to be pursuing that exact objective seems rather anomalous. This holds true for the turnover-based equalization levies and withholding taxes and also for the envisaged modifications to the permanent establishment threshold for the tech sector. All the reform options put forward share a requirement to separate certain 'tech taxpayers' and their 'tech transactions' from 'non-tech taxpayers' and their 'non-tech transactions'. Such a move would seem to be bringing little else to the table other than market distortions, inequities, arbitrary taxation, tax cascading, legal uncertainties, and red tape. When it comes to fixing the broken international tax framework, there seems to be no such thing as a readily available 'quick fix'. Perhaps, therefore, we should reconsider. And, in that respect, it may be worth considering breaking away from status quos in company taxation and instead proceeding to explore genuine and fundamental corporate tax reform. A wide range of suggestions worth exploring have already been put forward in literature, with the suggestions submitted ranging from supply-side oriented global (residual) profit-splitting systems – echoing transfer pricing approaches, but without pesky separate accounting and comparability issues – to supply-side or demand-side global formulary systems, and extending even to destination-based cash flow taxes.<sup>58</sup> Even the taxation of multinationals solely in the ultimate parent jurisdiction has been mentioned in literature as a solution.<sup>59</sup> All these proposals merit consideration, while I have arrived at the idea of taxing groups on their economic profit at destination.<sup>60</sup> We cannot separate digital from non-digital. Perhaps we should not even be trying to do so. The real question on the 'multi-jurisdictional tax base division poker table' then is whether to fold or to go all-in?

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<sup>55</sup> De Wilde (2017), *supra* n. 14 and De Wilde (2017), *supra* n. 14.

<sup>56</sup> *Ibid.*

<sup>57</sup> See e.g. K. A. Clausing & R. S. Avi-Yonah, *Reforming Corporate Taxation in a Global Economy: A Proposal to Adopt Formulary Apportionment*, 9 Fla. Tax Rev. 5 (2009), and see for a comparison Devereux & Vella, *supra* n. 2; M. Devereux & R. de la Feria, *Designing and Implementing a Destination-Based Corporate Tax*, Oxford University Centre for Business Taxation WP 14/07 (May 2014); H. Zee, *Reforming the Corporate Income Tax: The Case for a Hybrid Cash-Flow Tax*, 155(4) De Economist 417–448 (2007); and A. J. Auerbach, M. P. Devereux & H. Simpson, *Taxing Corporate Income*, in *Dimensions of Tax Design, The Mirrlees Review* (J. Mirrlees et al. eds, Oxford University Press 2010).

<sup>58</sup> For an overview and extensive analyses see De Wilde, *Sharing the Pie; Taxing Multinationals in a Global Market*, *supra* n. 14, Ch. 6.

<sup>59</sup> Avi-Yonah & Xu, *supra* n. 17.

<sup>60</sup> De Wilde, *Sharing the Pie; Taxing Multinationals in a Global Market*, *supra* n. 14, Ch. 7.